

McCurdy, Lauren

Subject: FW: RRC - 4-210 [1.8.5] - III.DD.
Attachments: RRC - 4-210 [1-8-5] - Compare - Rule & Comment Explanation - DFT2 (10-06-09)KEM-RLK.doc; RRC - 4-210 [1-8-5] - Compare - Introduction - DFT2 (10-06-09)KEM-RLK.doc; RRC - 4-210 [1-8-5] - Public Comment Chart - By Commenter - DFT2 (10-06-09)RD-KEM-RLK.doc; RRC - 4-210 [1-8-5] - Dashboard - ADOPT - DFT2.1 (10-06-09)AV-KEM-RLK.doc

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Tuesday, October 06, 2009 9:47 PM
To: Robert L. Kehr
Cc: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi; Harry Sondheim; Kevin Mohr G
Subject: Re: RRC - 4-210 [1.8.5] - III.DD.

Bob:

Thanks very much. I've gone through the documents you attached and accepted all the changes, and also corrected a couple or three nits in the rule/comment comparison chart. Some points:

1. Dashboard. First, I'm not sure we can say that we substantially adopted the Model Rule. I'd prefer we leave that box blank and simply check the "material additions" box. There are too many strikeouts for us to make that claim, even if the concepts of the two rules are the same. I've made the change.
2. Dashboard. There may have been some folks who didn't like some aspects of the Rule but we have not received any formal dissents or minority statements. Let's see if anyone submits one before we check off "yes" for minority. Like you have observed, this is probably not a controversial rule.
3. Introduction. I've added a couple of sentences about state variations. The only variation of note I've come across is Miss. and I've referenced it, but it probably isn't necessary.

I think Lauren can circulate the attached clean versions to the Commission.

Kevin

Proposed Rule 1.8.5 [4-210]

“Payment of Personal or Business Expenses Incurred by or for a Client”

(Draft # 8, 10/6/09)

Summary: Although proposed Rule 1.8.5 addresses the same concept as Model Rule 1.8(e), i.e., placing restrictions on a lawyer paying the personal or business expenses of a client, the proposed Rule provides a more detailed statement in order to afford better client protection and protect the integrity of the legal system. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules	RPC 4-210.
Statute	
Case law	

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.5* Payment of Personal or Business Expenses Incurred by or for a Client

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Although proposed Rule 1.8.5 addresses the same concept as Model Rule 1.8(e), i.e., placing restrictions on a lawyer paying the personal or business expenses of a client, the proposed Rule provide a fuller and more detailed statement in order to afford better client protection and protect the integrity of the legal system. The proposed Rule also clarifies points that are alluded to only in general terms by the Model Rule, or not at all. These include expanding the reach of the Rule to include promises made in advance and not just the lawyer's actual advancement of funds, adding a definition of "costs", limiting a lawyer's right to advance costs to those that are "reasonable", and clarifying that a lawyer may loan money to a client with certain limitation including compliance with the business transactions Rule. The proposed Rule operates to limit the risk of a conflict of interest between a lawyer and client that can result from the lawyer's heightened interest in the outcome of matter when the lawyer has advanced the costs and expenses of litigation. See Explanation of Changes for paragraph (a). The Rule also prohibits a lawyer from "purchasing" a client's loyalty by the lawyer promising loans or other remuneration to ensure that the client retains the lawyer by making clear that such promises or guarantees are prohibited, (see Explanation of Changes to paragraph (a)), and prohibiting the making of loans until after the lawyer has been retained. (See Explanation of Changes for subparagraph (a)(2).)

Variation in Other Jurisdictions. Every state has adopted a rule that places restrictions on a lawyer making loans or advancing costs and expenses to a client. Mississippi permits a lawyer to advance "reasonable and necessary medical expenses associated with the treatment of an injury giving rise to the litigation" and "reasonable and necessary living expenses." See State Variations, below.

* Proposed Rule 1.8.5, **Draft #8 (10/6/08)**.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:</p>	<p>(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:</p>	<p>Model Rule 1.8(e) is intended to avoid several risks. First, a lawyer's promise to provide financial assistance to a client could amount to bidding for clients, which traditionally has been deemed unacceptable. Also, the lawyer's resulting financial stake could create a conflict of interest for the lawyer and interfere with the lawyer's exercise of independent professional judgment on behalf of the client. The Commission agrees with these goals, but it has rejected the Model Rule in favor of a substantially more detailed version.</p>
	<p>(a) <u>A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except that a lawyer may:</u></p>	<p>Model Rule 1.8(e) prohibits a lawyer from providing financial assistance, but by its terms it is not limited to financial assistance to a client. The Commission does not believe that the risks addressed by the Rule arise when a lawyer provides financial assistance to a non-client. Paragraph (a) excludes a lawyer's assistance to non-clients. Paragraph (a) also moves the prohibition forward in time, recognizing that it is the promise to provide financial assistance and not the financial assistance itself that triggers the client solicitation concerns of the Rule. Paragraph (a) also expands the prohibition to assistance by the lawyer law firm.</p>
<p>(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and</p>	<p>(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and</p>	<p>Model Rule subparagraph (e)(1) addresses a lawyer's advancement of court costs and of litigation expenses. The Commission has moved this topic to subparagraph (3) where it is stated more fully.</p>

* Proposed Rule 1.8.5, Draft 8 (10/6/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client;</p>	<p>There is no Model Rule counterpart to subparagraph (a)(1). It recognizes that a lawyer might be asked to use client funds, which might come under the lawyer's control in the future, to pay the client's personal or business expenses. This could happen, for example, if a lawyer agrees to pay a client's medical provider out of the recovery. Because the risks addressed by this Rule are not involved when a lawyer does so, subparagraph (a)(1) expressly permits this arrangement.</p>
<p>(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.</p>	<p>(2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the lawyer complies with Rule 1.8.1 before making the loan or agreeing to do so;</p>	<p>There is no Model Rule counterpart to subparagraph (a)(2). The Model Rule implicitly permits a lawyer to loan money to a client. Subparagraph (a)(2) makes this explicit, and by doing so it permits reference to the business transactions Rule in order to provide guidance to lawyers in how to fulfill their duties.</p>
	<p>(3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. "Costs" within the meaning of this paragraph (a)(3) are limited to all reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client; and</p>	<p>Subparagraph (a)(3) is consistent with Model Rule 1.8(e)(1) but is stated more fully. It adds a definition of "costs" and, to eliminate a potential loophole in the Model Rule, limits costs to those that are reasonable.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(24) a lawyer representing an indigent client may pay court costs and <u>reasonable</u> expenses of litigation on behalf of <u>an indigent or pro bono client in a matter in which the lawyer represents</u> the client.</p>	<p>Subparagraph (a)(4) is based on Model Rule 1.8(e)(2). As the Commission did in subparagraph (3), it limits costs to those that are reasonable. Also, it expands the provision to include pro bono clients as well as indigent clients. Lawyers should be encouraged to support pro bono clients as well as indigent clients.</p>
	<p>(b) <u>A lawyer does not violate this rule by offering or giving a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.</u></p>	<p>The Model Rule has no counterpart to paragraph (b). Paragraph (b) is intended to avoid having a lawyer's gift to a client come within the scope of the Rule, so long as the gift was not bargained for.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Financial Assistance</p> <p>[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.</p>	<p>Financial Assistance</p> <p>[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.</p>	<p>To provide for a more complete explanation of the Rule, and to accommodate the Commission's changes in the Model Rule, the Commission has restated the Model Rule's single Comment paragraph as three paragraphs. The proposed Rule's comment generally is consistent with the Model Rule Comment except where the proposed Rule differs in substance, as described above.</p>
	<p>[1] This Rule is intended to balance two competing concerns. One is that a lawyer's subsidization of a client's legal proceedings would give the lawyer a financial stake in the proceedings that might injuriously affect the performance of the duties owed to the client, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's</p>	<p>See above. Comment [1] is taken from Restatement (3d), Law Governing Lawyers § 33.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(e) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>personal interests. The second concern is that a prohibition on the lawyer providing financial assistance to the client might adversely affect the client's access to justice. The Rule is also intended to protect against the hidden transfer of funds to a client under the guise of a loan and to protect the lawyer against client demands for loans or gifts.</u></p>	
	<p><u>[2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rule 1.8.1 and make a disclosure under Rule 1.7(d)(4) concerning the effect the proposed agreement might have on the lawyer's representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12.</u></p>	<p>See above. Comment [2] adds a reference to Rule 1.7(d)(4), which addresses a lawyer's potential conflict because of the lawyer's financial or other interest in the subject of the representation.</p>
	<p><u>[3] "Costs," as defined in paragraph (a)(3), are not limited to those that are taxable or recoverable under any applicable statute or rule of court.</u></p>	<p>See above. Comment [3] clarifies the meaning of "costs" in order to avoid any suggestion that it is limited to taxable costs.</p>

**Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Bar Association of San Francisco (Philip Humphreys)	A			Rule does not change the existing restrictions on advancing costs or making loans to a client. Supports the inclusion of the provision requiring compliance with Rule 1.8.1 (3-300) if an attorney wishes to lend a client funds.	No response necessary.
2	COPRAC (Dennis Maio)	M			Delete subpart (a)(2) from the Rule. The Rule should not permit lawyers to lend money to their clients because lawyers should not be able to get cases and clients based on their willingness to lend money. Lawyers' loans to clients dilute lawyer's independence and diminish clients' ability to control settlement.	Commission did not make the requested revision, in part, because both the Model Rule and the existing California rule permit loans to clients and such conduct can have a positive impact on access to justice. Commission disagreed, in part, because loans are only permitted with compliance with applicable conflict rules.
5	Orange County Bar Association (Trudy C. Levindofske)	M			Add pro bono clients to the exception in (a)(4) which allows the attorney to pay costs and expenses of litigation on behalf of an indigent client.	Commission agreed and implemented this recommendation
4	San Diego County Bar Association (Ross Simmons)	A			Approve of rule.	No response necessary.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client.
[Sorted by Commenter]**

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Santa Clara County Bar Association (Christine Burdick)	M			Add "or may not" after "may" in the third line of 1.8.5(a)(3).	Commission did not make the requested revision, in part, because the clarification is not grammatically necessary.

Rule 1.8.5: Payment of Personal or Business Expenses Incurred by or for a Client

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.5 is highlighted.)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in

writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar’s investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer’s behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer’s behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer's advantage or the advantage of a third person” without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client's consent be “in a writing signed by the client.” Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)'s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer's professional liability insurance ceases to be in effect.”

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and

client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer’s inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer’s own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.” DR 5-111(B)(3) forbids lawyers to begin

a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York’s counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer’s partner, associate, paralegal, law clerk or other employee of the lawyer’s firm, a lawyer acting ‘of counsel’ in the lawyer’s firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client’s rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client’s disadvantage only if the client’s consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client’s ability to pay.” Finally, Oregon’s rule governing sexual relations with clients contains a detailed description of “sexual relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate

parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

Pennsylvania: Rule 1.8(g) does not require that client consent be “confirmed in writing.”

Texas: Rule 1.08(c) provides that prior to the conclusion of “all aspects of the matter giving rise to the lawyer’s employment,” a lawyer shall not make or negotiate an agreement “with a client, prospective client, or former client” giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information “for the advantage of the lawyer or of a third person or to the disadvantage of the client.” Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is “an employee” of the client “as long as the client is independently represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

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August 27, 2009 McCurdy E-mail to Voogd, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. **III.B. Rule 1.0.1 Definition of "Law Firm" [1-100(B)(1)]** (Post Public Comment Rule Draft dated 6/16/07) and a global terminology rule [MR 1.0, RPC 1-100(B)]

Codrafters: Julien, Kehr, Sapiro

Assignment: (1) a chart comparing a proposed California version of a global terminology rule to MR 1.0 (including a comparison of the Commission's Rule 1.0.1 definition of "Law Firm" to MR 1.0(c)); (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received on the Commission's Rule 1.0.1 definition of "Law Firm" and the Commission's response.

2. **III.K. Rule 3.1 Meritorious Claims and Contentions [3-200]**
(April 2009 Comparison Chart - Post Public Comment Rule Draft #4 dated 6/26/07)

Codrafters: Ruvolo, Tuft

Assignment: (1) a chart comparing proposed Rule 3.1 to MR 3.1; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.L. Rule 3.2 Expediting Litigation [N/A]** (Dec. 2008 Comparison Chart; a rule is not recommended for adoption)

Codrafters: None

Assignment: (1) a chart comparing proposed Rule 3.2 to MR 3.2; and (2) a “dashboard” cover sheet.

4. **III.P. Rule 5.3.1 Employment of Disbarred Member [1-311]** (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #4 dated 6/26/07)

Codrafters: Lampport

Assignment: (1) a chart comparing proposed Rule 5.3.1 to RPC 1-311; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.DD. Rule 1.8.5 Payment of Expenses for a Client [4-210]** (Post Public Comment Draft #7.3 dated 7/5/08)
Codrafters: Julien, Kehr
Assignment: (1) a chart comparing proposed Rule 1.8.5 to MR 1.8(e); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.K. Possible Rule re: Class Action (no counterpart rules)** (possible rule last considered at the September 2006 meeting; see also the comments to proposed Rule 1.7)
Codrafters: Martinez, Sapiro (w/Karpman)
Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.
2. **IV.L. Possible Rule re: Hourly Fee (Record Time)** (no counterpart rules) (possible rule last considered at the August 2004 meeting; see also email compilation dated 1/31/08)
Codrafters: Foy, Peck

**RRC – Rule 4-210 (1.8.5)
E-mails, etc. – Revised (10/13/2009)**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Voogd, Kehr & Julien), cc RRC:

Tony & Codrafters (Bob & JoElla):

This message provides the assignment background materials for Rule 1.8.5 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

September 24, 2009 McCurdy E-mail to Voogd, cc Chair, Difuntorum & KEM:

I'm resending the assignment message I sent you for the September meeting, with all of the various materials for your upcoming assignments. In addition to a submission on Rule 1.8.5, (III.DD.) (assignment background materials sent to you by e-mail on Sept. 18th), we are also looking for materials for the following assignments that were carried over from the September meeting, to be submitted by September 30th for the October meeting:

Rule 3.1

Rule 3.2

Rule 5.3.1

I have also attached the most current Dashboard template for you to use. You can copy and paste any entries from the Dashboards sent out earlier into the revised Dashboard template provided (the last attachment to this message – named “Dashboard Template for Adoption V4 rev. 9-14-09.doc (43 KB).”

Attachments:

Rule 1.0.1

- Dashboard for Law Firm Definition (8/27/09)
- Introduction Template (8/27/09)
- Rule Chart Template (8/27/09)
- Comment Chart Template (8/27/09)
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Cf. to MR 1.0(c).
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Annotated
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Clean
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Cf. to PCD

Rule 3.1 [3-200]

- Dashboard (8/27/09)
- Introduction, Draft 2 (6/1/09)
- Rule Chart, Draft 2 (6/1/09)
- Comment Chart, Draft 2 (6/1/09)
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)

Rule 3.2 [3-200]

- Dashboard (8/27/09)
- Introduction, Draft 3 (12/14/08)KEM
- Rule Chart, Draft 3 (12/14/08)KEM
- Comment Chart, Draft 3 (12/14/08)KEM
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)

Rule 5.3.1 [1-311]

- Dashboard (8/27/09)
- Introduction, Draft 3.1 (12/17/08)KEM
- Rule Chart, Draft 3.1 (12/17/08)KEM
- Comment Chart, Draft 3.1 (12/17/08)KEM
- Public Comment Chart, Draft 1 (8/27/09)

October 1, 2009 Kehr E-mail to KEM:

After I learned that Paul had overlooked my 8.3 drafts, I went back to see what I overlooked and found this. I don't believe I ever heard from Tony on it. Has anything been done on it? Should I try to put together a tardy set of drafts? Any other suggestions or insights?

October 1, 2009 KEM E-mail to Kehr:

Just got home. If you think you have time tonight, then we can still get it into the agenda package. The mailing was supposed to go today but between and among the "supplemental" agenda, late minute submissions, and the "rolling" agenda, the staff was unable to get it all done in time. I can help with some of the documents. Please let me know how I can assist. Thanks.

October 1, 2009 KEM E-mail to Kehr:

I'm following up on my message of a few moments ago. I thought you were the lead drafter but now that I see Tony is, I think you should hold up on drafting anything. I know that Tony sent in two finished matters today (5.3.1 and 3.1), so he might be working on 1.8.5 as we speak. That's his only remaining matter, other than 3.2, which simply involves a rejection of the Model Rule. I'll check w/ Lauren and see where he's at with 1.8.5. Please give yourself a well-deserved rest from Commission work -- at least until the morning. ☺

October 6, 2009 KEM E-mail to Kehr, cc Chair & Staff:

If you still have some time, we're taking you up on your kind offer of assistance on completing the attached. I've attached the following, all in Word:

1. Dashboard, Draft 2 (10/6/09)AV-KEM. I've made revisions to Tony's dashboard. I didn't think it fair to say that our rule "tracks the concepts of the Model Rule."
2. Introduction, Draft 1 (10/6/09)KEM. I've taken a first shot at the Introduction. I don't think it should be long. Most of the explanation should be in the Rule & Comment chart. No pride of authorship if you'd prefer to describe what the Commission has done.
3. Rule & Comment Chart, Draft 1 (10/6/09)AV. Unfortunately, we haven't done anything w/ this yet. If you still have the time, would you please provide the required explanations. Harry wants to send this out by tomorrow. If you can't get to it today, tonight or tomorrow, let us know and I'll take a shot at it.
4. Public Comment Chart, Draft 2 (10/6/09)RD-KEM. Randy prepared the attached. I think it's fine.

I've also attached my cumulative notes for 1.8.5, in PDF.

One last point. There is a "new" draft, #8 (10/6/09). All I did to the previous draft was to remove the bracketed references to the current rule numbers as we have been doing w/ all our rules. I've made those changes to the rule & comment comparison chart as well. Otherwise, draft 8 is identical to the Post-PCD [#7.3] (7/5/08).

Please let me know if you need any assistance. As always, thanks for the generous contribution of your valuable time to these efforts.

October 6, 2009 Kehr E-mail to KEM, cc Chair & Staff:

I'm glad to help. I'll turn to this as soon as I can.

October 6, 2009 Kehr E-mail to KEM, cc Chair & Staff:

I have attached a draft of the comparison chart and computer marked revisions of the other drafts. Your draft of the Dashboard say there is no minority position, and I don't think that's right although there were objections to several of aspects of the Rule.

With any luck, this is complete except that it omits the state variation paragraph. I'm all in, and this Rule doesn't seem to me to be so important that the additional information would be crucial. If anyone thinks it is, perhaps we can pick it up next weekend, but I've had it for today.

October 6, 2009 KEM E-mail to Kehr, cc Chair & Staff:

Thanks very much. I've gone through the documents you attached and accepted all the changes, and also corrected a couple or three nits in the rule/comment comparison chart. Some points:

1. Dashboard. First, I'm not sure we can say that we substantially adopted the Model Rule. I'd prefer we leave that box blank and simply check the "material additions" box. There are too many strikeouts for us to make that claim, even if the concepts of the two rules are the same. I've made the change.
2. Dashboard. There may have been some folks who didn't like some aspects of the Rule but we have not received any formal dissents or minority statements. Let's see if anyone submits one before we check off "yes" for minority. Like you have observed, this is probably not a controversial rule.
3. Introduction. I've added a couple of sentences about state variations. The only variation of note I've come across is Miss. and I've referenced it, but it probably isn't necessary.

I think Lauren can circulate the attached clean versions to the Commission.

October 7, 2009 Kehr E-mail to KEM, cc Chair & Staff:

I don't have time now to look at the attachments, but your comments below all make sense to me. I agree this should be circulated.

October 10, 2009 Kehr E-mail to KEM:

I don't think I ever replied to your 10/6 e-mail, so I want to confirm that I'm fine with the suggestions you made there. See you on Friday.