

DISCUSSION DRAFT

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF  
THE STATE BAR OF CALIFORNIA

Commission for the Revision of the  
Rules of Professional Conduct



State Bar of California

July, 2007

## SUMMARY OF PUBLIC COMMENT PROPOSAL

**PLEASE NOTE:** *Publication for public comment is not, and shall not, be construed as a recommendation or approval by the Board of Governors of the materials published.*

**SUBJECT:** Five (5) proposed amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

**BACKGROUND:** The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval. The State Bar has assigned a special commission to conduct a thorough study of the rules and to recommend comprehensive amendments.

Last June, the Commission completed work on a group of 27 proposed new and amended rules and those rules were distributed for a public comment period, which ended on October 16, 2006. At the State Bar's Annual Meeting on October 7, 2006 in Monterey, the Commission held a public hearing to garner further public comment on the proposed rules. After the public hearing and the end of the public comment period, the Commission worked on revising the 27 rules in response to the public comment received.

During this same time period, the Commission has completed work on five (5) more rules that are the subject of this present request for public comment. As was the case with the Commission's first group of 27 rules, a public hearing is being planned to gather additional input. The public hearing will be conducted in Anaheim during the State Bar Annual Meeting on September 29, 2007.

The Supreme Court will provide preliminary guidance to the Commission after each group of proposed rules has been circulated for public comment and the Commission has made any subsequent revisions. The Court has agreed that the Commission may submit each group of proposed rules to the Supreme Court for informal review at this stage of the Commission's consideration. The purpose of this initial submission is to provide the Commission with an opportunity to consider any initial reactions, concerns, and suggestions that the Supreme Court may have about each group of proposed amendments. This preliminary consideration by the Supreme Court will not constrain or foreclose any action by the Supreme Court in the future, but is intended to provide helpful guidance to the Commission as it proceeds with its preparation of its final draft proposals and formal recommendations to the Court. Amendments to the rules will become operative only upon formal approval by the Supreme Court.

**PROPOSAL:** The five (5) proposed amended rules are listed below by proposed new rule number. The rule number of the comparable current rule is indicated in brackets. Each of these proposed rules are subject to change following consideration of the public comment received.

<u>Rule</u>	<u>Title</u>	<u>Page#</u>
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**FISCAL/PERSONNEL IMPACT:** No unbudgeted fiscal or personnel impact.

**SOURCE:** State Bar Special Commission for the Revision of the Rules of Professional Conduct

**COMMENT DEADLINE:** 5 p.m., October 26, 2007

## HOW TO COMMENT:

The State Bar encourages all interested persons or organizations to submit comments on the proposed new and amended Rules of Professional Conduct.

This Discussion Draft is available on a CD-ROM disc that includes word processing files for each of the proposed rules. If your comment will include recommended modifications of any of the proposed rules, then submitting a redraft of a rule will help the Rules Revision Commission understand your desired changes. A link to this Discussion Draft can be found at [www.calbar.ca.gov](http://www.calbar.ca.gov). Click on the link Proposed Rules of Professional Conduct under the heading **Ethics**, which is located on the right navigation bar.

Online Submission: Comments may be submitted **online** by using an online Public Comment Form.<sup>\*/</sup> A link to the Public Comment Form is posted on the State Bar website at the same page as the Discussion Draft indicated above.

Mail or Fax Submission: Comments may also be submitted in writing by **mail** or **fax**. To facilitate the Commission's consideration of written comments, each rule you choose to comment on should be on a **separate sheet of paper**. Indicate the rule number **in the subject line at the beginning of the letter**, your name, any organization or entity on whose behalf you are submitting comment, and any brief information about yourself which you wish to be considered on each page.

Mail or Fax to: Audrey Hollins  
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<sup>\*/</sup> The direct url for the online comment form is: [http://fs16.formsite.com/SB\\_RRC/form882622530/index.html](http://fs16.formsite.com/SB_RRC/form882622530/index.html)

## I. INTRODUCTION

### A. History and Commission Charge

The last complete revision of the California rules occurred in the late 1980's and it was at that time that the State Bar established its Special Commission for the Revision of the Rules of Professional Conduct ("the Commission"). In 2001, the State Bar reactivated the Commission, in part, to respond to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project for a systematic revision of the Model Rules of Professional Conduct. The Commission has been given the following charge:

The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to multi-disciplinary practice, multi-jurisdictional practice, court facilitated *in propria persona* assistance, discrete task representation and other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the California Rules that:

- 1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
- 2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
- 3) Promote confidence in the legal profession and the administration of justice; and
- 4) Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

## B. State Bar Rule Amendment Process and the Commission's Methodology

The Board of Governors of the State Bar ("the Board") has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct. Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State." The amendments adopted by the Board are submitted to the Supreme Court for approval and upon approval become binding disciplinary standards for all members of the State Bar. Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar."

The State Bar's process for consideration of rule amendments generally involves the following steps: (1) development of draft rules (including proposed new rules, amended rules, and deletion of existing rules); (2) publication of the draft rules for public comment; (3) further drafting following consideration of public comments received; (4) Board Committee and full Board action to adopt the draft rules; and (5) State Bar submission of a memorandum to the Supreme Court requesting approval of the rules adopted by the Board. The Commission's role is to carry out the substantive study and drafting aspects of the process, both before and after public comment. Ultimately, the Commission will issue a final report and recommendation to the Board setting forth its recommendations for comprehensive rule amendments.

The Commission's methodology for conducting its study and developing rule amendment proposals is a seriatim approach. The Commission is considering each of the current California rules in current rule number order. In considering each rule, any relevant ABA Model Rule or Restatement section is compared and contrasted, both as to policy as well as language. Developments in case law and analysis found in ethics opinions are also analyzed. If there are significant state variations of the rule, national studies or other major developments, trends or initiatives, those matters are also considered. The Commission's deliberations are conducted in open session and several groups, including representatives of local bar associations, regularly attend and monitor the work of the Commission.

The Commission's plan involves the issuance of four groups or batches of proposed rule amendments. The 27 proposed new and amended rules distributed for public comment in 2006 was the first batch. This batch of 5 proposed amended rules presented in this Discussion Draft is the second of the four batches.

After each of the four batches are issued for, and returned from, public comment, the Commission will seek Board committee authorization to publish the entirety of the proposed rule amendments as a single, comprehensive work product for a final additional public comment period. This redistribution for further public comment of the entirety of the rules would follow any changes implemented by the Commission in response to each of the four initial public comment periods. Following consideration of the public comments received in response to this distribution, the Commission will present its final report and recommendation to the Board with a request that the Board adopt the Commission's proposed rule amendments.

C. Online Ethics Resources

The following ethics resources are available on the internet and may be helpful in evaluating the proposed new and amended rules.

The California Rules of Professional Conduct: ([click here](#))  
[http://calbar.ca.gov/calbar/pdfs/ethics/2007\\_Rules-Prof-Conduct.pdf](http://calbar.ca.gov/calbar/pdfs/ethics/2007_Rules-Prof-Conduct.pdf)

The State Bar Act portion of the California Business and Professions Code: ([click here](#))  
[http://calbar.ca.gov/calbar/pdfs/ethics/2007\\_State-Bar-Act.pdf](http://calbar.ca.gov/calbar/pdfs/ethics/2007_State-Bar-Act.pdf)

The ABA Model Rules of Professional Conduct: ([click here](#))  
[http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html)

Detailed Comparison Chart: California Rules to ABA Model Rules: ([click here](#))  
[http://calbar.ca.gov/calbar/pdfs/ethics/ca\\_to\\_aba.pdf](http://calbar.ca.gov/calbar/pdfs/ethics/ca_to_aba.pdf)

Detailed Comparison Chart: ABA Model Rules to California Rules: ([click here](#))  
[http://calbar.ca.gov/calbar/pdfs/ethics/aba\\_to\\_ca.pdf](http://calbar.ca.gov/calbar/pdfs/ethics/aba_to_ca.pdf)

In addition to the foregoing, the Ethics Information page (<http://www.calbar.ca.gov/ethics>) at the State Bar's official website includes an area containing much information about the Commission, including a schedule of meetings and open session agendas, meeting summaries, and meeting materials.

D. Discussion Draft Available on CD-ROM Disc

This Discussion Draft is available on a CD-ROM disc (contact Audrey Hollins at (415) 538-2167). If you have received this Discussion Draft on a disc, then with the exception of the ABA Model Rules, the internet resources listed above are included on your disc. In addition, if you have the disc, be sure to follow the "[README](#)" file with instructions for saving the files so that the "Table of Contents/Cross Reference Chart" in Part III of the Discussion Draft activates the icon links to word-processing versions of each of the proposed rules. The word-processing files will open in your internet browser but from there the text can be copied and pasted into either WORD or WordPerfect. Word processing files are being provided to facilitate your ability to submit comments with suggested language for modifying a proposed rule. Submitting a redraft of a rule will help the Rules Revision Commission understand a commentator's desired changes to the proposed rules.

## II. SUMMARY OF PROPOSED NEW AND AMENDED RULES

The summary of the five proposed amended rules lists each rule by their proposed new rule number that tracks the ABA Model Rules numbering system. The current California rule number is shown in brackets following the rule title. The summaries include discussion of key issues considered by the Commission.

### Rule 1.8.3     Gifts from Client [4-400]

Proposed Rule 1.8.3 amends current rule 4-400. (Refer to: page 11 for a clean version of this draft rule; page 12 for a redline/strikeout version that shows changes to the current rule; and page 13 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Rule 1.8.3 continues the prohibition against a lawyer inducing a substantial gift from a client. It also continues the prohibition against a lawyer preparing an instrument that gives the lawyer, or a person related to the lawyer, any substantial gift, unless the lawyer or other recipient is related to the client.

The amendments implement some substantive changes. Paragraph (a)(1) of the rule provides that an "attempt" to induce a gift is prohibited. This express prohibition against attempted violations is not found in the current rule. Adding the prohibition against attempted rule violations tracks the ABA Model Rule standard (see ABA Model Rule 8.4(a) which generally prohibits attempted rule violations). In paragraph (b), a new definition of "related persons" has been added, tracking the definition found in the California Probate Code. The current rule's Discussion section was revised to include three comments that generally track the comments to ABA Model Rule 1.8(c) (see comments [6], [7], and [8] to ABA Model Rule 1.8). Where appropriate, the Commission has modified the comment language to refer to the California Probate Code.

### Rule 1.8.5     Payment of Personal or Business Expenses Incurred by or for a Client [4-210]

Proposed Rule 1.8.5 amends current rule 4-210. (Refer to: page 15 for a clean version of this draft rule; page 17 for a redline/strikeout version that shows changes to the current rule; and page 19 for a redline/strikeout version that shows changes to the relevant parts of ABA Model Rule 1.8.) Rule 1.8.5 continues the prohibition on a lawyer's payment of personal or business expenses of a prospective or existing client. ABA Model Rule 1.8(e) states a comparable prohibition against a lawyer "providing financial assistance to a client."

As in both the Model Rule and current rule 4-210, proposed rule 1.8.5 includes an exception for advancing costs, the repayment of which may be contingent on the outcome of the client's matter.

In addition to some clarifying amendments, there are a few substantive changes. One of the substantive changes would bring California's standard closer to the Model Rule standard by adding a new exception expressly allowing a lawyer to pay court costs and reasonable expenses of litigation on behalf of the lawyer's indigent client. (See new paragraph (a)(4) of proposed rule 1.8.5.) Another substantive change is the addition of a new paragraph (b) providing that the rule is not violated by a lawyer offering or giving a gift to a current client so long as the gift is not given in consideration of any promise,

agreement, or understanding. The Commission's amendments also include a new comment explaining the competing policy concerns that are the basis for the rule (see Comment [1] to proposed rule 1.8.5). Other new comments clarify the definition of "costs" as used in the rule and provide cross-references to related rules.

#### Rule 1.8.11 Relationship with Other Party's Lawyer [3-320]

Proposed Rule 1.8.11 amends current rule 3-320. (Refer to page 21 for a clean version of this draft rule and to page 22 for a redline/strikeout version that shows changes to the current rule.) Like current rule 3-320, proposed Rule 1.8.11 addresses the conflict of interest arising when opposing lawyers are related or have some other significant interpersonal relationship. Rule 1.8.11 continues the requirement that a lawyer inform a client in writing if the lawyer knows that the lawyer representing the opposing party, or another person involved in the case, is the lawyer's spouse, parent, child or sibling, or lives with the lawyer, or is a client of the lawyer, or has an intimate personal relationship with the lawyer. While this rule has been given an ABA rule number, the rule more closely tracks the current California rule. Although the ABA Model Rules do not have a precise counterpart to this rule, Model Rule 1.7 generally requires informed client consent in circumstances where a lawyer's representation is materially limited by responsibilities to third persons or personal interests in the client's matter. Comment [11] to Model Rule 1.7, in part, states: "a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent." This ABA standard differs from the California standard because the ABA standard requires informed consent while the California standard only requires that the client be informed in writing.

The Commission's proposed amendments implement one significant material change to the standard in the current rule and the ABA Model Rule comment. The current rule and ABA comment cover only relationships with another "party's" lawyer. The Commission's amendments broaden the scope of the rule to cover other person's involved in the case or matter who are not parties. For example, the amended rule would cover a relationship with a lawyer who is representing a witness in the case. The Commission believes that the client protection that is afforded under the rule is appropriate in such circumstances despite the fact that the person represented is not a party.

#### Rule 1.8.12 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review [4-300]

Proposed Rule 1.8.12 amends current rule 4-300. (Refer to page 23 for a clean version of this draft rule and to page 24 for a redline/strikeout version that shows changes to the current rule.) Rule 1.8.12 continues the restrictions on a lawyer who purchases property at a foreclosure sale or other sale subject to judicial review. This proposed rule tracks the current California rule as there is no corresponding ABA Model Rule. The ABA rule number that has been assigned is one that places the rule into the category of conflicts of interest that for the most part involve conflicts between the personal or business interests of the client and the lawyer (see ABA Model Rule 1.8).

The Commission's amendments to this rule include a key change in substance and policy. Under existing law, the California Probate Code conflicts with rule 4-300 because the Probate Code allows a lawyer to participate in certain probate proceeding transactions that would otherwise be prohibited by the rule. The Probate Code sets forth procedures for an independent lawyer to review suspect transactions, provide appropriate legal advice and counsel, and then execute a "Certificate of Independent Review" (see California Probate Code section 9880 et. seq.). Through this procedure, the statutory scheme seeks to nullify the risk of undue influence and overreaching that is completely avoided under current rule 4-300's absolute prohibition. The Commission's amendments would resolve the conflict of law by amending the rule to permit the lawyer participation that is allowed under the Probate Code procedures. This exception to the rule's general prohibition is found in new paragraph (c) of proposed Rule 1.8.12 and it is amplified in a new comment to the rule stating, in part, that the Probate Code provisions must be "strictly followed in order to avoid a violation of the rule."

#### Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation [2-400]

Proposed Rule 8.4.1 amends current rule 2-400. (Refer to page 25 of Attachment 1 for a clean version of this draft rule and to page 27 for a redline/strikeout version that shows changes to the current rule.) Rule 8.4.1 continues and expands the prohibition against a lawyer engaging in unlawful discrimination in the management of a law practice. This proposed rule tracks the current California rule, as there is no precise counterpart in the ABA Model Rules (compare ABA Model Rule 8.4(d) which generally prohibits a lawyer from engaging in conduct that is "prejudicial to the administration of justice"). The ABA rule number that has been assigned is one that places the rule in the category of rules adopted to maintain the integrity of the legal profession.

The Commission's amendments to this rule include two key substantive changes. The first change is the deletion of language in the current rule that limits the prohibition to acts that occur in the hiring, promoting, discharging, or otherwise determining the conditions of employment in the law practice; or accepting or terminating client representations (see current rule 2-400 (B)(1) and (B)(2)). By deleting this language, the Commission's amendments would slightly expand the rule to cover acts of unlawful discrimination in the operation of a law practice that might not be readily characterized as discrimination against employees or discrimination in client retention. For example, under the current rule acts of discrimination against a volunteer intern or a representative of a vendor might be construed to be outside of the rule due to the existing limiting language.

The second key substantive change is the addition of language indicating that the rule's prohibition applies "whether or not the lawyer is a partner or shareholder or serves in a management role" (see paragraph (b) of proposed Rule 8.4.1). The language of prohibition found in the current rule applies only to the "management or operation of a law practice" and is silent on whether the rule applies to misconduct committed by non-managerial lawyers. The Commission considered the origin and purpose of the rule and determined that the rule should be revised to explicitly apply to misconduct by non-managerial lawyers. It should be noted, however, that the proposed rule continues the condition to enforcement found in the current rule which provides that no discipline may be

initiated under the rule "unless and until a tribunal of competent jurisdiction, other than [the State Bar Court], shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred" (see paragraph (c) of proposed Rule 8.4.1). The Commission considered deleting this condition but there was no consensus to make the change.

The Commission also considered but did not adopt an amendment to current rule 2-400 that would have greatly expanded the prohibition to reach any conduct in the "practice of law" rather than just conduct in the management of a law practice. The Commission's action in rejecting this broad expansion of the rule was based partly on its separate decision to recommend adoption of a California counterpart to ABA Model Rule 8.4. As circulated for public comment last year, the Commission's proposed Rule 8.4 provides that it is misconduct for a lawyer to "knowingly manifest, by words or conduct, bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation," where such words or conduct are prejudicial to the administration of justice.

### III. TABLE OF CONTENTS/CROSS-REFERENCE CHART

<b>PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA (BATCH 2)</b>								
<b>Proposed Rule* (Clean Version)</b>	<b>Page</b>		<b>Comparison to Current CA Rule*</b>	<b>Page</b>		<b>Comparison to ABA Model Rule</b>	<b>Page</b>	
<b>Rule 1.8.3</b> Gifts from Client	<b>11</b>	 	<b>Rule 4-400</b> Gifts from Client	<b>12</b>		<b>Rule 1.8(c)</b> Conflict of Interest: Current Clients: Specific Rules	<b>13</b>	
<b>Rule 1.8.5</b> Payment of Personal or Business Expenses Incurred by or for the Client	<b>15</b>	 	<b>Rule 4-210</b> Payment of Personal or Business Expenses Incurred by or for the Client	<b>17</b>		<b>Rule 1.8(e)</b> Conflict of Interest: Current Clients: Specific Rules	<b>19</b>	
<b>Rule 1.8.11</b> Relationship with Other Party's Lawyer	<b>21</b>	 	<b>Rule 3-320</b> Relationship with Other Party's Lawyer	<b>22</b>		<i>A computer-generated comparison to Model Rule 1.7 Comment [11] was not found to be helpful</i>		
<b>Rule 1.8.12</b> Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review	<b>23</b>	 	<b>Rule 4-300</b> Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review	<b>24</b>		<i>There is no comparable ABA Rule</i>		
<b>Rule 8.4.1</b> Prohibited Discrimination in Law Practice Management and Operation Review	<b>25</b>	 	<b>Rule 2-400</b> Prohibited Discriminatory Conduct in a Law Practice	<b>27</b>		<i>A computer-generated comparison to Model Rule 8.4 Comment [3] was not found to be helpful</i>		

## PROPOSED RULE (CLEAN VERSION)

### Rule 1.8.3 [4-400] Gifts From Client

- (a) A lawyer shall not:
- (1) induce or attempt to induce a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or
  - (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,
- unless the lawyer or other recipient of the gift is related to the client.
- (b) For purposes of this Rule, related persons include a spouse, registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

### Comment

- [1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce or attempt to induce a substantial gift from a client except where the lawyer is related to the client as set forth in paragraph (a). (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)
- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.
- [3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

## COMPARISON TO CURRENT CA RULE

### Rule 1.8.3 [~~4-400-~~] Gifts From Client

(a) ~~A member~~lawyer shall not:

- (1) ~~induce or attempt to~~ induce a client to make a substantial gift, including a testamentary gift, to the ~~member or to the member's parent, child, sibling, lawyer or spouse, except where the client is~~ a person related to the ~~member~~lawyer, or
- (2) ~~prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,~~

~~unless the lawyer or other recipient of the gift is related to the client.~~

(b) ~~For purposes of this Rule, related persons include a spouse, registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.~~

#### Discussion:Comment

- [1] ~~A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce or attempt to induce a substantial gift from a client except where the lawyer is related to the client as set forth in paragraph (a). (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurred~~occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)
- [2] ~~If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.~~
- [3] ~~This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.~~

## COMPARISON TO ABA MODEL RULE

(This version shows changes to the relevant parts of ABA Model Rule 1.8.)

### ~~Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules~~ Rule 1.8.3 [4-400] Gifts From Client

\* \* \*

~~(e)~~(a) A lawyer shall not ~~solicit any~~:

(1) induce or attempt to induce a client to make a substantial gift from a client, including a testamentary gift, to the lawyer or a person related to the lawyer, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift.

unless the lawyer or other recipient of the gift is related to the client.

(b) For purposes of this paragraph Rule, related persons include a spouse, child, grandchild, parent, grandparent, registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

\* \* \*

### Comment

\* \* \*

### ~~Gifts to~~ Lawyers

~~[6]~~[1] A lawyer Lawyers may accept a gift from a client, if the transaction meets general standards modest holiday, birthday, and other gifts of fairness. For example, a simple gift such as a present given at a holiday celebration or as a token of appreciation is from their clients. Lawyers also may take steps that might result in their clients making permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although gifts, such a gift may be voidable as by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer induce or for the lawyer's benefit, attempt to induce a substantial gift from a client except where the lawyer is related to the client as set forth in paragraph (e).

a. (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

~~[7]~~[2] If effectuation of effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should must have the detached independent advice that

## COMPARISON TO ABA MODEL RULE

~~from~~ another lawyer ~~can provide.~~ (Cal. Probate Code, sections 21350 et seq.) The sole exception ~~to this Rule~~ is where the client is a relative of the donee.

- [83] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest ~~provision in Rule 1.7 when there is a significant risk that the lawyer's interest provisions in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary.~~ Rule 1.7(d) [3-310(B)]. In ~~obtaining the client's informed consent to~~ disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

## PROPOSED RULE (CLEAN VERSION)

### Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client, except a lawyer may:
- (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;
  - (2) lend money to the client after the lawyer is retained by the client, based on the client's promise, in writing, to repay the loan, provided the lawyer complies with Rule 1.8.1 [3-300] before making the loan or agreeing to do so;
  - (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
  - (4) pay court costs and reasonable expenses of litigation on behalf of an indigent client in a matter in which the lawyer represents the client.
- (b) A lawyer does not violate this rule by offering or giving a gift to a current client, provided that the gift was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

### Comment

- [1] This Rule is intended to balance two competing concerns. One is the concern that, if lawyers subsidize their clients' legal proceedings, they might encourage clients to pursue matters that might not otherwise be brought and might give lawyers a financial stake in the proceedings that might injuriously affect the performance of their duties to their clients, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that the prohibition on lawyers providing financial assistance to their clients might adversely affect clients' 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 lawyers against client demands for loans or gifts.
- [2] The lawyer must comply with Rule 1.8.1 [3-300] before entering into any proposed agreement with a client that is described in paragraph (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) [3-310(B)(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 [4-300].
- [3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable rule of court or statute.

## PROPOSED RULE (CLEAN VERSION)

- [4] See Rule 7.1 concerning the potential consequence of a representation by a lawyer, directly or indirectly, that the lawyer will provide any financial benefit that is not permitted by this Rule.

## COMPARISON TO CURRENT CA RULE

### Rule ~~4-210.1.8.5~~ Payment of Personal or Business Expenses Incurred by or for a Client

(A)(a) A member lawyer shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member lawyer or member's lawyer'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~~ a lawyer may:

- (1) ~~With the consent of the client, from paying~~ pay or ~~agreeing~~ to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation; ~~or, with the consent of the client;~~
- (2) ~~After employment, from lending~~ lend money to the client ~~upon~~ after the lawyer is retained by the client, based on the client's promise, in writing, to repay such the loan; ~~provided the lawyer complies with Rule 1.8.1 [3-300] before making the~~ loan or agreeing to do so;
- (3) ~~From advancing~~ 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. ~~Such costs~~ "Costs" within the meaning of this ~~subparagraph (3) shall be~~ paragraph (a)(3) are limited to all reasonable expenses of litigation ~~or, including court costs, and~~ reasonable expenses in preparation ~~preparing~~ for litigation or in providing any other legal services to the client; ~~and~~
- (4) pay court costs and reasonable expenses of litigation on behalf of an indigent client in a matter in which the lawyer represents the client.

~~(B)(b) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300. (Amended by order of Supreme Court, operative September 14, 1992.)~~ A lawyer does not violate this rule by offering or giving a gift to a current client, provided that the gift was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

### Comment

[1] This Rule is intended to balance two competing concerns. One is the concern that, if lawyers subsidize their clients' legal proceedings, they might encourage clients to pursue matters that might not otherwise be brought and might give lawyers a financial stake in the proceedings that might injuriously affect the performance of their duties to their clients, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that the prohibition on lawyers providing financial assistance to their clients might adversely affect clients' 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 lawyers against client demands for loans or gifts.

[2] The lawyer must comply with Rule 1.8.1 [3-300] before entering into any proposed agreement with a client that is described in paragraph (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) [3-310(B)(4)] concerning the effect the proposed

## COMPARISON TO CURRENT CA RULE

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 [4- 300].

[3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable rule of court or statute.

[4] See Rule 7.1 concerning the potential consequence of a representation by a lawyer, directly or indirectly, that the lawyer will provide any financial benefit that is not permitted by this Rule.

## COMPARISON TO ABA MODEL RULE

(This version shows changes to the relevant parts of ABA Model Rule 1.8.)

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

- ~~(e)(a)~~ A lawyer shall not ~~directly or indirectly provide financial assistance to a client in connection with pending or contemplated litigation~~ pay or agree to pay, guarantee, represent, or sanction a representation 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:
- ~~(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;
  - ~~(2)~~ lend money to the client after the lawyer is retained by the client, based on the client's promise, in writing, to repay the loan, provided the lawyer complies with Rule 1.8.1 [3-300] before making the loan or agreeing to do so;
  - ~~(1)(3)~~ a lawyer may advance court the costs and expenses of litigation 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
  - ~~(2)(4)~~ a lawyer representing an indigent client may pay court costs and reasonable expenses of litigation on behalf of an indigent client in a matter in which the lawyer represents the client.
- ~~(b)~~ A lawyer does not violate this rule by offering or giving a gift to a current client, provided that the gift was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

### Comment

#### *Financial Assistance*

~~[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.~~

~~[1] This Rule is intended to balance two competing concerns. One is the concern that, if lawyers subsidize their clients' legal proceedings, they might encourage clients to pursue~~

## COMPARISON TO ABA MODEL RULE

matters that might not otherwise be brought and might give lawyers a financial stake in the proceedings that might injuriously affect the performance of their duties to their clients, including the obligation to exercise independent professional judgment on the client's behalf without being influenced by the lawyer's personal interests. The second concern is that the prohibition on lawyers providing financial assistance to their clients might adversely affect clients' 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 lawyers against client demands for loans or gifts.

- [2] The lawyer must comply with Rule 1.8.1 [3-300] before entering into any proposed agreement with a client that is described in paragraph (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) [3-310(B)(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 [4- 300].
- [3] "Costs", as defined in paragraph (a)(3) are not limited to those that are taxable or recoverable under any applicable rule of court or statute.
- [4] See Rule 7.1 concerning the potential consequence of a representation by a lawyer, directly or indirectly, that the lawyer will provide any financial benefit that is not permitted by this Rule.

## PROPOSED RULE (CLEAN VERSION)

### **Rule 1.8.11 [3-320] Relationship With Other Party's Lawyer**

A lawyer shall not represent a client in a matter if the lawyer knows that the lawyer representing another person involved in the matter is the lawyer's spouse, parent, child, or sibling, lives with the lawyer, is a client of the lawyer, or has an intimate personal relationship with the lawyer, unless the lawyer informs the client in writing of the relationship.

#### **Comment**

- [1] Rule 1.8.11 [3-320] is not limited to litigation matters.
- [2] Rule 1.8.11 [3-320] is not intended to apply to circumstances in which a lawyer fails to advise the client of a relationship with another lawyer who is in the same law firm as the lawyer of another person involved in the matter, and who has no direct involvement in the matter.

## COMPARISON TO CURRENT CA RULE

### Rule 1.8.11 [3-320] Relationship With Other Party's Lawyer

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

#### ~~Discussion:~~ Comment

[1] Rule 1.8.11 [3-320] is not limited to litigation matters.

[2] Rule 1.8.11 [3-320] is not intended to apply to circumstances in which a ~~member-lawyer~~ fails to advise the client of a relationship with another lawyer who is ~~merely a partner or associate~~ in the same law firm as the ~~adverse party's counsel~~ lawyer of another person involved in the matter, and who has no direct involvement in the matter.

## PROPOSED RULE (CLEAN VERSION)

### **Rule 1.8.12 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review**

- (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.

## COMPARISON TO CURRENT CA RULE

### Rule 1.8.12 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (a) ~~A)~~ A ~~member~~ lawyer shall not directly or indirectly purchase property at a ~~probate,~~ foreclosure, ~~receiver's, trustee's~~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~~) A ~~member~~lawyer shall not represent the seller at a ~~probate,~~ foreclosure, receiver, ~~trustee's, 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.~~
- (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 (CLEAN VERSION)

### Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation

- (a) For purposes of this Rule:
- (1) “knowingly permit” means a failure to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and
  - (2) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.
- (b) In the management or operation of a law practice, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, whether or not the lawyer is a partner or shareholder or serves in a management role.
- (c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

#### Comment

- [1] Consistent with lawyers’ duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.
- [2] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (But see Rule 8.4(d).) “Law practice” in this Rule means “law firm,” as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Bus. & Prof. Code §6068, subd. (a).)
- [3] In order for discriminatory conduct to be actionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.

## **PROPOSED RULE (CLEAN VERSION)**

- [4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.
- [5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(d).

## COMPARISON TO CURRENT CA RULE

### Rule ~~2-4008.4.1~~ **Prohibited ~~Discriminatory Conduct~~Discrimination in a Law Practice- Management and Operation**

(Aa)- For purposes of this Rule:

(1) ~~"law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~

(2) ~~"knowingly~~"knowingly permit" means a failure to advocate corrective action where the ~~member~~lawyer knows of a discriminatory policy or practice ~~which~~that results in the unlawful discrimination prohibited in paragraph (Bb); and

(3) ~~"unlawfully"~~"unlawfully" and ~~"unlawful"~~"unlawful" shall be determined by reference to applicable state or federal statutes ~~or decisions making unlawful~~prohibiting discrimination ~~in employment and in offering goods and services to the public.~~(B) on the basis of race, national origin, sex, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice, a ~~member~~lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race-, national origin, sex, sexual orientation, religion, age or disability ~~in:~~

(1) ~~hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~

(2) ~~accepting or terminating representation of any client.~~

, whether or not the lawyer is a partner or shareholder or serves in a management role.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

#### **Discussion: Comment**

[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.

[2] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (But see Rule 8.4(d).) "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole

## COMPARISON TO CURRENT CA RULE

practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Bus. & Prof. Code §6068, subd. (a).)

- [3] In order for discriminatory conduct to be actionable under this Rule, it ~~must first~~first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.
- [4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding ~~is thereafter~~ is appealed.
- [5] ~~A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)~~This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see rule 8.4(d).