

**Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), 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) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 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; and
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this rule shall be deemed to limit the application of rule 1.8.9.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.5
(Current Rule 4-210)
Payment of Personal or Business Expenses Incurred by or for a Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 4-210 (Payment of Personal or Business Expenses Incurred by or for a Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 1.8(e) (Conflict Of Interest: Current Clients: Specific Rules), pertaining to financial assistance to a client. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the evaluation is proposed rule 1.8.5 (Payment of Personal or Business Expenses Incurred by or for a Client).

Rule As Issued For 90-day Public Comment

The main issues considered were whether to permit lawyers to pay the costs and expenses for a pro bono or indigent client, and whether to allow gifts to existing clients. While the Commission adopted payments to pro bono or indigent clients in order to promote access to justice, permitting gifts to existing clients was excluded from the proposed rule due to the potential of unintended expectations and confusion between the personal and professional relationship between the lawyer and client.

Proposed rule 1.8.5(a) prohibits the direct or indirect payment of personal or business expenses of a prospective or existing client.

Paragraph (b) allows for a lawyer to make payments to a client under the following defined circumstances:

- (1) with the client consent, making payments to third parties from funds collected on behalf of the client during the representation;
- (2) after being retained by the client, loaning money to the client with client’s written promise to repay the loan and the lawyer’s compliance with rules 1.7(b)¹ and 1.8.1;
- (3) advancing the costs of prosecuting or defending a client’s claim or action, repayment of which may be contingent on the outcome of the matter;
- (4) paying the costs of prosecuting or defending a claim or action of an indigent or pro bono client.

Paragraph (c) clarifies costs under (b)(3) and (b)(4) to include reasonable expenses for litigation or providing other legal services to the client.

Paragraph (d) reinforces the applicability of proposed rule 1.8.9 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review).

Post-Public Comment Revisions

¹ One member of the Commission submitted a written dissent stating general support for the Commission’s draft rule but objecting to the inclusion of a reference to proposed Rule 1.7(b). The full text of the dissent is attached to this summary. (See also, the Executive Summary for proposed Rule 1.7.)

After consideration of comments received in response to the initial 90-day public comment period, the Commission made only two revisions. In paragraph (b)(2), the Commission updated a cross reference to rule 1.7 (re current client conflicts of interest) to account for changes made to that rule. In paragraph (b)(4), the Commission substituted the phrase “an indigent person” for “an indigent or pro bono client” to refine and simplify the language.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-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 1.8.5 [4-210]

Commission Drafting Team Information

Lead Drafter: Toby Rothschild

Co-Drafters: Tobi Inlender, Judge Dean Stout, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client

- (A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:
- (1) With the consent of the client, from paying 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
 - (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or
 - (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.
- (B) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 1.8.5 [4-210]

Vote: 14 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.8.5 [4-210]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

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, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), 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) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 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; and
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this rule shall be deemed to limit the application of rule 1.8.9.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 4-210)

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

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

(b) Notwithstanding paragraph (a), a lawyer may:

- (1) ~~With the consent of the client, from paying or agreeing~~ 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; ~~or~~
- (2) ~~After employment, from lending~~ after the lawyer is retained by the client, agree to lend money to the client ~~upon the client's~~ based on the client's written* promise ~~in writing~~ to repay ~~such~~ the loan; ~~or, provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 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; and~~
- (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

(c) "Costs" within the meaning of ~~this subparagraph (3) shall be limited to~~ all paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any 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.

(Bd) Nothing in ~~rule 4-210~~ this rule shall be deemed to limit ~~rules 3-300, 3-310, and 4-300~~ the application of rule 1.8.9.

V. RULE HISTORY

Current rule 4-210's concept became part of the rules in 1960 with former rule 3a, which prohibited a member from directly or indirectly paying or agreeing to pay medical, hospital or nursing bills, or other personal expenses of the client as a condition of, or for the purpose of, securing professional employment (*Report on Rules of Professional Conduct, effective January 5, 1960* (1959) 34 Cal. State Bar J. 857). Former rule 3a, however, permitted members to advance the costs of prosecuting or defending a claim or action, including related costs.

Former rule 3a was amended in 1970 to expand the ability of a member, with the client's consent, to pay or agree to pay to third parties expenses from funds collected or to be collected for the client. At the same time, rule 3a was amended to permit a member to lend money to the client *after* the attorney was retained by the client. In 1972, rule 3a was renumbered rule 5-104; however, rule 5-104's text was identical text to former rule 3a:

Rule 5-104 Payment of Personal Expenses Incurred by or for a Client

A member of the State Bar shall not directly or indirectly pay or agree to pay, or represent or sanction the representation that he will pay, medical, hospital or nursing bills or other personal expenses incurred by or for a client, prospective or existing; provided this rule shall not prohibit a member;

- (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or
- (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or
- (3) from advancing the costs of prosecuting or defending a claim or action. Such costs within the meaning of this subparagraph (3) include all taxable costs or disbursements, costs of investigation and costs of obtaining and presenting evidence.

Former rule 5-104 was amended in 1975 to prohibit a member from entering into a discussion or other communication with a prospective client regarding payment of personal or business expenses incurred by the client. The 1975 rule revision expressly permitted a member to read or show the rule to a prospective client, in order to explain the nature and extent of conduct the rule prohibited. The 1975 version of rule 5-104 also retained the three exceptions which permitted a member to pay or agree to pay third persons, allowed the member to lend money to the client after the member became employed by the client, and allowed the member to advance the costs of prosecuting or defending a claim or action:

Rule 5-104 Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for a client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member:

- (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or
- (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or
- (3) from advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable

expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in Rule 5-104 shall be deemed to abrogate any of the provisions set forth in Rules 5-101 through 5-103.

(C) Nothing in this Rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this Rule.

In 1989, rule 5-104 was renumbered rule 4-210. It was also revised to remove language that prohibited a member from entering into a discussion or other communication with a prospective client regarding payment of personal or business expenses incurred by the client. With the removal of that provision, former rule 5-104(C), which permitted a member to read or show a client the rule was no longer necessary and was also removed. A substantive revision explicitly permitted a member to advance the costs of litigation, contingent upon the outcome of the matter:

Rule ~~4-210, 5-104.~~ Payment of Personal or Business Expenses Incurred by or for a Client

(A) ~~A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent, or sanction the a representation that he the member or member's law firm will pay the personal or business expenses incurred by or for of a client, prospective or existing client, and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided except that~~ this rule shall not prohibit a member:

(1) ~~w~~With the consent of the client, from paying or agreeing to pay such expenses to third persons ~~such expenses~~ from funds collected or to be collected for the client as a result of the representation; or

(2) ~~a~~After he has been employed employment, from lending money to his the client upon the client's promise in writing to repay such loan; or

(3) ~~f~~From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule ~~5-104~~ 4-210 shall be deemed to abrogate ~~any of the provisions set forth in limit~~ rules ~~5-101 through 5-103~~ 3-300, 3-310, and 4-300.

~~(C) Nothing in this rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this rule.~~

The rule was not amended in the comprehensive 1992 revisions and current rule 4-210 is identical to the text of the 1989 amendments.

VI. OFFICE OF CHIEF TRIAL COUNSEL / 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.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017
(In response to 45-day public comment circulation):**

1. OCTC generally supports this rule. However, OCTC is concerned that subsection (b)(4) does not define indigent person. The rule exempts an attorney from the requirements of this rule when the attorney pays expenses for an indigent client, but does not define when a person is considered indigent. This lack of precision will make this rule difficult to understand or enforce. This subsection could be used by attorneys to incite or promote unnecessary litigation.

Commission Response: The Commission did not make the suggested change. The Commission believes that the term “indigent” is sufficiently defined in other areas of the law (see, for example, Bus. & Prof. Code § 6213(d)) and does not require a specific definition for this rule. In addition, the rule adopted in most states use the term “indigent” without a specific definition.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. All four comments agreed with the proposed Rule. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Public Protection Afforded by the Current Rule (avoiding solicitation of clients by the lawyer and interference with the lawyer’s professional judgment): Rule 4-210 prevents a lawyer from acquiring a potential financial stake in a client’s legal

proceedings that might create a conflict of interest between a lawyer and a client, and injuriously affect the performance of the duties owed to the client. The rule prohibits a lawyer from “purchasing” a client’s loyalty by promising loans or other remuneration in an effort to have the client retain the lawyer. The proposed rule expressly provides that such promises or guarantees are disallowed and prohibits a lawyer from making a loan until after the client has retained the lawyer.

2. Adverse Interests and Business Transactions (avoiding conflicts of interest developing during the representation): Rule 4-210 works in concert with rule 3-300. To the extent a lawyer is permitted by rule 4-210 to make a loan to a client, rule 3-300 imposes requirements (e.g., client consent, fair and reasonable terms, and advice to seek the counsel of an independent lawyer) that prevent overreaching. Similarly, California Probate Code § 16004(c) provides:

A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.8(e), which is the counterpart to current rule 4-210, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf [Last accessed on 2/7/17]
- Thirty jurisdictions have adopted Model Rule 1.8(e) verbatim.¹ Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(e).² Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.8(e).³

¹ The thirty jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming.

² The sixteen jurisdictions are: Alabama, Connecticut, District of Columbia, Georgia, Hawaii, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio, Texas, Utah, Vermont, Virginia, and Washington.

³ The five jurisdictions are: California, Louisiana, Mississippi, New York, and Oregon.

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

A. Concepts Accepted (Pros and Cons):

1. Revise the rule to expressly state that a lawyer may pay certain costs and expenses of an indigent or pro bono client.
 - Pros: Current rule 4-210 does not permit a lawyer to *pay* court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client. Rule 4-210 only permits a lawyer to advance such costs, the repayment of which may be contingent on the outcome in the matter. Proposed paragraph (a)(4) does not require a similar contingency. Permitting a lawyer to make such payments should contribute to promoting access to justice.
 - Cons: None identified.
2. Delete the phrase “sanction a representation” as vague and unnecessary.
 - Pros: This phrase does not add anything given that the existing language prohibits direct or indirect representations concerning a lawyer’s payment of personal expenses of a current or prospective client
 - Cons: This phrase is found in the current rule and there is no evidence or authority that suggests it is confusing or problematic.
3. Change the rule structure by substituting the phrase “Notwithstanding paragraph (a), a lawyer may” for the current rule clause: “except that this rule shall not prohibit a member.”
 - Pros: With the proposed change, conduct permitted under the rule is not mischaracterized as “exceptions” to the conduct prohibited. There is a disconnect in current rule 4-210 because not all of the items identified as “exceptions” actually involve conduct that would violate the rule. The concept underlying a loan or an advance generally is a debtor – creditor relationship that leaves the debtor financially liable rather than absolving them of a financial obligation. It may even be more costly to the debtor if interest is involved. In that sense, a loan from a lawyer to client does not constitute a *payment* by the lawyer of a client’s personal expense or cost that frees the client from accountability.
 - Cons: The proposed change in rule structure is only necessary if the proposed “exception” for a “gift” to a current client is added.

4. Revise the description of a permitted client loan to substitute the phrase “after the lawyer is retained” for the current phrase, “after employment.”
 - Pros: This change removes an ambiguity in the existing rule. There is a potential for the phrase “after employment” to be misinterpreted as after a client’s representation has concluded and the attorney-client relationship terminated when the intent is to permit such conduct during the representation, i.e., *after the lawyer is retained*.
 - Cons: None identified.
5. Add to the description of a permitted client loan, a proviso that references other applicable rules (e.g., proposed Rule 1.7 regarding current client conflicts of interests).
 - Pros: This change promotes compliance with the Rules and advances client protection in settings (business transactions between lawyer and client) that potentially) pose great risks for a client. Moreover, retaining these rule references is consistent with paragraph (B) of the current rule.
 - Cons: A loan to a client is a business transaction between fiduciary and a beneficiary. A lawyer should be expected to know that other rules apply.
6. Add a Comment clarifying the scope of the term “costs” as used in the rule.
 - Pros: This change removes a possible misperception that the term “costs” is intended to encompass only that term’s meaning in litigation.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Deleting the current rule in its entirety.
 - Pros: The current rule is a remnant of outdated concepts of maintenance and champerty. Deleting the current rule would obviate the need for proposing additional permitted conduct. In fact, the new proposed paragraphs (b)(4) and (b)(5) tend to show that the general prohibition is no longer needed.
 - Cons: Permitting a lawyer to induce a prospective client to hire the lawyer based upon promises of financial assistance is permitting a form of overreaching and commercializes the practice of law.
2. Revise the rule to expressly state that it is not a violation for a lawyer to offer or give a gift to a current client.
 - Pros: Permitting bona fide gifts would remove an apparent ambiguity in the current rule without contradicting the policy underlying the prohibition against entering into an agreement to pay costs or personal expenses.

- Cons: Gift giving between a lawyer and a client could confuse the line between a personal and a professional relationship and precipitate unintended expectations.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. A lawyer's payment of certain costs and expenses of an indigent or pro bono client would be expressly permitted.
2. A lawyer's giving of a bona fide gift to a client would be expressly permitted.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Assign the number 1.8.5 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(e).
- Pros: The Commission agrees with the approach taken by the first Commission. The first Commission proposed, and the Board agreed, 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 first Commission recommended that each rule in the 1.8 series be given a separate number. 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 nevertheless 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.
 - Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

E. Alternatives Considered:

None.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.5 [4-210] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.5 [4-210] in the form attached to this Report and Recommendation.

**Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.8.5**

Proposed Rule 1.8.5 states the general prohibition on a lawyer bidding for clients by promising benefits to a potential client other than the benefit of the quality of the lawyer's services and the price at which they will be provided. I don't disagree with that policy, which is in current rule 4-210. I dissent for the single reason that the proposed Rule, in proposed paragraph (b)(2), makes compliance with "Rules 1.7(b), 1.7(c), and 1.8.1" a condition to a lawyer making a loan to the lawyer's client.

Proposed paragraph (b)(2) continues the current exception to the general prohibition on a lawyer providing benefits to a client that permits a lawyer's post-retention agreement to lend money to the client based on the client's written promise to repay the loan. It is my view that a lawyer's loan transaction with a client is a "business transaction" within the meaning of current rule 3-300 and proposed Rule 1.8.1, and I therefore believe that the proposed reference to Rule 1.8.1 in paragraph (b)(2) is both correct and helpful.

However, proposed Rule 1.8.5(b)(2) would add to the Rule 1.8.1 reference a reference to proposed Rules 1.7(b) and (c), and this is the reason for my dissent. My dissent to paragraph (b)(2) overlaps to an extent with my separate dissent to proposed Rules 1.7(b) and (c), but I will minimize my dissent to those proposals.

Let me first get out of the way a small drafting error. Any reference to Rules 1.7(b) and (c) is incorrect because there is no situation in which both would apply. The correct statement would be "17(b) or (c), as applicable". I will assume that proposed Rule 1.8.5(b)(2) uses "or" rather than "and".

Current rule 3-310(B) contains four subparagraphs, all of which now have been blended into – and I would say "hidden" – in proposed Rules 1.7(b) and (c). The only part of current rule 3-310(B) that has any conceivable connection to a lawyer's loan to a client is subparagraph (4). It includes within a lawyer's "disclosure" requirement the situation in which the lawyer "has or had a legal, business, financial, or professional interest *in the subject matter of the representation.*" (emphasis added).¹

The Commission's discussion on the rule 3-310(B)(4) reference was to the effect that the existence of a creditor – debtor relationship between lawyer and client could have an effect on the representation as might occur if there were any unwanted change in the lawyer's position as a debtor, such as might occur if the client were to default on the loan or the lawyer were to sense that possibility. This of course is correct, but the logic

¹ Rule 3-310(A)(1) states in full: "Disclosure' means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;" Proposed Rule 1.0.1(e) implicitly contains a requirement of "disclosure": "Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct."

of this view would require lawyers to make rule 3-310(B) disclosures to their clients whenever any relationship between a lawyer and client might change and, in changing, affect the lawyer-client relationship. This would mean that rule 3-310(B)(4) would require a “disclosure” whenever a lawyer has a “legal, business, financial, or professional” relationship with the client. This would include the representation of family members, neighbors, acquaintances from clubs and other social situations, social relationships based on common connections (the client was referred to the lawyer by their common accountant or dentist), and so on. To take one of many possible examples, imagine a lawyer who represents her brother-in-law in a matter. In that situation, the Commission’s logic is that the lawyer’s “disclosure” would have to warn the brother-in-law about the possible hazard to the lawyer-client relationship if the new client were to divorce the lawyer’s sister.

That “disclosure” would be plain silly. It would trivialize the important role that a “disclosure” has under the conflict rules by requiring the lawyer to say things that are perfectly obvious. It would be a waste of effort by the lawyer, would make the lawyer appear foolish to the client and thereby potentially interfere with the client’s willingness to rely on the lawyer’s advice, and would be a trap for unwary lawyers without any client protection benefit. Given the frequency with which many lawyers represent their family members and social and acquaintances, this is not a small matter.

Most important, the use of rule 3-310(B)(4) in these situations would be possible only by reading out of the current rule that the lawyer’s interest be “*in the subject matter of the representation.*” One example of what is included within this Rule is a lawyer who is asked to sue a company in which the lawyer has invested. There, the disclosure would include “the relevant circumstances” (lawyer has an investment in the target defendant) and the “reasonably foreseeable adverse consequences” (that investment amounts to roughly \$X, which the client might consider to be large enough to compromise the lawyer’s zeal in the representation).

It should be perfectly obvious to the hypothetical brother-in-law/client that his relationship with his lawyer would be affected if he were to divorce his lawyer’s sister, so no explanation should be needed. But disclosures currently required under rule 3-310(B)(4) are of facts that might not be known to the client (the lawyer’s interest in or relationship with others), and the consequences of that interest or relationship (the client’s confidence that the lawyer performance of her duties of loyalty, confidentiality, and competence would not be affected). Thus, a Rule 1.8.5 reference to the rule 3-310(B) could be seen as altering the meaning of what now is rule 3-310(B). This would lead to “disclosures” under proposed Rule 1.7(c) that have no client benefit and make the lawyer and the legal system appear foolish.

I would remove from Rule 1.8.5 the reference to Rule 1.7 but otherwise would adopt Rule 1.8.5 as drafted by the Commission. I believe that, as is true under current rule 4-210, satisfaction of the business transaction rule provides ample protection to the client. Any Rule 1.7 reference in Rule 1.8.5 would provide no material client benefit,

would imply a gap in the current for which there is no evidence, and would create Rule 1.7 issues even if that Rule were corrected.²

**Commission’s Response to Dissent Submitted by Robert Kehr
on the Recommended Adoption of Proposed Rule 1.8.5**

Proposed Rule 1.8.5, which carries forward the substance of current rule 4-210, addresses payment of personal or business expenses of a client. The Commission and the dissent agreed as to the language of the rule with one exception. The dissent objects to the inclusion of references to Rule 1.7 in paragraph (b) of the proposed rule. The dissent believes that the language of proposed Rule 1.8.5 (b)(2) requires that the lawyer give the disclosures required by Rule 1.7 in any situation that comes within the scope of Rule 1.8.5(b)(2). The reference to Rule 1.7 is the same, in different words, as the reference to Rule 3-310 in the current Rule 4-210. The only differences are to refer to Rule “1.7,” the number in the proposed Rules that corresponds to rule 3-310 in the current Rules, and the placement of the reference in the text of the rule rather than a comment to conform to the principles of the Commission’s Charter.

Proposed Rule 1.8.5 (a) prohibits a lawyer from paying the personal or business expenses of a prospective or existing client. Paragraph (b) lays out a series of exceptions to the rule. In relevant part, paragraph (b) provides:

(b) Notwithstanding paragraph (a), a lawyer may:

* * *

(2) after the lawyer is retained by the client, agree to lend money to the client based on the client’s written promise to repay the loan, *provided that the lawyer complies with Rules 1.7(b), 1.7(c) and 1.8.1* before making the loan or agreeing to so.” [emphasis added.]

Proposed Rules 1.7(b) and 1.7(c) require either “informed written consent” of the client or “written disclosure” to the client to allow representation where there is a possible conflict of interest between current clients. The lawyer’s duty to obtain the client’s consent or make disclosure is required only where the circumstances spelled out in Rule 1.7 are met. Since Rule 1.8.5 cannot change Rule 1.7, the only reasonable reading of Rule 1.8.5 (b)(2) is that *only if the circumstances that trigger the application of Rule 1.7 are present* will the disclosures or consent be required. If those circumstances are not present, then no action by the lawyer is required to comply with Rule 1.7. The references in paragraph (b)(2) to Rules 1.7(b), 1.7(c), and 1.8.1 are

² Although I see consistency with the other states’ Model Rule variations as being the least important of our rule-drafting goals, I should add that Model Rule 1.8(e) has nothing that corresponds to proposed Rue 1.8.5(b)(2) and therefore no reference to Model Rule 1.7.

intended to remind the lawyer to ensure the requirements of those rules are satisfied if they apply. In the cases cited by the dissent, the terms of Rule 1.7 would not apply, so the lawyer would not need to comply with the proposed Rule 1.7(b) or (c).

During its deliberations, the Commission discussed the concerns of the dissent and concluded, with only the one negative vote of the dissent, that the proposed language does not create the concerns expressed by the dissent.