

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-210 [1.8.5]

**Lead Drafter:** Rothschild  
**Co-Drafters:** Kornberg, Peters  
**Meeting Date:** November 13 – 14, 2015

### 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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### III. PROPOSED RULE 1.8.5 (CLEAN)

#### Rule 1.8.5 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

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**Meeting Date:** November 13 – 14, 2015

- client's written promise to repay the loan, provided the lawyer complies with Rules 1.7(a)(2) [3-310(B)] and 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;
  - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client; and
  - (5) offer or give a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) 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.
- (d) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9 [4-300].

### Comment

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

## IV. PROPOSED RULE 1.8.5 (REDLINE TO CURRENT CALIFORNIA RULE 4-210)

### Rule ~~4-210~~1.8.5 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~~ based on the client's written promise ~~in writing~~ to repay such the loan; ~~or, provided the lawyer complies with Rules 1.7(a)(2) [3-310(B)] and 1.8.1 [3-~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-210 [1.8.5]

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Meeting Date: November 13 – 14, 2015

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;~~

(4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client; and

(5) offer or give a gift to a current client, provided that anything given was not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

(c) "Costs" within the meaning of ~~this subparagraph~~ paragraphs (b)(3) shall be and (b)(4) 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.

(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 [4-300]. ~~(Amended by order of Supreme Court, operative September 14, 1992.~~

### Comment

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

## V. PUBLIC COMMENTS SUMMARY

None.

## VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 10/27/15:**

- **E. Rule 4-210: Payment of Personal or Business Expenses Incurred by or for a Client**

- 1. Any revision to rule 4-210 permitting a member to loan a client money during his or her representation of the client, should provide that rules 3-300, 3-310 and 4-300 apply to the transaction.

- 2. OCTC does not oppose permitting a member to pay costs for a pro bono client.

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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-210 [1.8.5]

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### VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Illinois Rule 1.8(e)** is identical to Model Rule 1.8(e):

#### **Illinois Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**

\* \* \* \* \*

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

\* \* \* \* \*

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

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> The five jurisdictions are: California, Louisiana, Mississippi, New York, and Oregon.

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**Meeting Date:** November 13 – 14, 2015

### VIII. 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. 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.
3. 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.
4. 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.
5. Revise the description of a permitted client loan to substitute the phrase “after the lawyer is retained” for the current phrase, “after employment.”

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-210 [1.8.5]

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**Meeting Date:** November 13 – 14, 2015

- 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.
- 6. Add to the description of a permitted client loan, a proviso that references other applicable rules (e.g., Rules 3-300 (business transactions with clients) and 3-310(B) (mandatory disclosure of personal/financial interests a client’s matter)).
  - 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.
- 7. 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.

### **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.

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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 drafting team agrees with the approach taken by RRC1. RRC1 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, RRC1 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:**

1. None.

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### IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) The term “prospective client” has been bracketed as creating a possible issue depending upon the Commission’s decision whether to recommend a rule analogous to Model Rule 1.18 [Duties to Prospective Clients]. In the Model Rules, “prospective client” is defined in Model Rule 1.18 to mean “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.” MR 1.18(a). In 2012, the Ethics 20/20 Commission removed all other references to “prospective client” in the Model Rules, i.e., several places in the Model Rules that address advertising and replaced the term with “the public.” Cal. Rule 1-400 on advertising and communication of legal services also uses the term “prospective client” in the latter sense.

If the meaning to be ascribed to “prospective client” in this Rule is that of MR 1.18, it might unnecessarily narrow the rule’s scope because rule 4-210 is intended to address not only statements made to a prospective client during a consultation but also in an advertisement (a lawyer can make promises in an advertisement, e.g., you pay no fee if you don’t win, so long as there is a disclaimer that the client might still be liable for costs.) In any event, this is an issue that might have to be revisited depending on the Commission’s use of the term “prospective client” in other rules. The drafting team does not believe there is a need to address the issue at this time.

### X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

None.

### XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

#### **Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 4-210 [1.8.5] in the form attached to this report and recommendation.

#### **Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 4-210 [1.8.5] in the form attached to this Report and Recommendation.

### XII. DISSENTING POSITION(S)

None.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-210 [1.8.5]**

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**Meeting Date:** November 13 – 14, 2015

**XIII. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)





# THE STATE BAR OF CALIFORNIA

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Date: October 27, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for November 2015 meeting

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## CONTENTS

- B. Opening Comment
- C. Points for Consideration, as calendared
  - A. Rule 1-310: Forming a Partnership with a Non-Lawyer, Rule 1-320: Financial Arrangements with Non-Lawyers and Model Rule 5.4 Professional Independence
  - B. Rule 1-400: Advertising and Solicitation
  - C. Rule 1-600: Legal Service Programs
  - D. Rule 1-650: Limited Legal Services Program
  - E. Rule 4-210: Payment of Personal or Business Expenses Incurred by or for a Client
  - F. Rule 4-300: Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
  - G. Rule 4-400: Gifts From Client
- D. Closing Comment

## I.

### OPENING COMMENT

The following comments address the rules to be considered at the Commission's November 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

**II.**  
**POINTS FOR CONSIDERATION**

**[TEXT OMITTED]**

**E. Rule 4-210: Payment of Personal or Business Expenses Incurred by or for a Client**

1. Any revision to rule 4-210 permitting a member to loan a client money during his or her representation of the client, should provide that rules 3-300, 3-310 and 4-300 apply to the transaction.
2. OCTC does not oppose permitting a member to pay costs for a pro bono client.

**CURRENT CALIFORNIA RULE 4-210**  
**“Payment of Personal or Business Expenses Incurred by or for a Client”**

***I. Text of Current Rule:***

- (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. Background/Purpose:***

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.

**III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):***

A. In a \_\_\_\_\_, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 4-210:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. In a 2010 Letter to the first Commission, OCTC Provided the Following Comment on Rule 4-210:

**Rule 1.8.5. Payment of Personal or Business Expenses by or for a Client.**

1. Comment 3 should be in the rule and not a comment.<sup>1</sup>

C. In a 2001 Letter to the first Commission, OCTC Provided the Following Comment on Rule 4-210:

None.

**IV. Potential Deficiencies in the Current Rule:**

A. See above input from OCTC.

B. The “exception” in subparagraph (A)(2) of current rule 4-210, which excepts from paragraph (A)’s prohibition loans made “after employment,” (see E, below), is not strictly an exception, because paragraph (A) does not expressly prohibit a lawyer from making a loan to a client. To clarify this, the rule might need to be restructured so that the subparagraphs of (A) are not denominated as exceptions.

C. The current rule 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. Permitting such payments may promote access to justice.

D. The current rule does not address whether it is not a violation for a lawyer to offer or give a gift to a current client. Expressly permitting bona fide gifts might clarify an existing ambiguity in the rule and not implicate the purposes of the prohibition against entering into an agreement to pay costs or personal expenses.

E. The current rule uses the phrase “after employment” which could be interpreted as after retention by the client or after termination of the representation. This could be clarified expressly stating that a lawyer is permitted to lend money to a client after the lawyer is retained, so long as there is compliance with other applicable rules, such as the rule governing business transactions with a client.

F. The term “prospective client” in paragraph (A) may be ambiguous depending upon the Commission’s decision whether to recommend a rule analogous to Model Rule 1.18 [Duties to Prospective Clients]. In the Model Rules, “prospective client” is defined in Model Rule 1.18 to mean “[a] person who

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<sup>1</sup> Comment [3] of RRC1’s proposed Rule 1.8.5 provided:

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

consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.” MR 1.18(a). In 2012, the Ethics 20/20 Commission removed all other references to “prospective client” in the Model Rules, i.e., several places in the Model Rules that address advertising and replaced the term with “the public.” If the meaning to be ascribed to “prospective client” in this Rule is that of MR 1.18, it might unnecessarily narrow the rule’s scope because rule 4-210 is intended to address not only statements made to a prospective client during a consultation but also in an advertisement (a lawyer can make promises in an advertisement, e.g., “you pay no fee if you don’t win,” so long as there is a disclaimer that the client might still be liable for costs. In any event, this is an issue that might have to be revisited depending on the Commission’s use of the term “prospective client” in other rules. Cal. Rule 1-400 on advertising and communication of legal services also uses the term “prospective client” in the latter sense.

## V. **California Context:**

- A. 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.
  
- B. 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.

## VI. *Approach In Other Jurisdictions (National Backdrop):*

- A. The analogous Model Rule is MR 1.8(e).<sup>2</sup> Model Rule 1.8(e) has a single comment, Comment [10].<sup>3</sup>
- B. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules,” revised April 21, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_8.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf)

- Thirty jurisdictions have adopted Model Rule 1.8(e) verbatim.<sup>4</sup> Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(e).<sup>5</sup>

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<sup>2</sup> Model Rule 1.8(e) provides:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

<sup>3</sup> Model Rule 1.8, Comment [10], provides:

### **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.

<sup>4</sup> The thirty jurisdictions are: Alaska, Arizona, Arkansas, California, 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.

<sup>5</sup> 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.

Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.8(e).”<sup>6</sup>

**VII. Public Comment Received by the First Commission:**

- A. The clean text of a proposed new rule 1.8.5 drafted by the first Commission and adopted by the Board to replace rule 4-210 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 4-210, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 4-210 is also enclosed with the public comments received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

**VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:**

Bearing in mind the Commission’s Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

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<sup>6</sup> The five jurisdictions are: California, Louisiana, Mississippi, New York, and Oregon.

(1) Whether the rule should be restructured to more accurately denote conduct that is permitted under the rule and recognize that not all permitted conduct in current rule 4-210(A)(1) to (3) is an exception. (See IV.B, above.)

(2) Whether the rule should be amended to expressly 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.

(3) Whether the rule should be amended to clarify that it is not a violation for a lawyer to offer or give a gift to a current client, provided that anything given is not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

(4) Whether the rule should be amended to clarify that while a lawyer is prohibited from lending money, or offering, promising or agreeing to lend money, to a prospective client, a lawyer is permitted to lend money to a client after the lawyer is retained, so long as there is compliance with other applicable rules, such as the rule governing business transactions with a client.

(5) Whether the rule should be amended to clarify that as used in the rule the term “costs” is not limited to those that are taxable or recoverable under an applicable statute or rule of court.

(6) Whether the term “prospective client” should be replaced or defined to clarify specifically what is meant by the term. (See IV.F, above.)

**IX. Research Resources:**

- [Boccardo v. Commissioner of Internal Revenue](#) (9th Cir. 1995) 56 F.3d 1016