

Proposed Rule 1.8.9 [4-300]

“Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review”

(Draft #3, 2/09/10 – Note: Rule 1.8.9 was distributed for public comment previously as “Rule 1.8.12.”)

Summary: Proposed Rule 1.8.9, for which there is no Model Rule counterpart, carries forward current rule 4-300’s prohibition on lawyers’ (i) purchasing property at various legally required sales such as foreclosure, execution, receiver’s and similar sales, or (ii) representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer. Unlike the current rule, however, the proposed Rule does not regulate probate sales. 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 type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 4-300

Statute

Probate Code §§ 9880-9885.

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 Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 3

Abstain 1

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:

The Commission's decision to remove probate sales from the scope of the current rule, under which participation in such sales is prohibited, might be viewed as lessening client protection because the Probate Code permits lawyer's participation in such sales under certain conditions.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.9* Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.8.9 prohibits lawyers' either purchasing property at various sales under legal process, such as foreclosure, execution, receiver's and similar sales, or representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer.

There is no equivalent Model Rule, but the Commission believes that such a rule is a necessary public protection device, as it has been for many years.

There is only one substantive change to the current rule that the Commission proposes. The current rule applies to probate sales as well as to other types of sales; but Probate Code sections 9880-9885 specifically allow such transactions under specified and detailed provisions including disclosure and court approval. This conflict between statute and rule has existed for a number of years. Consequently, the Commission proposes that the statute provides sufficient public protection and that therefore the Rule need not address probate sales. However, a cross reference to the pertinent Probate Code sections is provided so as to identify the issue and the statute controls for any interested parties.

Minority. This proposal will change current Rule 4-300 to permit a lawyer in a probate case to buy assets out of the estate. As set forth in more detail in the dissent to this proposal, it thereby abrogates decades of clear decisional law, will allow lawyers to take advantage of vulnerable members of the public, will promote conflicts of interest for lawyers in probate cases, and will deprive the

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Proposed Rule 1.8.9, Draft #3 (2/09/10) - Note: Rule 1.8.9 was distributed for public comment previously as "Rule 1.8.12."

RRC - 4-300 [1-8-9] - Compare - Introduction - DFT3.3 -RD-ML-RD.doc-RD

INTRODUCTION (Continued):

judiciary of objective advocacy in an essential aspect of the probate process. Proposed Rule 1.7 does not cure the defects in this new proposed rule because it does not require a lawyer to obtain the informed written consent of the client or of the heirs, beneficiaries, or creditors of the probate estate, nor to assure that they obtain independent representation, before the lawyer or the lawyer's relation may purchase an asset of the estate. Thus, the proposed rules will not protect the public but will encourage harm to those interested in probate estates

A Note on the Rule Number. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each such concept its own separate rule number.

<p style="text-align: center;"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p style="text-align: center;"><u>Commission's Proposed Rule</u> Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review</p>	<p style="text-align: center;"><u>Explanation of Changes to the California Rule 4-300</u></p>
	<p>(Aa) A memberlawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such memberlawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member'slawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.</p>	<p>Since there is no comparable ABA Model Rule, this Explanation will only address changes to the existing California Rule, 4-300. The Commission believes that this Rule protects the public against self-dealing by lawyers who are performing professional functions in connection with various forms of property sales under legal processes, such as receiver's, trustee's, or judicial sales, and should be continued. The Commission is not aware of any reasons why the ABA has not addressed this subject; but it believes that the possibility for self-dealing or abuse in these situations is apparent wherever a lawyer performs professional functions concerning a public or semi-public sale under legal process.</p> <p>Thus, proposed Rule 1.8.9 retains virtually all of current California rule 4-300, with one significant exception. Lawyers' roles in probate sales have been regulated both by rule 4-300 and by statute (Probate Code §§ 9880-9885). The current rule completely prohibits lawyers' self-dealing (directly or indirectly through family members etc.) in such transactions; but the Probate Code allows such transactions upon court order, given after notice to all interested parties as specified in the Code.</p> <p>After extensive consideration whether to continue the current rule's total prohibition of that which the legislature has decided to allow with specified conditions, the Commission decided that the statutory provision afforded adequate public protection in probate sales transactions, and has deleted that part of current rule 4-300 from the proposed Rule.</p>

* Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart. (Note: Rule 1.8.9 was distributed for public comment previously as "Rule 1.8.12.")

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review</p>	<p align="center"><u>Explanation of Changes to the California Rule 4-300</u></p>
		<p>The only other changes to part (a) are that the qualification which describes the nature of the "affiliation" which precludes participation in such a sale was eliminated as unnecessary and perhaps too limiting, and that "lawyer" was substituted for "member."</p>
	<p>(B) A memberlawyer shall not represent the seller at a probate, foreclosure, receiverreceiver's, trusteetrustee's, or judicial sale in an action or proceeding in which the purchaser is a spouse of, relative or other close associate of the memberlawyer or of another lawyer in the member'slawyer's law firm or is an employee of the member or the member's law firm. (Amended by order of Supreme Court, operative September 14, 1992.)</p>	<p>See Explanation of Changes for paragraph (a).</p>
	<p>(c) <u>This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].</u></p>	<p>New paragraph (c) excepts probate sales from the Rule and cross-references the specific provision of the Probate Code. See Explanation to part (a) of this proposed rule. Paragraph (c) also adds the caveat that although probate sales might be regulated under the statute, a lawyer's participation in such transactions is still subject to other rules.</p>

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review Comment</p>	<p align="center"><u>Explanation of Changes to the California Rule 4-300</u></p>
	<p>[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.</p>	<p>Comment [1] has been added to caution lawyers that failure to comply with the conditions of the Probate Code as to probate sales is a violation of this Rule.</p>

**Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
(Commission's Proposed Rule – Clean Version)**

(Note: Rule 1.8.9 was distributed for public comment previously as "Rule 1.8.12.")

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

COMMENT

- [1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

Rule 1.8.12-9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].

COMMENT

- [1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

Proposed Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

Rules Revision Commission — Minority Dissent

(Note: Rule 1.8.9 was distributed for public comment previously as “Rule 1.8.12.”)

This proposal will change current Rule 4-300 to permit a lawyer in a probate case to buy assets out of the estate. It thereby abrogates decades of clear decisional law, will allow lawyers to take advantage of vulnerable members of the public, will promote conflicts of interest for lawyers in probate cases, and will deprive the judiciary of objective advocacy in an essential aspect of the probate process. Proposed Rule 1.7 does not cure the defects in this new proposed rule because it does not require a lawyer to obtain the informed written consent of the client or of the heirs, beneficiaries, or creditors of the probate estate, nor to assure that they obtain independent representation, before the lawyer or the lawyer’s relation may purchase an asset of the estate. Thus, the proposed rules will not protect the public but will encourage harm to those interested in probate estates.

California has always strictly prohibited an attorney from purchasing assets at a probate or other judicial sale if the attorney represents a party to the matter. This prophylactic rule is intended to remove any temptation for a lawyer to deal unfairly and is intended to protect the reputation of the legal profession. In *Eschwig v. State Bar* (1969) 1 Cal. 3d 8, 16, the Court disbarred an attorney for purchasing property that was an asset of an estate in which he was an attorney for the executrix. The Court emphasized the conflicts of interest inherent in this situation:

An attorney representing the representative of an estate is under an obligation to seek the highest possible price on the sale of an estate asset. As a purchaser, however, he would be inclined to seek the lowest possible price. The resulting conflict of interest where the attorney becomes the purchaser is apparent. Because of the conflict of interest inherent in the situation, [former] Rule 8 is applicable even where an attorney is acting in good faith and even where there is competitive bidding. A conflict of interest exists, and is inherently more dangerous, in a sale during probate such as occurred here, because it was not public, was unknown to the court, did not involve competitive bidding, and allowed petitioner to overreach or exercise undue influence upon his client.

Id., 1 Cal. 3d at 15. Attorneys should not be allowed to purchase, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See, e.g., *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 [attorney's wife bought at judicial sale. Held act of moral turpitude and breach of fiduciary duty.]; *Sodikoff v. State Bar* (1975) 14 Cal. 3d 422 [attorney bought asset through his corporate alter ego: six months suspension].

It is astounding that the majority of the Commission recommends continuing the absolute prohibition as to foreclosure, receiver’s, trustee’s, or judicial sales but would permit lawyers to purchase in probate sales. In

probate, the executor, executrix, administrator, heir, or beneficiary is often less able to protect herself or himself than in the other types of sales. A widow, widower, orphan, or surviving parent may have no experience in sales of business, real property, or other assets. Often, they are unsophisticated. Particularly when a close relative, spouse, or lover has died, a normal reaction of the survivors is one of shock and pain. Often, the full emotional impact of the death is more than the survivor or survivors can tolerate, and they become dependent on their attorney to guide them through the transition. Even if the survivors would normally have the ability to exercise independent judgment, after the death of a loved one they often do not. The author of this dissent has met with surviving spouses and parents, and months later they admit that they were in such shock that they did not even remember that we met, let alone what we discussed. Nevertheless, the majority of the Commission who voted to change this rule would deprive vulnerable people of the protections of existing law but continue those protections for commercial receivership sales, foreclosure sales and the like.

Permitting attorneys in probate cases to loot estates would be inexcusable. An attorney who has the opportunity to recommend a sale of an asset and to guide the survivors in how to sell, to whom to sell, under what circumstances, and at what price, may perform a valuable service. However, an attorney who has a direct interest in the sale because he or she is a buyer is more likely to perform a huge disservice. The attorney's own financial, business, property, and personal interests will conflict with the interests of the client and with the

interests of the heirs, beneficiaries, and creditors of the probate estate. The attorney may find it very difficult to set his or her personal interests aside, and those interested in the estate will not receive advice based upon independent professional judgment. This will occur precisely when they are most vulnerable.

Particularly in probate cases, the courts are uniquely dependent upon the integrity of counsel. Many matters are unopposed, so no advocate urges that a petition for authority to sell is not in the best interests of the estate or those interested in it. Often, the personal representative has no idea what the consequences of a sale at a given price may be and is dependent on the attorney to ascertain what is in the personal representative's or the heirs' best interests. Permitting lawyers to buy assets from probate estates will impair the ability of clients to obtain independent advice and representation and will cut the courts off from advocacy by someone without a personal stake in the outcome.

The heirs, beneficiaries, and creditors of the probate estate will not adequately be protected by court procedures. For example, because the executrix trusts the attorney, she and the beneficiaries or heirs consent to the petition for approval of the sale without obtaining any independent advice. The petition comes on for an unopposed hearing before a judge who may not have time to examine the merits, let alone give attention to the lawyer's conflicts of interest.¹ Now, when a lawyer

¹ On October 7, 2009, the San Francisco probate department heard 55 matters on its 9:00 calendar. At three minutes a case, only contested matters can receive much attention.

alleges in a petition that a sale is in the best interests of the estate and those beneficially interested in the estate, the probate judge can assume that the lawyer is advocating for the executrix, heirs, and creditors and not from self interest. In the future, if proposed rule 1.8.9 is adopted, no one will be advocating for them who does not have an inherent conflict of interest. This rule will create a very substantial risk that parties to probate proceedings will be represented in the courts by attorneys who cannot give them objective advice and who cannot objectively represent them in court. When an attorney for a personal representative appears on the petition for authority to sell property, he or she will be advocating that the property should be sold to the attorney or to the attorney's relative or partner, but not to a bona fide purchaser. The attorney will be advocating what is in his or her own interest when, instead, the lawyer should be advocating what is in the best interests of the estate and those beneficially interested in it. The administration of justice will have been corrupted.

The type of transaction that would be promoted by the proposed new rule is inherently abhorrent. It will victimize clients and other members of the public who are inherently vulnerable.

Deviating from established norms of our profession is not justified by the lobbying that the probate bar did to induce the Legislature to permit lawyers to buy at a probate sale. The fact that the Legislature included permission for lawyers to buy at probate sales does not make that wrongful practice right. Probate Code section 9881 does not serve as a substitute for rules of ethics or of discipline

and does not absolve the lawyer of the duty to address the significant conflicts of interest when buying from a probate estate.

The Supreme Court has inherent jurisdiction to control conduct of lawyers in probate cases. See Bus. & Prof. Code §§ 6077 & 6103. The Supreme Court can require attorneys to adhere to stricter standards than the Legislature may require. Legislative standards are only minimal standards that must be applied for discipline, and the Supreme Court retains inherent power to make its rules more strict than the Legislature requires. See, e.g., *Stratmore v. State Bar* (1975) 14 Cal. 3d 887, 889-90.

In 1990, Commission for the Revision of the Rules recommended adoption of current Rule 4-300. In its report, the Commission expressly pointed out to the Board of Governors and to the Supreme Court the conflict between that rule and then new Probate Code sections 9880 through 9885. The Commission recommended that the Supreme Court adopt Rule 4-300 because it affords clients protection from predatory lawyers in situations where clients, for emotional or other reasons, will likely have difficulty exercising independent or objective judgment. The Board of Governors and the Supreme Court agreed. That was the ethical and correct position, and it would be the ethical and correct position to take today.

The Commission should be embarrassed by proposing to enrich lawyers by blessing inherent conflicts of interest that jeopardize the public. The Board of Governors should reject this new rule.

Rule ~~4-300~~1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(Comparison of the Current Proposed Rule to Current California Rule)

- ~~(A)~~ (a) A ~~member~~lawyer shall not directly or indirectly purchase property at a ~~probate,~~ foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member~~lawyer or any lawyer affiliated ~~by reason of personal, business, or professional relationship~~ with that ~~member or with that member's~~lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- ~~(B)~~ (b) A ~~member~~lawyer shall not represent the seller at a ~~probate,~~ foreclosure, ~~receiver~~receiver's, ~~trustee~~trustee's, or judicial sale ~~in an action or proceeding~~ in which the purchaser is a spouse ~~or~~ relative or other close associate of the ~~member~~lawyer or of another lawyer in the ~~member's~~lawyer's law firm ~~or is an employee of the member or the member's law firm. (Amended by order of Supreme Court, operative September 14, 1992.)~~
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].

COMMENT

- [1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.
 (Note: Rule 1.8.9 was distributed for public comment initially as "Rule 1.8.12.")
[Sorted by Commenter]

TOTAL = 2 Agree = 2
 Disagree = 0
 Modify = 0
 NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association (Ross Simmons)	A	Y		Rule 4-300 conflicted with Probate Code 9880-9885 which provided that a lawyer could participate in a probate proceeding sale. This revision aligns both statutes.	No response necessary.
2	San Francisco, Bar Association of (Philip Humphreys)	A	Y		Current rule (4-300) is overbroad; this proposal properly limits the individuals covered by the Rule to the lawyer and any other lawyer affiliated with the lawyer's firm. In favor of provision creating exception for transactions complying with Probate Code 9980-9885 and the provision requiring compliance with 3-300 and 3-310. Only concern is that since this rule requires more than the Probate Code it could be considered an invalid de facto amendment.	No response necessary. No response necessary. Commission disagreed, in part, because the rule does not seek to vary from the applicable Probate Code provisions.

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