

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-300 [1.8.9]

Lead Drafter: Langford
Co-Drafters: Clinch, Martinez, Stout
Meeting Date: November 13 – 14, 2015

I. CURRENT CALIFORNIA Rule

Rule 4-300 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.

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 proposed amendments are non-substantive and the revisions only incorporate the global changes RRC2 has approved (e.g., rule numbering and the substitution of "member" with "lawyer"). The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 1.8.9 (CLEAN)

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (a) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that lawyer or with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm or is an employee of the lawyer or the lawyer's law firm.

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IV. PROPOSED RULE 1,8.9 (REDLINE TO CURRENT CALIFORNIA RULE 4-300)

Rule ~~4-300~~1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (Aa) A ~~member-lawyer~~ shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member-lawyer~~ or any lawyer affiliated by reason of personal, business, or professional relationship with that ~~member-lawyer~~ or with that ~~member's-lawyer's~~ law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (Bb) A ~~member-lawyer~~ shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the ~~member-lawyer~~ or of another lawyer in the ~~member's-lawyer's~~ law firm or is an employee of the ~~member-lawyer~~ or the ~~member's-lawyer's~~ law firm.

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

A. Jayne Kim, OCTC, 10/27/15:

F. Rule 4-300: Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

1. Rule 4-300 should be retained as currently written. A more permissive rule, even in light of Probate Code sections 9880 through 9885, could undermine the membership's duty of undivided loyalty to its clients and the public's confidence in the profession.

B. RUSSELL WEINER, OCTC, 6/15/2010:

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

1. OCTC opposes the change in this rule. Current rule 4-300 prohibits all such transactions, but subparagraph (c) of the proposed rule permits lawyers to directly or indirectly purchase property as specifically authorized by Probate Code sections 9880 through 9885. However, it is not clear that Probate Code section 9881 was intended to permit the personal representative's attorney to purchase property of the estate personally. OCTC believes the Supreme Court can and should exercise its inherent authority to demand more than the legislature has required. In our view, there are important ethical and policy reasons for maintaining current rule 4-300's complete prohibition upon a member's direct or indirect purchase of property at a foreclosure or other sale subject to judicial review. If such purchases were conditionally permitted, it is

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likely, as in the case of alleged violations of current rule 3-300, that the State Bar would receive an increased number of complaints against attorney who have allegedly failed to comply with some or all of the conditions or requirements for the purchase. OCTC has serious concerns about permitting a member to either directly or indirectly purchase estate property pursuant to Probate Code sections 9880 – 9885. Among our concerns are: 1) whether the transaction is truly fair and in the best interest of the client; 2) its impact on the public's confidence in the profession; 3) whether such transactions undermine or may undermine the attorney's duty of undivided loyalty to the client; 4) whether the attorney is looking for a deal rather than representing his or her client's best interest; and 5) the appearance of or actual overreaching by the attorney against potentially unsophisticated and/or grieving parties or family members. (For a fuller discussion of OCTC's position it refers the Commission to OCTC's July 20, 2006 Response to Commission Inquiry Regarding Rule 4-300 of the Rules of Professional Conduct.)

2. If the Commission strikes subparagraph (c) then Comment 1 should be stricken.¹

C. SCOTT DREXEL, OCTC, 7/20/06:

The OCTC 2006 comment letter states, in part, the following:

In our view, there are important ethical and policy reasons for maintaining rule 4-300's complete prohibition upon a member's direct or indirect purchase of property at a foreclosure or other sale subject to judicial review. It is entirely possible that one of the many reasons that the Office of the Chief Trial Counsel does not receive many complaints of alleged rule 4-300 violations is due to the rule's complete prohibition of the purchase of estate property. If such purchases were conditionally permitted, it is likely, as in the case of alleged violations of rule 3-300, that the State Bar would receive an increased number of complaints against attorneys who have allegedly failed to comply with some or all of the conditions or requirements for the purchase.

Additionally, there is a fundamental difference between the purchase of estate property that is totally prohibited by rule 4-300 and the business transactions between members and clients that are conditionally permitted by rule 3-300. The transactions prohibited by rule 4-300 always involve the very subject matter of the representation, i.e., the assets of the estate. In every case, therefore, there is a potential for a conflict of interest or the

¹ OCTC's 2010 comment was in reference to RRC1's proposed rule 1.8.9, which is quoted in note 6, below. Comment (c) of RRC1 proposed Rule 1.8.9 alerted lawyers to the procedures afforded by the Probate Code under which a lawyer for the estate's personal representative could purchase estate assets at a probate sale. It provided:

- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

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appearance of divided loyalty between the member's own personal interests and the interests of his or her client. While these transactions require court approval, there is perhaps an unwarranted assumption that probate judges have the time and resources to thoroughly investigate and analyze the fairness of each transaction between the member and the beneficiaries of the estate. By contrast, most of the business transactions between members and their clients that are governed by rule 3-300 are not inherently present in the attorney-client relationship itself, i.e., they don't normally involve the subject matter of the representation. Moreover, the business transactions governed by rule 3-300 occur only infrequently.

...

In the event a complaint is received by the Office of the Chief Trial Counsel in which a violation of rule 4-300 is alleged, the complaint will be investigated regardless of whether the member acted in accordance with Probate Code sections 9880-9885. Whether a formal disciplinary proceeding will be initiated depends upon a thorough analysis of the facts and circumstances surrounding the purchase of the estate property, including the fairness of the transaction, whether the purchase is in the best interests of the client and whether there were any apparent elements of overreaching or undue influence by the member. The court's approval of the purchase is also a factor to be considered. However, such approval will only be considered as a mitigating circumstance in determining the appropriate degree of discipline to be imposed if culpability of the alleged violation of rule 4-300 is found. (See Standard 1.2((e)(ii), Stds. For Atty. Sanctions for Prof. Misconduct [good faith of the member].)

For a fuller discussion of OCTC's position refer to OCTC's July 20, 2006 Response to Commission Inquiry Regarding Rule 4-300 of the Rules of Professional Conduct. – SEE ATTACHMENT to the Assignment Memo for the full text of the letter.

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

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

California has had a variation of rule 4-300 since 1928. There is no ABA Model Rule directly analogous to rule 4-300. Although the first Commission numbered its proposed rule 4-300 successor as Rule 1.8.9, suggesting the rule is analogous to Model Rule 1.8(i), neither RRC1's rule nor current rule 4-300 should be considered analogous to Model Rule 1.8(i), which applies to a lawyer's acquisition of "a proprietary interest in the cause of action or subject matter of

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litigation,” a scope of coverage that is broader (not limited to specific types of sales connected to the litigation) than rule 4-300’s.²

California’s divergence from ABA rules regulating lawyers with respect to rule 4-300 and its predecessors is long-standing. The 1908 ABA Canons of Professional Ethics, Canon 10, provided: “The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.” In 1928, the State Bar of California adopted its Rules of Professional Conduct, including Rule 8, which provided: “A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member appears as attorney for a party.” (See, *The State Bar Journal* (July 1928) Vol. III, No.1, p. 17.) There was no rule analogous to ABA Canon 8 in the 1928 Rules, nor has California adopted a rule analogous to current Model Rule 1.8(i) [successor to ABA Canon 8] in the intervening years.

Nevertheless, Model Rule 1.8(a)³ [ABA counterpart to Cal. Rule 3-300] and its predecessor, ABA Model Code of Professional Responsibility DR 5-104, have been applied to facts that would fall under rule 4-300. For example, in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Stamp* (Iowa 1999) 590 N.W.2d 496, 500, a lawyer who probated an estate was disciplined for violating Iowa rule DR 5-104(A) [the predecessor to MR 1.8(a)], in part, for representing the estate and purchasing stock from the estate without required court approval and at a price substantially below market value. (See also, citations in 35 A.L.R.3d 674 reporting on “Attorney and client: disciplinary proceeding based upon attorney’s direct or indirect purchase of client’s property.”)

² Model Rule 1.8(i) provides:

- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.

³ Model rule 1.8(a) is very similar to current California rule 3-300 and provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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Although California is not unique in regulating the described lawyer conduct through discipline, California presently diverges from the approach taken in other jurisdictions by its adoption of a rule specifically regulating a lawyer's purchase of assets at any of the identified types of sales subject to judicial review.

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

A. Introduction: History of Rule 4-300 and related Probate Code sections, and Reasons For Drafting Team's Recommendation

As noted in Section VII, above, California is unique in its adoption of a rule that regulates a lawyer's purchase of client assets at specific types of sales. Other jurisdictions appear to regulate such transactions by applying their rule corresponding to Model Rule 1.8(a) [Cal. Rule 3-300]. (See Section VII.) This raises the question whether rule 4-300 is still necessary. The drafting team concluded it is. Current rule 3-300 [MR 1.8(a)] by its terms refers only to transactions between a lawyer *and a client* or a lawyer's acquisition of a pecuniary interest adverse to a client. Rule 4-300, on the other hand, applies not only to such transactions or interests, but whenever the lawyer or a lawyer in the lawyer's firm is representing a party (e.g., an estate's personal representative) or is acting as an "executor, receiver, trustee, administrator, guardian, or conservator" in the matter. By its terms, rule 4-300 applies to a much broader set of situations than does rule 3-300. Moreover, rule 4-300 provides for an absolute prohibition on lawyer purchases; unlike 3-300, there is no procedure under which a lawyer might obtain the consents of interest persons to the purchases.

However, as discussed in the Rule Assignment Memo, (attached), current rule 4-300 conflicts with Probate Code §§ 9880-9885, which do permit a lawyer for an estate's personal representative to make *probate* purchases, provided all known heirs and devisees are notified and consent, and subject to judicial review.⁴ Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

⁴ Probate Code §§ 9881 and 9882 provide:

9881. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if all of the following requirements are satisfied:

- (a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.
- (b) The written consents are filed with the court.
- (c) The purchase is shown to be to the advantage of the estate.

9882. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney

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In recognition of this conflict, the first Commission proposed a rule that removed probate sales from the prohibitory language of 4-300(A) and added a rule section that informed lawyers of the existence of the Probate Code requirements and added further requirements with which the lawyer must comply, rule 1.8.1 [current rule 3-300] and 1.7 [current rule 3-310(B)].⁵

Because of the conflict between rule 4-300 and the Probate Code sections permitting probate sales to the personal representative's lawyer subject to certain conditions, the drafting team thoroughly considered RRC1's proposed rule. However, after consideration of the legislative history and the process by which current rule 4-300 was adopted by the Board and approved by the Supreme Court, the drafting team consensus is to recommend retaining current rule 4-300, revised to incorporate the Commission's global changes, i.e., Model Rule numbering, format and style and substitution of "lawyer" for "member."

There are numerous reasons for the drafting team's recommendation. *First* and most important, when the Supreme Court approved rule 4-300, effective September 14, 1992, it was fully aware of the conflict that existed between the Probate Code sections and the rule. (See State Bar's 1991 Supreme Court filing seeking Supreme Court approval of the current rule, Enclosure 6, attached to Rule Assignment.) Enclosure 6 fully explained the conflict between the rule and the Probate Code. Notwithstanding the described conflict, the Supreme Court concluded that the more stringent protections afforded by rule 4-300 were warranted. *Second*, Rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See *Eschwig v. State Bar* (1969) 1 Cal. 3d 8 (attorney purchased principal asset of estate while representing executor in probate proceeding); *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 (purchase of second deed of trust by wife of attorney deemed adverse to client where the property constituted the major, if not the only, source from which client could recover alimony payments); *Ames v. State Bar* (1973) 8 Cal.3d 910 (an attorney "must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client."). Therefore, the fact that the Probate Code allows such purchases (upon court approval but with limited judicial supervision), does not vitiate a lawyer's obligation to comply with these higher ethical standards. *Third*, the drafting team is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. (See also OCTC Comment, at VI.C, above.) Fourth, a review of the legislative history has revealed no evidence that either the legislature or the California Law Review Commission, the principal sponsor of the comprehensive revision of Probate Code in 1987 and 1991, considered rule 5-103, the

to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative's attorney to purchase the property.

See also Probate Code 9880-9885 (2015), attached.

⁵ See note 6 for RRC1's proposed Rule 1.8.9.

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predecessor to rule 4-300, or considered the public protection policies underlying the rule. There is no mention at all of rule 5-103 anywhere in the legislative history, including the California Law Revision Commission's two lengthy reports on the proposed amendments to the Probate Code. *Fifth*, OCTC has on three separate occasions submitted comments urging the first Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the Probate Code sections. (See Section VI.B & C, above, and OCTC's July 20, 2006 Response to Commission Inquiry Regarding Rule 4-300 of the Rules of Professional Conduct, attachment to attached Rule Assignment.) The drafting team agrees that under appropriate circumstances, as are present with respect to rule 4-300, the Rules can and should hold lawyers to a higher standard than corresponding legislation. *Sixth*, the drafting team also found the minority dissent to RRC1's proposed Rule persuasive. (See Minority Dissent, attached).

B. Concepts Accepted (Pros and Cons):

1. Retain the substance of the current rule and only revise the language to implement non-substantive terminology and format changes
 - Pros: The current rule sets the appropriate standard of public protection and there are no known problems notwithstanding inconsistency with the Probate Code. (See also, OCTC comments in Section VI and paragraph A (Introduction), above.)
 - Cons: There is a risk of confusion in having a rule that subjects a lawyer to discipline even though the conduct is authorized by statutory law.

C. Concepts Rejected (Pros and Cons):

1. Change the rule to state that it is not a violation for a lawyer to participate in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but that such transactions remain subject to other applicable rules, such as the rules governing business transactions with a client [current rule 3-300] and the representation of adverse interests [current rule 3-310]. In effect, this proposal is to adopt RRC1 proposed Rule 1.8.9.⁶

⁶ RRC1 proposed Rule 1.8.9 provided:

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through

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- Pros: This change would harmonize the rule with statutory law and avoid the potential anomalous result of a lawyer who participates in a legally enforceable probate sale under the Probate Code would nevertheless be subject to discipline.
- Cons: This change would diminish the existing public protection afforded by the absolute prohibition in current rule 4-300 and facilitate attorney self-dealing. (See also paragraph A (Introduction) and OCTC Comment in VI.C, above.)

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

1. None.

E. 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.

9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

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- 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 1.8.9 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the Model Rule that is rule 4-300's closest analog as rule 1.8(i).
 - 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.

F. Alternatives Considered:

1. None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. The drafting team proposes that the Commission recommend that the Board adopt current rule 4-300, revised to implement the global changes in format, style and rule number to which the Commission has already agreed. (See Section VIII.A, above.) However, given the conflict that exists between the Probate Code and the rule, and notwithstanding the fact that the Supreme Court was aware of the conflict when it approved rule 4-300 in 1992, the drafting team requests that the Commission consider both options in making its decision: the drafting team's proposed rule 1.8.9, (Section III, above), and RRC1's proposed Rule 1.8.9 (see note 6.)

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

None.

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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 4-300 [1.8.9] 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 4-300 [1.8.9] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)



THE STATE BAR OF CALIFORNIA

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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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]

F. Rule 4-300: Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

1. Rule 4-300 should be retained as currently written. A more permissive rule, even in light of Probate Code sections 9880 through 9885, could undermine the membership's duty of undivided loyalty to its clients and the public's confidence in the profession.

CURRENT CALIFORNIA RULE 4-300
“Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review”

I. Text of Current Rule:

- (A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver’s, trustee’s, or judicial sale in an action or proceeding in which such member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member’s law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member’s law firm or is an employee of the member or the member’s law firm.

II. Background/Purpose:

Current rule 4-300 originated in 1928 as former rule 8, operative on July 24, 1928. (See, *The State Bar Journal* (July 1928) Vol. III, No.1, p. 17.) Rule 8 originally read: “A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member appears as attorney for a party.”

In 1972, former rule 8 was renumbered as rule 5-103, “Purchasing Property in a Matter in Which a Member Appears as Attorney” with the identical text of former rule 8. Rule 5-103 was amended operative January 1, 1975 and titled “Purchasing Property at a Probate, Foreclosure or Judicial Sale.” The 1975 version of the rule extended the proscription on purchasing property at the described sales to partners and associates of the member. The rule also prohibited a member from purchasing property at the specified sales if the member, or a partner or associate of the member acts as executor, trustee, administrator, or guardian or conservator. Finally, for the purposes of the rule, rule 5-103 defined the term “associate” to mean an employee or fellow employee who is a member of the State Bar. The 1975 version of the rule provided:

Rule 5-103. Purchasing Property at a Probate, Foreclosure or Judicial Sale.

A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member or any partner or associate of such member appears as attorney for a party or is acting as executor, trustee, administrator, or guardian or conservator.

As used in this rule, the term “associate” means an employee or fellow employee who is a member of the State Bar.

In 1989, rule 5-103 was amended and renumbered as rule 4-300 as part of a comprehensive revision and renumbering of the entire rules. Rule 4-300 was retitled “Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.” Receiver’s and trustee’s sales were added to the rule because such sales were viewed as similar to the type of sales already prohibited under the rule. The rule was also amended to apply to members who may have never appeared on behalf of the client but had provided legal services to the client. In addition, the phrase “partner or associate of such member” was deleted and replaced with “any member affiliated by reason of personal, business, or professional relationship with that member or with that member’s law firm.” This last change rendered the definition of the term “associate” unnecessary to the rule and the

definition was removed.¹ (See page 46 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules of Professional Conduct Of The State Bar of California, And Memorandum And Supporting Documents In Explanations,” December 1987.) The 1989 version of rule 4-300 provided:

Rule 4-300. ~~5-403.~~ Purchasing Property at a ~~Probate,~~ Foreclosure or a Judicial Sale Subject to Judicial Review

A member of the ~~State Bar~~ shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any ~~partner or associate of such member~~ affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm appears ~~as is an~~ attorney for a party or is acting as executor, receiver, trustee, administrator, guardian, or conservator.

~~As used in this rule, the term “associate” means an employee or fellow employee who is a member of the State Bar.~~

Rule 4-300 was last amended in 1992. An amendment to rule 1-100(B)(3)'s definition of “lawyer” extended the application of rule 4-300 to foreign-licensed attorneys, as well as California or out-of-state attorneys, who are affiliated by reason of personal, business or professional relationship with a member or a member’s firm. An additional, non-substantive change intended for brevity and clarity was made to paragraph (A). (See below).

Paragraph (B) was added to prohibit a member from representing a seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member’s law firm or is an employee of the member or the member’s law firm. This addition extended the protection of a client’s interest where the attorney’s relationship to the buyer created a conflict with the lawyer’s representation of the interests of the seller-client. (See pages 18 – 19 of Supreme Court File No. 24408, “Request That The Supreme Court of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991.) The 1992 version of rule 4-300 provided:

Rule 4-300. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

{ TC \11 "Rule 4-300. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any member lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is ~~an attorney~~ acting as a lawyer for a party or ~~is acting~~ as executor,

¹ Nevertheless, the definition of “associate,” which is relevant to other current rules, was moved to current rule 1-100(B)(4).

receiver, trustee, administrator, guardian, or conservator.

(B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.

When current rule 4-300 was being revised during the 1992 rule revision process, the 1992 Rule Revision Commission was aware of Probate Code sections 9880 – 9885, which became operative on July 1, 1988. These Probate Code sections permit a “personal representative *or the personal representative’s attorney*,” (emphasis added), to purchase property from a probate estate if certain requirements are satisfied, including notice to, and consent of all heirs and devisees to the purchase, and approval after court review. Notwithstanding the direct conflict between rule 4-300 and the Probate Code, the 1992 Rule Revision Commission recommended that rule 4-300 should be continued.²

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 4-300:

(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 4-300:

1. OCTC opposes the change in this rule. Current rule 4-300 prohibits all such transactions, but subparagraph (c) of the proposed rule permits lawyers to directly or indirectly purchase property as specifically authorized by Probate Code sections 9880 through 9885. However, it is not clear that Probate Code section 9881 was intended to permit the personal representative’s attorney to purchase property of the estate personally. OCTC believes the Supreme Court can and should exercise its inherent authority to demand more than the legislature has required. In our view, there are important ethical and policy reasons for maintaining current rule 4-300’s complete prohibition upon a member’s direct or indirect purchase of property at a foreclosure or other sale subject to judicial review. If such purchases were conditionally permitted, it is likely, as in the case of alleged violations of current rule 3-300, that the State Bar would receive an increased number of complaints against attorney who have allegedly failed to comply with some or all of the conditions or requirements for the purchase. OCTC has serious concerns about permitting a member to either directly or indirectly purchase estate property pursuant to Probate Code sections 9880 – 9885. Among our concerns are: 1) whether the transaction is truly fair and in the best interest of the client; 2) its impact on the public’s confidence in the profession; 3) whether such transactions undermine or may undermine the attorney’s duty of undivided loyalty to

² Specifically, the recommendation to adopt rule 4-300 notwithstanding a conflict with the Probate Code was presented in Enclosure 6 of the “Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation,” December 1991, Supreme Court File No. 24408. (See attached.)

the client; 4) whether the attorney is looking for a deal rather than representing his or her client's best interest; and 5) the appearance of or actual overreaching by the attorney against potentially unsophisticated and/or grieving parties or family members. (For a fuller discussion of OCTC's position it refers the Commission to OCTC's July 20, 2006 Response to Commission Inquiry Regarding Rule 4-300 of the Rules of Professional Conduct. – **SEE ATTACHMENT to this Assignment Memo of an excerpt of OCTC's 2006 comments**).

2. If the Commission strikes subparagraph (c) then Comment 1 should be stricken.

C. In a 2001 Letter to the first Commission, OCTC Provided the Following Comment on Rule 4-300:

None.

IV. Potential Deficiencies in the Current Rule:

A. In part, the current rule conflicts with provisions of the Probate Code. (See discussion below in section V. See also, Footnote #1 and the attached "Enclosure 6" from the State Bar's 1991 Supreme Court filing seeking Supreme Court approval of the current rule.)

B. Compare above input from OCTC. OCTC does not believe there are deficiencies in the current rule. OCTC has taken the position that notwithstanding any conflict that might exist between current rule 4-300 and Probate Code §§ 9880-9885, "the Supreme Court can and should exercise its inherent authority to demand more than the legislature has required." (See OCTC public comment submission to RRC1 in III.B, above.) In other words, OCTC takes the position that RRC1's proposed rule, not the current rule, is deficient.

V. California Context:

A. Conflict with Probate Code. Rule 4-300 prohibits, without exception, a lawyer for an estate administrator from directly or indirectly purchasing property at a probate, foreclosure, receiver's, trustee's, or other judicial sale. However, the Probate Code specifically allows a court to authorize such a purchase provided that the requirements of the Probate Code provisions are met, including provisions requiring the attorney to obtain, and file with the court, the written consent signed of "each known heir whose interest in the estate would be affected by the proposed purchase," and "each known devisee whose interest in the estate would be affected by the proposed purchase." The full text of the Probate Code sections 9880 – 9888 is attached.

The current rule is intended to function as a prophylactic prohibition that removes any temptation for a lawyer to deal unfairly and is intended to protect the reputation of the legal profession. An attorney's own financial, business, property, and personal interests are likely to conflict with the interests of the client and with the interests of the heirs, beneficiaries, and creditors of the probate estate if the attorney is permitted to participate in these transactions. (See, *Eschwig v. State Bar* (1969) 1 Cal.3d 8, 15 – 16 [81 Cal.Rptr. 352] (attorney disbarred for purchasing property that was an asset of an estate in which he was an attorney for the executrix); *Marlowe v. State Bar* (1965) 63 Cal.2d 304 [46 Cal.Rptr. 326] (attorney found to have committed an act of moral turpitude and breach of

fiduciary duty when his wife bought property at a judicial sale); and *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467] (attorney was suspended for six months after purchasing asset through his corporate alter ego).

B. Primacy of Judicial Regulation of the Legal Profession. Legislative standards for discipline are only minimal standards and the Supreme Court retains inherent power to expand upon them. See, *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889-90 (123 Cal.Rptr. 101, 102, 538 P.2d 229). The Supreme Court of California extensively addressed its inherent authority over the legal profession in *In re Attorney Discipline System* (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836]. The Court stated:

Our inherent authority over the discipline of licensed attorneys in this state is well established. Article VI, section 1 of the California Constitution vests the judicial power in the Supreme Court, Courts of Appeal, superior courts, municipal courts, and justice courts. “Since the ‘courts are set up by the Constitution without any special limitations’ on their power, they ‘have . . . all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. [Citations.]’ [Citations.] [¶] In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. [Citation.] ‘This is necessarily so. An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question.’ [Citations.]” (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337, fns. omitted.) “This principle, which was first recognized in California in 1850 [citation], has been reaffirmed on numerous occasions. [Citations.]” (Id. at p. 336, fn. 5, 178 Cal.Rptr. 801, 636 P.2d 1139; see also *In re Shannon* (Ariz.1994) 179 Ariz. 52, 876 P.2d 548, 571 [“The judiciary's authority to regulate and control the practice of law is universally accepted and dates back to the year 1292.”]; Martineau, *The Supreme Court and State Regulation of the Legal Profession* (1980-1981) 8 Hastings Const.L.Q. 199, 202 [“In each state it is the supreme court, with or without the legislative approval, that dictates the standards for education, admission and discipline of attorneys.” (Fn. omitted.)].) Our more recent decisions have continued to recognize this power. (E.g., *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 542-544, 28 Cal.Rptr.2d 617, 869 P.2d 1142; *Howard v. Babcock* (1993) 6 Cal.4th 409, 418, 25 Cal.Rptr.2d 80, 863 P.2d 150.)

Witkin has described our authority in this area as follows: “The important difference between regulation of the legal profession and regulation of other professions is this: Admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power. [Citations.]” (1 Witkin, Cal. Procedure (4th ed.1996) Attorneys, § 356, p. 438, original italics.)

In re Attorney Discipline at pp. 592-593 (Footnotes omitted.)

VI. Approach In Other Jurisdictions (National Backdrop):

A. There is no analogous ABA Model Rule. The closest analog to rule 4-300 in the Model Rules is Model Rule 1.8(i), which provides:

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.³

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

- Thirty-five jurisdictions have adopted Model Rule 1.8(i) verbatim.⁴ Fifteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(i).⁵

VII. Public Comment Received by the First Commission:

³ Model Rule 1.8(i) has one comment, Comment [16], which provides:

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

⁴ The thirty-five jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁵ The fifteen jurisdictions are: Alabama, District of Columbia, Florida, Georgia, Maryland, Michigan, Mississippi, Montana, New Jersey, New York, North Carolina, North Dakota, Ohio, Texas, and Virginia.

- A. The clean text of a proposed new rule 1.8.9 drafted by the first Commission and adopted by the Board to replace rule 4-300 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 4-300, 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 4-300 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.)

(1) Whether current rule 4-300's absolute prohibition on purchases of property should be retained, notwithstanding the apparent conflict that exists between the current rules and Probate §§ 9880-9885 with respect to purchases of property at a probate sale.

(2) Whether the rule should be amended to state that it is not a violation for a lawyer to participate in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but that such transactions remain subject to other applicable rules, such as the rules governing business transactions with a client and the representation of adverse interests.

IX. *Research Resources:*

- [Probate Code §§ 9880 - 9885](#)
- [Eschwig v. State Bar](#) (1969) 1 Cal.3d 8, 17 [81 Cal.Rptr. 352, 459 P.2d 904]
- [In re Estate of Martin](#) (1999) 72 Cal.App.4th 1438 [86 Cal.Rptr.2d 37]
- [Marlowe v. State Bar](#) (1965) 63 Cal.2d 304 [46 Cal.Rptr. 326]
- [Sodikoff v. State Bar](#) (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467]

- In re Attorney Discipline System (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836]
- Stratmore v. State Bar (1975) 14 Cal.3d 887 [123 Cal.Rptr. 101]

9880. Except as provided in this chapter, neither the personal representative nor the personal representative's attorney may do any of the following:

- (a) Purchase any property of the estate or any claim against the estate, directly or indirectly.
- (b) Be interested in any such purchase.

9881. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if all of the following requirements are satisfied:

- (a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.
- (b) The written consents are filed with the court.
- (c) The purchase is shown to be to the advantage of the estate.

9882. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative's attorney to purchase the property.

9883. (a) The personal representative may file a petition requesting that the court make an order under Section 9881 or 9882. The petition shall set forth the facts upon which the request for the order is based.

(b) If court confirmation of the sale is required, the court may make its order under Section 9881 or 9882 at the time of the confirmation.

(c) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

- (1) Each person listed in Section 1220.
 - (2) Each known heir whose interest in the estate would be affected by the proposed purchase.
 - (3) Each known devisee whose interest in the estate would be affected by the proposed purchase.
- (d) If the court is satisfied that the purchase should be authorized, the court shall make an order authorizing the purchase upon the terms and conditions specified in the order, and the personal representative may execute a conveyance or transfer according to the terms of the order. Unless otherwise provided in the will or in the order of the court, the sale of the property shall be made in the same manner as the sale of other estate property of the same nature.

9884. This chapter does not prohibit the purchase of property of the estate by the personal representative or the personal representative's attorney pursuant to a contract in writing made during the lifetime of the decedent if the contract is one that can be specifically enforced and the requirements of Part 19 (commencing with Section 850) of Division 2 are satisfied.

9885. This chapter does not prevent the exercise by the personal representative or the personal representative's attorney of an option to purchase property of the estate given in the will of the decedent if the requirements of Chapter 17 (commencing with Section 9980) are satisfied.

ENCLOSURE 6:

**Memorandum From the Commission for the Revision of the Rules of
Professional Conduct Regarding Proposed Amendment to Rule 4-300
(Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review)**

REPORT AND RECOMMENDATION OF THE COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT REGARDING CALIFORNIA RULE OF PROFESSIONAL CONDUCT 4-300

RECOMMENDATION

The Commission to Revise the Rules of Professional Conduct recommends that the Board of Governors propose an amendment to Rule of Professional Conduct 4-300 in the form set forth in Exhibit 1.

In addition, the Commission calls to the attention of the Board of Governors a conflict between current Rule of Professional Conduct 4-300 and chapter 12 of the California Probate Code. While the Rules of Professional Conduct were being rewritten, the Legislature passed current Probate Code sections 9880 through 9885, which permit an attorney for a probate estate to purchase assets from the probate estate under some circumstances. For the reasons set forth in this report, the Commission recommends that the Board of Governors (1) call the conflict between rule 4-300 and the Probate Code to the attention of the Supreme Court, (2) recommend that the Rule of Professional Conduct continue in effect as amended in Exhibit 1, and (3) contact the California Law Revision Commission to urge the amendment of Probate Code sections 9880 through 9885 to conform with rule 4-300.

DISCUSSION

Rule 4-300 reads:

A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any member affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is an attorney for a party or is acting as executor, receiver, trustee, administrator, guardian, or conservator.

Rule 4-300 is a revision of former rule 5-103, which prohibited an attorney from purchasing property at a probate, foreclosure, or judicial sale. Former rule 5-103 read:

A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member or any partner or associate of such member appears as attorney for a party or is acting as executor, trustees, administrator, guardian, or conservator.

As used in this rule, the term "associate" means an employee or fellow employee who is a member of the State Bar.

Prior to the adoption of that rule, former rule 8 of the Rules of Professional Conduct provided:

A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure, or judicial sale in an action or proceeding in which such member appears as attorney for a party.

By the revision of former rule 5-103 into present rule 4-300, substantive changes were not intended. The discussion to the May 29, 1986, draft of the revised rule read:

No substantive revision of rule 5-103 was intended. The recommended changes in the first paragraph were made on the basis of syntax for clarity and to cover similar capacities which may have been inadvertently omitted. The changes in the first paragraph were intended to render the second paragraph unnecessary.

In 1989, the Commission began to consider rule 4-300 because some probate practitioners pointed out that rule 4-300 is potentially capable of evasion. Although it prohibits a member from "directly or indirectly" purchasing property, a child or other non-attorney relative of a lawyer could make the prohibited purchase, leaving a paper trail which shows no connection between the attorney and purchasing party.

While that study was in progress, the Commission received a letter from an attorney. That letter said that the attorney wanted to sell a luxury car from a probate estate to an employee in his firm, instead of advertising it for sale publicly. This circumstance illustrates the potential for abuses if such purchases are permitted. For example, even if the sale is for a blue book price, the estate and beneficiaries would never know whether a higher price would have been obtained if the executor had placed a newspaper advertisement or tried to sell by other means. The letter suggested that the rule could be clarified "to specifically recite that a member's employee, who is purchasing for the employee's own account, is not under any sort of disability or otherwise precluded from purchasing property in such circumstances." Another extension could be to exclude from the rule a purchase by an attorney's spouse, brother, parent, or issue.

Many rationales for such possible exclusions can be stated. The estate would save time, save the expense of marketing the asset, and save brokers' fees and commissions. However, the potential damage to the estate and to those interested in it is great. In addition, under the Independent Administration of Estates Act, the probate court will likely never know what happened.

While considering a possible modification of the rule, the Commission learned that, on the recommendation of the California Law Revision Commission, in 1987, effective July 1, 1988, the Legislature added chapter 12 to the Probate Code, which, among other things, now permits the attorney for a personal representative to purchase property from a probate estate if certain requirements are satisfied. Sections 9880 through 9885 now read:

§ 9880. General Prohibition Against Purchase of Estate Property or Claim Against Estate.

Except as provided in this chapter, neither the personal representative nor the personal representative's attorney may purchase any property of the estate, or any claim against the estate, directly or indirectly, nor be interested in any such purchase. Leg.H 1987 ch. 923, operative July 1, 1988.

§ 9881. Purchase permitted With Consent of All Heirs or Devisees.

Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if all of the following requirements are satisfied:

- (a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate is affected by the proposed purchase and (2) each known devisee whose interest in the estate is affected by the proposed purchase.
- (b) The written consents are filed with the court.
- (c) The purchase is shown to be to the advantage of the estate. Leg.H. 1987 ch. 923, operative July 1, 1988.

§ 9882. Purchase Permitted When Authorized by Will.

Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative's attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative's attorney to purchase the property. Leg.H. 1987 ch. 923, operative July 1, 1988.

§ 9883. Petition for Purchase Order.

(a) The personal representative may file a petition requesting that the court make an order under Section 9881 or 9882. The petition shall set forth the facts upon which the request for the order is based.

(b) If court confirmation of the sale is required, the court may make its order under Section 9881 or 9882 at the time of the confirmation.

(c) Notice of the hearing on the petition shall be given as provided in Section 1220.

(d) In addition to the notice required by the subdivision (c), notice of the hearing shall be given as provided in Section 1220 to all of the following persons:

(1) Each known devisee whose interest in the estate is affected by the proposed purchase.

(2) Each known heir whose interest in the estate is affected by the proposed purchase.

(e) If the court is satisfied that the purchase should be authorized, the court shall make an order authorizing the purchase upon the terms and conditions specified in the order, and the personal representative may execute a conveyance or transfer according to the terms of the order. Unless otherwise provided in the will or in the order of the court, the sale of the property shall be made in the same manner as other estate property of the same nature. Leg.H. 1987 ch. 923, operative July 1, 1988.

§ 9884. Purchase Pursuant to Contract of Decedent to Sell.

This chapter does not prohibit the purchase of property of the estate by the personal representative or the personal representative's attorney pursuant to a contract in writing made during the lifetime of the decedent if the contract is one that can be specifically enforced and the requirements of Chapter 11 (commencing with Section 9860) are satisfied. Leg.H. 1987 ch. 923, operative July 1, 1988.

§ 9885. Exercise of Option to Purchase Given in Will.

This chapter does not prevent the exercise by the personal representative or the personal representative's attorney of an option to purchase property of the estate given in the will of the decedent if the requirements of Chapter 17 (commencing with Section 9980) are satisfied. Leg.H. 1987 ch. 923, operative July 1, 1988.

As a result of the foregoing, there is now a direct conflict between Rule of Professional Conduct 4-300 and the Probate Code. Rule 4-300 prohibits an attorney from purchasing property at a probate sale if the attorney is an attorney for a party to the case or acts as the personal representative. Sections 9880, et seq., permit the personal representative's attorney to purchase property of the estate.

There may be circumstances in which the personal representative of an estate and the heirs and beneficiaries of the estate are all sufficiently sophisticated, independently advised, and able to exercise independent judgment, so a purchase of an asset from an estate by an attorney for the estate may not cause harm. However, that is not always the case. In addition, particularly when a close relative, spouse, or lover dies, a normal reaction of the survivors is one of shock and pain. Often, the full emotional impact of the death is more than the survivor or survivors can tolerate, and they become totally dependent on their attorney to guide them through the transition. Even if the survivors would normally have the ability to exercise independent judgment, after the death of a loved one they often do not.

An attorney who has an opportunity to recommend a sale of an asset and to guide the survivors in how to sell, to whom, and under what circumstances, may perform a valuable service. However, an attorney who has a direct interest in the sale may also perform a great disservice. At that point, the attorney's own financial, business, property, and personal interests will be very difficult to set aside, and the client will not receive advice based on independent professional judgment. This will occur at precisely the time the client is most vulnerable.

The strict prohibition against an attorney purchasing at a probate or other judicial sale where the attorney represents a party is a prophylactic rule to remove any temptation to deal unfairly and to protect the reputation of the legal profession. In Eschwig v. State Bar (1969) 1 Cal.3d 8, 16 [81 Cal. Rptr. 352, 357-58, 459 P.2d 904], the attorney was disbarred. He had purchased property held as an asset of an estate in which he was an attorney for the executrix. He was disbarred because of the prophylactic nature of the rule, even though the purchase was consummated outside normal probate procedures. The court stated:

An attorney representing the representative of an estate is under an obligation to seek the highest possible price on the sale of an estate asset. As a purchaser, however, he would be inclined to seek the lowest possible price. The resulting conflict of interest where the attorney becomes the purchaser is apparent. Because of the conflict of interest inherent in the situation, rule 8 is applicable even where an attorney is acting in good faith and even where there is competitive bidding. A conflict of interest exists, and is inherently more dangerous, in a sale during probate such as occurred here, because it was not public, was unknown to the court, did not involve competitive bidding, and allowed petitioner to overreach or exercise undue influence upon his client. Id., 1 Cal.3d at 15 [81 Cal.Rptr. at 357].

It is the type of transaction that is abhorrent, not the technical details of the transaction. Eschwig quoted extensively from McGee v. State Bar (1962) 58 Cal.2d 423, 429, 431 [24 Cal. Rptr. 839, 843, 374 P.2d 807, 811]. Part of the materials quoted from McGee in Eschwig included:

For the very reason that the boundary between ethical and unethical behavior in such cases is not clearly defined, attorneys should avoid drawing wills containing gifts to themselves under circumstances in which there is a reasonable basis for suspicion that the client was overreached or that the gift would prevent the attorney from acting in the client's best interests. Such a practice would remove any temptation to deal unfairly and would protect the reputation of the profession. When an attorney does draw a will under circumstances that suggest that he took advantage of a client's weakness or that he benefitted unduly he must justify his action as he must when an inference of undue influence arises.

The Commission is of the opinion that these decisions properly state what the professional standards should be and that rule 4-300 should continue to be a Rule of Professional Conduct, notwithstanding the recent legislation.

This inexorably leads to the question of whether a Rule of Professional Conduct may prohibit what the Legislature has expressly permitted. It is our conclusion that it may.

The State Bar Act permits the Supreme Court to adopt rules of professional conduct and gives the Board of Governors of the State Bar and the Supreme Court disciplinary power. Business and Professions Code section 6077 provides:

The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.

For a wilful breach of any of these rules, the board has power to discipline members of the State Bar by reproof, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar.

In addition, discipline may be imposed under Business and Professions Code section 6103:

A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any such violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

The Supreme Court could amend rule 4-300 to match the new Probate Code provisions. However, if it does, it will create a very substantial risk that parties to probate proceedings will be represented in the courts by attorneys who cannot give objective advice to their clients and cannot objectively represent them. When an attorney for a personal representative appears on a petition for authority to sell property to himself or herself, the attorney may be advocating what is in his or her interest when, instead, the attorney should be advocating what is in the best interest of the estate and those beneficially interested in it.

In probate, unlike most areas of practice, the courts are uniquely dependent upon the integrity of counsel. Most matters are unopposed, so there is no advocate urging that a petition for authority to sell is not in the best interests of the estate or those interested in it. Often, the personal representative does not understand the consequences of a sale and is dependent on the attorney to recommend what is in his or her or the heirs' best interests. Permitting lawyers to purchase assets from probate estates will impair the ability of clients to obtain independent advice and representation and impair the ability of the courts to receive advocacy from someone without a personal stake in the outcome. The legislative change, therefore, impairs the ability of the courts to adjudicate petitions for authority to sell probate assets.

The Supreme Court has the ability to restrict the conduct of members of the bar where necessary to protect the integrity of the judicial process. Cf., Champion v. Superior Court (1988) 201 Cal.App.3d 777, 783-84 [247 Cal. Rptr. 624, 627-28] (Holding unconscionable and void a partnership agreement regarding division of fees between former partner and partnership because, among other things, the client may be deprived of representation by the attorney of choice.); and In re Lavine (1935) 2 Cal.2d 324 [41 P.2d 161] (Holding statute which provided that a pardon from the governor would operate to restore the convicted person to all rights and privileges of which he had been deprived could not reverse a judicial rule governing admission to practice law, which is a judicial function.)

The Supreme Court can require attorneys to adhere to stricter standards than those required by the Legislature. For example, Rule 1-500 prohibits agreements restricting the right of a member to practice law. This clearly conflicts with Business and Professions Code section 16602, which permits a partner to agree that he or she will not carry out a similar business within a specified county or counties where the partnership business has been transacted so long as any member of the partnership carries on a similar business in that area.

The statutory grounds for discipline are not exclusive. Legislative standards for discipline are only minimal standards that must be applied, and the Supreme Court retains inherent power to expand upon them. See, Stratmore v. State Bar (1975) 14 Cal.3d 887, 889-90 [123 Cal.Rptr. 101, 102, 538 P.2d 229].

Because the legislative enactment may taint the quality of representation clients receive in judicial proceedings, the law impairs both clients' access to the courts and the ability of the courts to carry out their duties. Therefore, the Supreme Court should have the discretion to discipline attorneys for such conduct, even if the law would otherwise permit it. The "legislature may put reasonable restrictions on constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." Brydonjack v. State Bar (1929) 208 Cal. 439, 444 [281 P. 1018]. The legislature can pass laws which dictate the procedure by which jurisdiction is to be exercised, "unless, indeed, such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise." Ex parte Harker (1875) 49 Cal. 465, 467.

Moreover, the Commission recommends that the scope of rule 4-300 should be expanded. The concept that an attorney may not "indirectly" purchase property at a probate, foreclosure, or judicial sale has been interpreted broadly to prohibit any indirect purchase, even if the attorney did not directly participate in the transaction. For example, in Marlowe v. State Bar (1965) 63 Cal.2d 304 [46 Cal.Rptr. 326, 405 P.2d 150], the attorney was not even present at the judicial sale. He had obtained a writ of execution on real property located in Oakland. He told his client about her rights at the sale and told his client that he could not attend the execution sale because of a trial which conflicted with the sale. His client told him that she had no interest in the property, but only wanted her money in payment of the obligation on which the execution was obtained. The attorney told his wife about the transaction. At the marshal's execution sale, the only people present were a deputy marshal, the attorney's wife, and the attorney's secretary. When no one bid, the attorney's wife asked the marshal whether she could bid on the property, and he told her that she could. She made the only bid, paying the marshal with a borrowed check for \$50. Subsequently, the attorney and his wife borrowed over \$2,000 from a bank, giving the Oakland property as collateral. The attorney contended that the property was his wife's separate property under Civil Code section 164, so that he did not acquire interest in it. The court stated, "We cannot adopt this proposition; an attorney cannot hide behind the apron-strings of the community property laws to avoid obligation to his client." Id., 63 Cal.2d at 307 [46 Cal.Rptr. at 328]. The Supreme Court held that the mere fact that the attorney did not literally violate the then rule (because the property was purchased without his knowledge or consent) did not mean that he could not be disciplined. It held that the acts of the attorney constituted moral turpitude, which it defined as "conduct which is contrary to justice, honesty, and good morals." Id., 63 Cal.2d at 308 [46 Cal.Rptr. at 329].

In Sodikoff v. State Bar (1975) 14 Cal.3d 422 [121 Cal.Rptr 467, 535 P.2d 331], the attorney was suspended for six months. While he was the attorney for the administrator with the will annexed, he offered to the decedent's joint tenant that he would try to obtain offers from some of his clients to purchase the property. He subsequently presented an offer from someone he characterized as one of his firm's clients, a California corporation. In fact, the corporation was not a client of the attorney's law firm but was an alter ego of the attorney individually. It was a close corporation owned and controlled by the attorney and was not actually incorporated until after the offer was communicated. The court characterized as "irrelevant distinctions" the facts that there was no fiduciary relationship between the attorney and the joint tenant, that the probate court authorized him to file a quiet title action against the joint tenant, and that the joint tenancy property was not a probate asset.

The Commission recommends that rule 4-300 be expanded to reflect the breadth of the interpretation of the prohibitions so that not only are purchases by the attorney prohibited but also so that representation of the seller is prohibited if the attorney's relationship to the buyer creates a likelihood of a conflict with representation of the interests of the seller. Amending rule 4-300 to add new paragraph B as shown on Exhibit 1 will make it clear to attorneys that they may be subject to discipline if an employee, spouse, or relative of the attorney or a member of that attorney's firm is the purchaser.

EXHIBIT 1

PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 4-300

Rule 4-300. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.

- (A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any ~~member lawyer~~ lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is ~~an attorney acting as an lawyer~~ acting as executor, receiver, trustee, administrator, guardian, or conservator.
- (B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.



THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL

Scott J. Drexel, *Chief Trial Counsel*

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2063

July 20, 2006

Mary Yen
Deputy General Counsel
Office of General Counsel
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Office of the Chief Trial Counsel's Response to Commission Inquiry
Regarding Rule 4-300 of the Rules of Professional Conduct

Dear Ms. Yen:

By e-mail dated June 19, 2006, you notified the Office of the Chief Trial Counsel ("OCTC") that the Commission for the Revision of the Rules of Professional Conduct ("Commission") is discussing rule 4-300 of the Rules of Professional Conduct, relating to a member's purchase of property at a foreclosure or other sale subject to judicial review. Your e-mail indicates that the Commission has noted that rule 4-300 and Probate Code sections 9880-9885 appear to be in conflict in that rule 4-300 strictly prohibits a member from purchasing such property while the Probate Code permits an attorney who is a personal representative or who represents a personal representative to purchase such property with court approval. In your e-mail, you indicated that the Commission is interested in the views of OCTC on this subject and, in particular, with respect to the following questions:

1. Has the Office of the Chief Trial Counsel seen any situations where the member acted in accordance with these Probate Code sections and his or her actions were brought to OCTC's attention as violating rule 4-300? If so, what did OCTC do with the complaint about the alleged violation of rule 4-300?
2. Even if the Office of the Chief Trial Counsel has not had complaints about a member who complied with the Probate Code sections but violated rule 4-300, what would OCTC do if this situation were brought to its attention?

Thank you for soliciting the views of the Office of the Chief Trial Counsel on this subject. The Office of the Chief Trial Counsel receives very few complaints alleging a violation of rule 4-300. Since 1980, there have been only 39 complaints alleging a violation of rule 4-300 or its predecessor (rule 5-103). Only one of those complaints resulted in the imposition of discipline, although a second matter is currently pending before the State Bar Court and two other complaints resulted in an admonition and a warning letter. To our knowledge, however, none of these complaints involved a case in which the member complied with the provisions of Probate Code sections 9880-9885.

Probate Code section 9880 generally prohibits a personal representative or the personal representative's attorney from either directly or indirectly purchasing any property of the estate or any claim against the estate. However, section 9881 permits the court to make an order authorizing the personal representative or the personal representative's attorney to purchase property of the estate if specified requirements are satisfied.¹ It is not entirely clear whether section 9881 was intended to permit the personal representative's attorney to purchase property of the estate personally or whether it was only intended to allow him or her to purchase such property on behalf of the personal representative.

However, to the extent that Probate Code sections 9881, 9882, 9884 and/or 9885 permit the court to authorize a member to directly or indirectly purchase the property of an estate on his or her own behalf, that section conflicts with the provision of rule 4-300 of the Rules of Professional Conduct.

As you know, the Supreme Court has inherent authority over the practice of law in California and over the regulation of the legal profession, including but not limited to the admission and discipline of attorneys. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592-593; *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337.) The Supreme Court has held that legislative enactments relating to the regulation of the legal profession or the practice of law are, at best, minimal standards and that the Court, in the exercise of its inherent power, may demand more than the legislature has required. (*In re Attorney Discipline System, supra*, 19 Cal.4th at p. 602; *In re Lavine* (1935) 2 Cal.2d 324, 328.) As the Court noted in *Obrien v. Jones* (2000) 23 Cal.4th 40, 49, it has invalidated numerous legislative enactments that materially impaired its inherent power, such as provisions (1) authorizing another entity to discipline an attorney (*Hustedt v. Workers Comp. Appeals Bd., supra*, 30 Cal.3d at pp. 339-341); (2) permitting a corporation to appear in an action through a non-attorney (*Merco v. Constr. Engineers, Inc.* (1978) 21 Cal.3d 724, 727-733); and (3) requiring the readmission of attorneys pardoned after disbarment for felony convictions (*In re Lavine, supra*, 2 Cal.2d at p. 329).

Thus, although at least one publication has opined that the above-referenced Probate Code provisions create an exception to the prohibition of rule 4-300 of the Rules of Professional Conduct (Vapnek, Tuft, Peck & Wiener, *Calif. Practice Guide: Professional Responsibility* (Rutter Group 2005) ¶¶ 8:847.5-8:847.6), it is the opinion of the Office of the Chief Trial Counsel that rule 4-300 constitutes an exercise of the Supreme Court's inherent authority to regulate the practice of law. As a result, rule 4-300 prevails over the conflicting legislative enactments (i.e., Prob. Code, §§ 9881, 9882, 9884 & 9885).

In our view, there are important ethical and policy reasons for maintaining rule 4-300's complete prohibition upon a member's direct or indirect purchase of property at a foreclosure or other sale subject to judicial review. It is entirely possible that one of the many reasons that the Office of the Chief Trial Counsel does not receive many complaints of alleged rule 4-300 violations is due to the rule's complete prohibition of the purchase of estate property. If such purchases were conditionally permitted, it is likely, as in the case of alleged violations of rule 3-300, that the State Bar would receive an increased

¹ Similarly, Probate Code section 9882 permits the court to make an order authorizing the personal representative's attorney to purchase property of the estate if the will of the decedent authorizes the purchase. Section 9884 also permits the purchase of property by the personal representative's attorney pursuant to a written contract made during the lifetime of the decedent and section 9885 permits the exercise by the personal representative's attorney of an option to purchase property of the estate given in the decedent's will.

number of complaints against attorneys who have allegedly failed to comply with some or all of the conditions or requirements for the purchase.

Additionally, there is a fundamental difference between the purchase of estate property that is totally prohibited by rule 4-300 and the business transactions between members and clients that are conditionally permitted by rule 3-300. The transactions prohibited by rule 4-300 *always* involve the very subject matter of the representation, i.e., the assets of the estate. In every case, therefore, there is a potential for a conflict of interest or the appearance of divided loyalty between the member's own personal interests and the interests of his or her client. While these transactions require court approval, there is perhaps an unwarranted assumption that probate judges have the time and resources to thoroughly investigate and analyze the fairness of each transaction between the member and the beneficiaries of the estate. By contrast, most of the business transactions between members and their clients that are governed by rule 3-300 are not inherently present in the attorney-client relationship itself, i.e., they don't normally involve the subject matter of the representation. Moreover, the business transactions governed by rule 3-300 occur only infrequently.

The Office of the Chief Trial Counsel has serious concerns about permitting a member to either directly or indirectly purchase estate property pursuant to Probate Code sections 9880-9885. Among our concerns are the following:

1. whether the transaction is truly fair and in the best interests of the member's client;
2. the public's perception of lawyers who appear to make deals for property based upon information obtained from the attorney-client relationship, especially where it appears that the member may have "inside information" that is not available to the general public;
3. whether the conflict of interest created by the member's personal interest in purchasing the property has undermined or may undermine the member's duty of undivided loyalty to his or her client;
4. whether the member is looking for a "deal" rather than representing his or her client's best interests; and
5. the appearance of or actual overreaching by the member against potentially unsophisticated and/or grieving parties or family members.

In the event a complaint is received by the Office of the Chief Trial Counsel in which a violation of rule 4-300 is alleged, the complaint will be investigated regardless of whether the member acted in accordance with Probate Code sections 9880-9885. Whether a formal disciplinary proceeding will be initiated depends upon a thorough analysis of the facts and circumstances surrounding the purchase of the estate property, including the fairness of the transaction, whether the purchase is in the best interests of the client and whether there were any apparent elements of overreaching or undue influence by the member. The court's approval of the purchase is also a factor to be considered. However, such approval will only be considered as a mitigating circumstance in determining the appropriate degree of discipline to be imposed if culpability of the alleged violation of rule 4-300 is found. (See Standard 1.2((e)(ii), Stds. For Atty. Sanctions for Prof. Misconduct [good faith of the member].)

Mary Yen, Esq.
July 20, 2006
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We hope that the foregoing is useful in your consideration of this issue. We would be pleased to answer any questions that the Commission may have and to provide the Commission with any additional information that it may find helpful.

Very truly yours,

Scott J. Drexel
Chief Trial Counsel

SJD:dim

cc: Randall Difuntorum
Lauren McCurdy

Proposed Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review Rules Revision Commission — Minority Dissent

This proposal will change current Rule 4-300 to permit a lawyer in a probate case to buy assets out of the estate. It thereby abrogates decades of clear decisional law, will allow lawyers to take advantage of vulnerable members of the public, will promote conflicts of interest for lawyers in probate cases, and will deprive the judiciary of objective advocacy in an essential aspect of the probate process. Proposed Rule 1.7 does not cure the defects in this new proposed rule because it does not require a lawyer to obtain the informed written consent of the client or of the heirs, beneficiaries, or creditors of the probate estate, nor to assure that they obtain independent representation, before the lawyer or the lawyer's relation may purchase an asset of the estate. Thus, the proposed rules will not protect the public but will encourage harm to those interested in probate estates.

California has always strictly prohibited an attorney from purchasing assets at a probate or other judicial sale if the attorney represents a party to the matter. This prophylactic rule is intended to remove any temptation for a lawyer to deal unfairly and is intended to protect the reputation of the legal profession. In *Eschwig v. State Bar* (1969) 1 Cal. 3d 8, 16, the Court disbarred an attorney for purchasing property that was an asset of an estate in which he was an attorney for the executrix. The Court emphasized the conflicts of interest inherent in this situation:

An attorney representing the representative of an estate is under an obligation to seek the highest possible price

on the sale of an estate asset. As a purchaser, however, he would be inclined to seek the lowest possible price. The resulting conflict of interest where the attorney becomes the purchaser is apparent. Because of the conflict of interest inherent in the situation, [former] Rule 8 is applicable even where an attorney is acting in good faith and even where there is competitive bidding. A conflict of interest exists, and is inherently more dangerous, in a sale during probate such as occurred here, because it was not public, was unknown to the court, did not involve competitive bidding, and allowed petitioner to overreach or exercise undue influence upon his client.

Id., 1 Cal. 3d at 15. Attorneys should not be allowed to purchase, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See, e.g., *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 [attorney's wife bought at judicial sale. Held act of moral turpitude and breach of fiduciary duty.]; *Sodikoff v. State Bar* (1975) 14 Cal. 3d 422 [attorney bought asset through his corporate alter ego: six months suspension].

It is astounding that the majority of the Commission recommends continuing the absolute prohibition as to foreclosure, receiver's, trustee's, or judicial sales but would permit lawyers to purchase in probate sales. In probate, the executor, executrix, administrator, heir, or beneficiary is often less able to protect herself or himself than in the other types of sales. A widow, widower,

orphan, or surviving parent may have no experience in sales of business, real property, or other assets. Often, they are unsophisticated. Particularly when a close relative, spouse, or lover has died, a normal reaction of the survivors is one of shock and pain. Often, the full emotional impact of the death is more than the survivor or survivors can tolerate, and they become dependent on their attorney to guide them through the transition. Even if the survivors would normally have the ability to exercise independent judgment, after the death of a loved one they often do not. The author of this dissent has met with surviving spouses and parents, and months later they admit that they were in such shock that they did not even remember that we met, let alone what we discussed. Nevertheless, the majority of the Commission who voted to change this rule would deprive vulnerable people of the protections of existing law but continue those protections for commercial receivership sales, foreclosure sales and the like.

Permitting attorneys in probate cases to loot estates would be inexcusable. An attorney who has the opportunity to recommend a sale of an asset and to guide the survivors in how to sell, to whom to sell, under what circumstances, and at what price, may perform a valuable service. However, an attorney who has a direct interest in the sale because he or she is a buyer is more likely to perform a huge disservice. The attorney's own financial, business, property, and personal interests will conflict with the interests of the client and with the interests of the heirs, beneficiaries, and creditors of the probate estate. The attorney may find it very difficult to set his or her personal interests aside, and those

interested in the estate will not receive advice based upon independent professional judgment. This will occur precisely when they are most vulnerable.

Particularly in probate cases, the courts are uniquely dependent upon the integrity of counsel. Many matters are unopposed, so no advocate urges that a petition for authority to sell is not in the best interests of the estate or those interested in it. Often, the personal representative has no idea what the consequences of a sale at a given price may be and is dependent on the attorney to ascertain what is in the personal representative's or the heirs' best interests. Permitting lawyers to buy assets from probate estates will impair the ability of clients to obtain independent advice and representation and will cut the courts off from advocacy by someone without a personal stake in the outcome.

The heirs, beneficiaries, and creditors of the probate estate will not adequately be protected by court procedures. For example, because the executrix trusts the attorney, she and the beneficiaries or heirs consent to the petition for approval of the sale without obtaining any independent advice. The petition comes on for an unopposed hearing before a judge who may not have time to examine the merits, let alone give attention to the lawyer's conflicts of interest.¹ Now, when a lawyer alleges in a petition that a sale is in the best interests of the estate and those beneficially interested in the estate, the probate judge can assume that the lawyer is

¹ On October 7, 2009, the San Francisco probate department heard 55 matters on its 9:00 calendar. At three minutes a case, only contested matters can receive much attention.

advocating for the executrix, heirs, and creditors and not from self interest. In the future, if proposed rule 1.8.9 is adopted, no one will be advocating for them who does not have an inherent conflict of interest. This rule will create a very substantial risk that parties to probate proceedings will be represented in the courts by attorneys who cannot give them objective advice and who cannot objectively represent them in court. When an attorney for a personal representative appears on the petition for authority to sell property, he or she will be advocating that the property should be sold to the attorney or to the attorney's relative or partner, but not to a bona fide purchaser. The attorney will be advocating what is in his or her own interest when, instead, the lawyer should be advocating what is in the best interests of the estate and those beneficially interested in it. The administration of justice will have been corrupted.

The type of transaction that would be promoted by the proposed new rule is inherently abhorrent. It will victimize clients and other members of the public who are inherently vulnerable.

Deviating from established norms of our profession is not justified by the lobbying that the probate bar did to induce the Legislature to permit lawyers to buy at a probate sale. The fact that the Legislature included permission for lawyers to buy at probate sales does not make that wrongful practice right. Probate Code section 9881 does not serve as a substitute for rules of ethics or of discipline and does not absolve the lawyer of the duty to address the significant conflicts of interest when buying from a probate estate.

The Supreme Court has inherent jurisdiction to control conduct of lawyers in probate cases. See Bus. & Prof. Code §§ 6077 & 6103. The Supreme Court can require attorneys to adhere to stricter standards than the Legislature may require. Legislative standards are only minimal standards that must be applied for discipline, and the Supreme Court retains inherent power to make its rules more strict than the Legislature requires. See, e.g., *Stratmore v. State Bar* (1975) 14 Cal. 3d 887, 889-90.

In 1990, Commission for the Revision of the Rules recommended adoption of current Rule 4-300. In its report, the Commission expressly pointed out to the Board of Governors and to the Supreme Court the conflict between that rule and then new Probate Code sections 9880 through 9885. The Commission recommended that the Supreme Court adopt Rule 4-300 because it affords clients protection from predatory lawyers in situations where clients, for emotional or other reasons, will likely have difficulty exercising independent or objective judgment. The Board of Governors and the Supreme Court agreed. That was the ethical and correct position, and it would be the ethical and correct position to take today.

The Commission should be embarrassed by proposing to enrich lawyers by blessing inherent conflicts of interest that jeopardize the public. The Board of Governors should reject this new rule.