



The State Bar of California

Rule 1.8.6 Compensation from One Other than Client (Rule Approved by the Supreme Court, Effective November 1, 2018)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;
- (b) information is protected as required by Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6; and
- (c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:
 - (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or
 - (2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this rule as soon thereafter as is reasonably* practicable.

[5] This rule is not intended to alter or diminish a lawyer's obligations under rule 5.4(c).

**NEW RULE OF PROFESSIONAL CONDUCT 1.8.6
(Former Rule 3-310 (F))
Compensation From One Other Than Client**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-310(F) (Avoiding the Representation of Adverse Interest) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.8(f) (Conflict of Interest Current Clients: Specific Rules), pertaining to accepting compensation for representing a client from one other than the client. The result of the Commission’s evaluation is proposed rule 1.8.6 (Compensation From One Other Than Client).

Rule As Issued For 90-day Public Comment

Current rule 3-310(F) prohibits a member from accepting compensation from one other than the client unless there is no interference with the lawyer’s independent professional judgment and the duty of confidentiality owed to a client. The rule is intended to protect the client in situations where the lawyer’s independent professional judgment may become compromised based upon the lawyer’s fees being paid by one other than the client. Proposed rule 1.8.6 retains the substance of current rule 3-310(F) while expanding the public protection of the current rule. The proposed rule expands the current language of “accepting compensation” to include “enter into an agreement for or charge or accept compensation.”

In general, the proposed rule would retain the disclosure and waiver requirements found in current rule 3-310(F)(3). A substantive change that is recommended by the Commission is the addition of a new timing requirement in proposed paragraph (c) that requires a lawyer to obtain a client’s consent “at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . .” The rationale for this addition is to enhance the ability of a client to render informed consent after duly considering the concerns that arise from a third-party payor arrangement. A possible concern posed by this addition is whether a lawyer’s ability to render services to the client in time-sensitive matters would be compromised; however, this concern is mitigated by including the phrase “as soon thereafter as reasonably practical.”

Paragraph (a) incorporates the concept that the lawyer’s independent professional judgment shall not be compromised due to an agreement between the lawyer and a third-party payor. This is consistent with the language of 3-310(F)(1) and Model Rule 1.8 (f)(2).

Paragraph (b) includes a non-substantive revision to the current rule, which uses the phrase “information relating to the representation of the client” to describe the information protected by the duty of confidentiality. The proposed rule substitutes the phrase “information protected by the Business and Professions Code § 6068 (e)(1) and rule 1.6.” The Commission believes the proposed phrase provides enhanced guidance by citing to the specific provisions of California law that state a lawyer’s duty of confidentiality. A similar change has been made throughout the proposed rules, e.g., proposed rule 1.6 [3-100].

Paragraph (c) requires the lawyer to obtain a client’s consent “at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . .”

Regarding paragraph (c)(1), the current rule provides an exception to the requirement of obtaining consent where the lawyer's compensation is otherwise authorized by law. The proposed rule would expand the exemption to include court orders.

Paragraph (c)(2) provides an exception to the requirement of obtaining consent where the lawyer is rendering legal services on behalf of any public agency that provides legal services to the public or other public agencies. The proposed rule expands the exception to include non-profit organizations.

Proposed rule 1.8.6 contains four comments, all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [1], which recognizes the existence of overlapping duties in a situation where the lawyer represents both a client and the third-party payor in the same matter. Comment [2] has been added to clarify the scope of the exemption from the disclosure and consent requirements under paragraph (c). Comment [3] further clarifies the scope of the rule as it relates to existing relationships between insurers and insureds. It carries forward the concept in current rule 3-310, Discussion ¶. 12. Comment [4] acknowledges that there might be some limited situations where a lawyer might not be able to obtain a client's consent.

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.

The Board adopted proposed rule 1.8.6 at its November 17, 2016 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. The Court added Comment [5] which states that the rule is not intended to alter or diminish a lawyer's obligations under rule 5.4(c).

~~Rule 3-310 Avoiding the Representation of Adverse Interests~~

Rule 1.8.6 Compensation from One Other Than Client

(Redline Comparison to the California Rule Operative Until October 31, 2018)

~~(F)~~—A ~~member~~lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

~~(1)(a)~~ There~~there~~ is no interference with the ~~member's independence of~~lawyer's independent professional judgment or with the ~~client-lawyer~~lawyer-client relationship; ~~and~~

~~(2)(b)~~ ~~Information relating to representation of the client~~ information is protected as required by Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6; and

~~(3)(c)~~ ~~The member~~the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

~~(a)(1)~~ such nondisclosure or the compensation is otherwise authorized by law or a court order; or

~~(b)(2)~~ the ~~member~~lawyer is rendering legal services on behalf of any public agency ~~which~~or nonprofit organization that provides legal services to other public agencies or the public.

Comment~~Discussion~~

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This rule~~Paragraph (F)~~ is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) ~~(Amended by order of Supreme Court, operative September 14, 1992; operative March 3, 2003.)~~

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain

commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this rule as soon thereafter as is reasonably* practicable.

[5] This rule is not intended to alter or diminish a lawyer's obligations under rule 5.4(c).