

**Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
(Proposed Rule Adopted by the Board on November 17, 2016)**

While lawyers are associated in a law firm,* a prohibition in rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

A prohibition on conduct by an individual lawyer in rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another lawyer associated in the law firm* without complying with rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This rule does not apply to rule 1.8.10 since the prohibition in that rule is personal and is not applied to associated lawyers.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.11
(No Current Rule)
Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: Model 1.7 (current client conflicts) [rule 3-310(B) and (C); 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

Rule As Issued For 90-day Public Comment

As part of its study of conflicts of interest rules, the Commission also evaluated Model Rule 1.8, which compiles in a single rule 10 unrelated conflicts of interest concepts. In addition, where applicable the Commission has studied the current California rules that correspond to each of the conflicts concepts in Model Rule 1.8. The Model Rule 1.8 provisions and their California counterparts are:

Model Rule	California Rule Counterpart [new number]
1.8(a)	3-300 (Business Transactions With Client) [1.8.1]
1.8(b)	No California rule Counterpart [but see proposed rule 1.8.2]
1.8(c)	4-400 (Gifts From Clients) [1.8.3]
1.8(d)	No California rule (none recommended)
1.8(e)	4-210 (Payment of Client’s Personal or Business Expenses) [1.8.5]
1.8(f)	3-310(F) (Third Party Payments) [1.8.6]
1.8(g)	3-310(D) (Aggregate Settlements) [1.8.7]
1.8(h)	3-400 (Limiting Liability to a Client) [1.8.8]
1.8(i)	No California rule (none recommended) 4-300 (Purchasing Client Property at a Foreclosure) [1.8.9]
1.8(j)	3-120 (Sex with Client) [1.8.10]

The result of the Commission’s evaluation is a three-fold recommendation that the State Bar adopt, and the Supreme Court approve:

- (1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements), and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in California case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).
- (2) the rejection of the Model Rule 1.8 framework pursuant to which 10 unrelated conflicts of interest concepts are compiled in a single rule. Instead, the Commission has recommended that those concepts, most of which are already found in the current California Rules of Professional Conduct as separately numbered rules, be carried forward as separate rules with their own rule number that corresponds to the counterpart concept in Model Rule 1.8. For example, the proposed rule corresponding to Model Rule 1.8(a) is numbered 1.8.1 [current rule 3-300]; the rule corresponding to Model Rule 1.8(c) is numbered 1.8.3 [current rule 4-400], and so forth. Each of these rules is addressed in separate executive summaries.
- (3) proposed rule 1.8.11 (imputation of prohibitions in the 1.8 series of rules), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest that arise from the 1.8 series of rules. Because conflicts that these rules are intended to prevent are not necessarily cured by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts.

Proposed rule 1.8.11 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts of Interest Framework.** The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice California Rules of Court (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard for how the different conflicts of interest principles are organized within the rules.¹

2. **Recommendation that the Model Rule 1.8 compilation framework approach be rejected in favor of separately numbered rules as in the current California Rules.** The Commission recommends that California not follow the Model Rules' approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the Commission recommends that the rules in the 1.8 series, which are unrelated to one another

¹ Every other jurisdiction besides California has adopted the aforementioned ABA conflicts rules' framework.

except to the extent they involve potential conflict of interest situations, be given separate numbers. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the model rule counterpart should achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide. Aside from this ease of access rationale, the Commission also determined that the different concepts reflected in the rules, each of which imposes important duties critical to the maintenance of an effective lawyer-client relationship founded in trust, deserved the prominence of a separate, standalone rule.

3. **Recommendation of separate imputation rule for the 1.8 series of rules.** As noted, because the conflicts that these rules are intended to prevent cannot be cured by either the client's consent or by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts. Prior to 2002, imputation of conflicts arising under Model Rule 1.8 were handled by reference to Model Rule 1.10. However, the ABA Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The ABA Commission reasoned that rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

1. **Treat imputation under Rule 1.8 rather than 1.10**

The [Ethics 2000] Commission is recommending that imputation of the prohibitions in rule 1.8 be addressed by rule 1.8 rather than by rule 1.10. Under paragraph (k) [counterpart to proposed rule 1.8.11], an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under rule 1.10); moreover, there is no exception here (as there is in rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html

The first Commission also considered whether to recommend adoption of an imputation rule to be applied to the 1.8 series of rules. Similar to the Ethics 2000 Commission, the first Commission concluded that a separate imputation rule was warranted.

Text of Rule 1.8.11. Proposed rule 1.8.11 carries forward the rule proposed by the first Commission. The first Commission made no substantive changes to the Model Rule. Rather, all of the changes were made to conform the Model Rule to the structure of the 1.8 rules series, each Model Rule paragraph being a separate, standalone rule. Proposed rule 1.8.11, however, would be a substantive change to the current California rules and a change in a lawyer's duties as there is no counterpart in the current rules.²

² Compare rule 3-310(B) and the accompanying sixth Discussion paragraph which provides that: "Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation."

Comment. The Commission recommends including a single comment to the rule. After a lead-in sentence, the comment provides an important example of how rule 1.8.11 would be applied when the rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the Commission concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule, proposed rule 1.8.10, because that rule is personal to the lawyer involved.

National Background – Adoption of Model Rule 1.8(k)

Aside from California, every jurisdiction except five have adopted some version of Model Rule 1.8(k). The five jurisdictions are Georgia, Michigan, Mississippi, New York and Texas. Of those five jurisdictions, four have either not completed their review of the Ethics 2000 changes to the Model Rules (Georgia and Texas) or have made only piecemeal changes to their rules since the ABA adopted the Ethics 2000 revisions (Michigan and Mississippi).

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.11

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Judge Dean Stout

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.8(k),
from which proposed Rule 1.8.11 is derived.]

Rule 1.8(k) Conflict Of Interest: Current Clients: Specific Rules

* * * * *

- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

* * * * *

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.8.11

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.8.11

Vote: 12 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 1.8.11 (CLEAN)

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

While lawyers are associated in a law firm,* a prohibition in rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

A prohibition on conduct by an individual lawyer in rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another lawyer associated in the law firm* without complying with rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This rule does not apply to rule 1.8.10 since the prohibition in that rule is personal and is not applied to associated lawyers.

IV. COMMISSION'S PROPOSED RULE 1.8.11 (REDLINE TO ABA MODEL RULE 1.8(K))

Rule ~~1.8(k) Conflict Of Interest: Current Clients: Specific~~1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

* * * * *

~~(k)~~ While lawyers are associated in a law firm,* a prohibition in ~~the foregoing paragraphs (a)~~rules 1.8.1 through ~~(i)~~1.8.9 that applies to any one of them shall apply to all of them.

Comment

* * * * *

Imputation of Prohibitions

~~[20] Under paragraph (k), a~~A prohibition on conduct by an individual lawyer in ~~paragraphs (a)~~rules 1.8.1 through ~~(i)~~1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another ~~member of lawyer associated in~~ the law firm* without complying with ~~paragraph (a)~~rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. ~~The~~ This rule does not apply to rule 1.8.10 since the prohibition ~~set forth in paragraph (j) in that rule~~ is personal and is not applied to associated lawyers.

V. RULE HISTORY

There is no California rule that corresponds to Model Rule 1.8(k). The ABA did not adopt Model Rule 1.8(k) until 2002 as part of its Ethics 2000 comprehensive study and revision of the Model Rules. Prior to 2002, imputation of conflicts arising under Model

Rule 1.8 were handled by reference to Model Rule 1.10. However, the Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The Commission reasoned that rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

1. Treat imputation under rule 1.8 rather than 1.10

The [Ethics 2000] Commission is recommending that imputation of the prohibitions in rule 1.8 be addressed by Rule 1.8 rather than by rule 1.10. Under paragraph (k), an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under rule 1.10); moreover, there is no exception here (as there is in rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_mission/e2k_rule18rem.html

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016
(In response to 90-day public comment circulation):**

1. OCTC supports this rule.

Commission Response: No response required.

2. The Commission should strike the Comment to this rule, except for the last sentence in the Comment. The Comment just repeats the rule, which is clear on its face.

Commission Response: The Commission did not make the suggested change. It believes that the first and second sentences of the Comment present an important example that explains the application of the rule. This is an appropriate function of a comment.

- **State Bar Court:** No comments received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Four comments, including the above-referenced comment from OCTC, were received. Two agreed with the proposed rule, one disagreed, and one agreed only if the proposed rule were modified. A public comment synopsis table, with the Commission's responses to the comments received, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTION

A. Related California Law

As noted in rule 3-100, Discussion paragraph [2], the duty of confidentiality encompasses the lawyer-client privilege, the work product doctrine, and ethical standards of confidentiality.

a. Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. See Evidence Code §§ 951-962. It applies only to lawyer-client communications where the client has consulted the lawyer in the latter's professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client's lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)

b. Duty of Confidentiality. As noted above, the duty of confidentiality is set forth in Business & Professions Code § 6068(e)(1). It is much broader than the lawyer-client privilege, which is limited to communications between client and lawyer for the purpose of obtaining legal services or advice from a lawyer in the latter's professional capacity. The duty applies to information acquired by virtue of the representation of a client, regardless of its source. It includes not only privileged information but also information that is likely to be embarrassing or detrimental to the client, or that the client has requested be kept confidential. (E.g., *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179). Even information in the public record that is not easily discoverable is protected by the duty. (*Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. 179).

Duty of Confidentiality and Lawyer-Client Privilege Compared. The duty of confidentiality overlaps with the evidentiary lawyer-client privilege. The scope of the duty is broader than the privilege in three key respects. *First*, the duty encompasses more information than privilege because the latter is confined to the statutorily defined concept of a "confidential communication" (see Evid. Code § 952 for the definition of a "confidential communication" between a "lawyer" (see Evid. Code § 950 for the definition of "lawyer") and a "client" (see Evid. Code § 951 for the definition of "client")). For example, the duty encompasses information acquired by virtue of the lawyer-client relationship regardless of the source of that information. *Second*, the duty applies beyond the limited context of an evidentiary setting where a judicial officer is making a decision on whether information may be admitted into evidence. For example, a lawyer who is

preparing advertising material may not use information protected by the duty without the client's consent. *Third*, exceptions to the privilege do not function as an exception to the duty (but see, Evid. Code § 956.5 that provides for an exception that is coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).

Other Points About the Duty. The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other laws in California relate, and refer, to the duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code § 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code § 6453).

c. Attorney Work-Product. In California, attorney-work product is governed by statute. (Code Civ. Proc. §§ 2018.010-2018.080). "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." § 2018.030(a). Any other work product of an attorney "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." § 2018.030(b).

Duty of Confidentiality and Work-Product Compared. There is also overlap between the protection afforded by the duty of confidentiality and the attorney work-product protection. The duty is broader in both scope and function. For example, the duty is not limited to the discovery of a writing that reflects an attorney's impressions, conclusions, opinions, research or theories (see Code of Civ. Proc. § 2018.030). Also, the exceptions to the work-product doctrine do not function as exceptions to the duty (but see, Code of Civ. Proc. § 2018.050 providing for a crime or fraud exception that might in some circumstances be coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).

B. ABA Model Rule Adoptions

- **Maine Rule 1.8(k)** is identical to Maine Rule 1.8(k):

Rule 1.8(k) Conflict of Interest: Current Clients: Specific Rules

- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

The ABA State Adoption Chart for the ABA Model Rule 1.8(k), from which proposed Rule 1.8.11 is derived, revised December 1, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [Last visited 2/6/17]
- Thirty-five jurisdictions have adopted Model Rule 1.8(k) verbatim;¹ seven jurisdictions have adopted a rule that is similar to 1.8(k);² and nine jurisdictions have not adopted a rule derived from Model Rule 1.8(k).³

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Adopting a rule separate from the general imputation rule (proposed Rule 1.10) that imputes prohibitions in the 1.8 series of rules to lawyers within the prohibited lawyer's firm.
 - **Pros:** As noted in Section V, above, the ABA Ethics 2000 Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. Because conflicts that the 1.8 series of rules are intended to prevent are not necessarily cured by obtaining the client's consent or by the erection of an ethical screen within the law firm, this specific rule, which does permit either, is necessary to protect the client's interests. Further, by adopting this rule, where client consent is appropriate, (e.g., proposed Rule 1.8.1 [3-300]), it will be available on a rule-by-rule basis in the 1.8 series.
 - **Cons:** At present, California has addresses imputation of conflicts of interest and other prohibited representations in case law. See, e.g., *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776. There appears to be no evidence that client or public protection has been diminished by that approach. If anything,

¹ The thirty-five jurisdictions are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

² The seven jurisdictions are: Alaska, Colorado, District of Columbia, Nevada, Virginia, Washington, and Wisconsin.

³ The nine jurisdictions are: California, Georgia, Michigan, Mississippi, New Jersey, New York, North Dakota, Tennessee, and Texas.

2. Adopting a single comment, derived from Model Rule 1.8, Cmt. [20], as revised.

- Pros: The Comment provides an important example of how Rule 1.8.11 would be applied when a Rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the drafting concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule, proposed Rule 1.8.10, because that rule is personal to the lawyer involved.
- Cons: See “Cons” in Section IX.A.1, above.

B. Concepts Rejected (Pros and Cons):

None. This section identifies concepts the Commission considered before the rule was circulated for public comment. There may be concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Proposed Rule 1.8.11 is a substantive change to the current California rules and thus would appear to be a change in a lawyer’s duties as there is no counterpart in the current rules, because imputation has largely been addressed in California by case law, there arguably is no change in duties.⁴

D. Non-Substantive Changes to the Current Rule:

1. References to subparagraphs (a) – (i) of Rule 1.8 have been replaced with the stand alone numbering of the proposed Rules 1.8.1 – 1.8.9.

All other changes, including the designation of proposed Rule 1.8.11 and the other rules in the 1.8 series as separate, standalone rules rather than as paragraphs in a single rule as in the ABA Model Rules, are non-substantive.

⁴ There is one mention of imputation in the current California Rules. The sixth Discussion paragraph to Rule 3-310 provides:

“Paragraph (B) is intended to apply only to a member’s own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.”

However, that provision would not apply to the prohibitions in the 1.8 series. The 1.8 series of rules are largely derived from other provisions of the current California rules. Proposed Rule 1.8.1 is derived from rule 3-300; 1.8.3 from rule 4-400, 1.8.5 from rule 4-210, 1.8.6 and 1.8.7 from rules 3-310(F) and (D), respectively, 1.8.8 from rule 3-400, 1.8.9 from rule 4-300, and 1.8.10 from rule 3-120.

E. Alternatives Considered:

The only alternative considered was not to recommend adoption of the proposed rule.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.11 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.11 in the form attached to this Report and Recommendation.