CHAPTER 4

BUSINESS TRANSACTIONS WITH A CLIENT

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RULE 1.8 CONFLICT OF INTEREST;
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A lawyer who is representing a client in a matter:

(a) 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 interests are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client consents thereto.

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§4.1 OVERVIEW

In general, business transactions between attorneys and their clients are regarded with disfavor by the courts, largely because of the fiduciary relationship between attorneys and their clients. “Transactions between attorney and client, as in all other cases where fiduciary relations exist between parties, one of whom possesses superior knowledge and ability and the other is

subject to his influence, are regarded with a scrutinizing and jealous eye by courts of equity…." *Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895, 897–98 (Iowa 1982) (citations omitted). However, recognizing the impracticality of an absolute ban, Washington Rule of Professional Conduct (WRPC) 1.8(a) provides a set of rules under which such transactions may be effected.

WRPC 1.8 may fairly be viewed as an offshoot of WRPC 1.7(b). *See generally In re McMullen*, 127 Wn.2d 150, 164, 896 P.2d 1281 (1995). In general, WRPC 1.7(b) prohibits attorneys from representing clients when the representation may be materially limited by the attorney's own interests unless (1) the attorney reasonably believes the representation will not be adversely affected and (2) the client consents in writing after full disclosure of the material facts. See §3.2(2) for a detailed discussion of WRPC 1.7(b). As a result, when evaluating whether to enter into a business transaction with a client, attorneys should also review and consider WRPC 1.7(b).

WRPC 1.8(a) should not be read to apply to certain common transactions that may occur between an attorney and client. The Comment to ABA Model Rule 1.8(a) notes that certain common commercial transactions between an attorney and his or her client do not give rise to the concerns that the rule is intended to address. For example, an attorney receiving medical, dental, banking or brokerage services from a client, or purchasing products manufactured or distributed by a client, would not ordinarily have an advantage over the client and would not be subject to the rule.

Finally, because most of the subparts of WRPC 1.8 do not necessarily relate to business transactions with clients, a discussion of all of such subparts is beyond the scope of this chapter. The reader should refer to the complete copy of WRPC 1.8 in Appendix A concerning potential conflict situations not covered by this chapter.

§4.2 ELEMENTS OF RULE 1.8(a)

WRPC 1.8(a) requires that business transactions with clients be (1) fair and reasonable, (2) fully disclosed and transmitted in writing to the client in a way the client can understand, (3) the client must consent, and (4) the client must be given a reasonable opportunity to seek the advice of independent counsel. *In re Gillingham*, 126 Wn.2d 454, 462, 896 P.2d 656 (1995). Note also that in Washington, business transactions between an attorney and a client are considered prima facie fraudulent unless the attorney can show that "(1) there was no undue influence; (2) the attorney gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger." *In re McMullen*, 127 Wn.2d 150, 164, 897 P.2d 1281 (1995) (citing *In re McGlothlen*, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983)).

(1) Attorney-client relationship

WRPC 1.8(a) does not apply to transactions in which no attorney-client relationship exists. However, attorneys should not assume that no attorney-client relationship exists simply because there is no formal, articulated engagement. See chapter 2 for a discussion on when an attorney-client relationship arises. *See also In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988) (finding that for purposes of the rules governing professional conduct, an attorney-client relationship exists when a person holds an objectively reasonable belief that such a relationship exists and relies upon

that belief, and when the attorney does nothing to refute that belief); *In re McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983) (for purposes of disciplinary rules, attorney-client relationship continues as long as influence arising from the relationship continues). *But see In re Owens,* 144 Ill. 2d 372, 581 N.E.2d 633 (1991) (finding no attorney-client relationship between attorney and business partner).

(2) Fair and reasonable terms

The terms of any business transaction between attorney and client must be objectively fair and reasonable. Note that even when the terms of a transaction may appear fair and reasonable, an attorney may still run afoul of WRPC 1.8(a), even if the client entered into the business transaction knowingly and voluntarily and suffered no harm. *See, e.g.*, *In re Gillingham*, 126 Wn.2d 454, 896 P.2d 656 (1995).

(3) Full disclosure by attorney and understanding by client

In any business transaction with a client, the attorney has a heavy burden of showing that a full and fair written disclosure of the transaction was made to the client. The primary purpose of requiring attorneys to fully disclose the nature and substance of a contemplated business transaction with a client is to permit the client to assess whether to do business and to continue to be represented despite the attorney's conflicting self-interest. The extent of such disclosure may also serve as a measure of the attorney's good faith.

The attorney should ensure that his or her written disclosure to the client be prepared so as to enable the client to fully understand (1) the nature of the transaction and each of its terms; (2) the extent of the attorney's interest in the transaction; (3) the ways in which the attorney's participation in the transaction might affect the attorney's exercise of professional judgment in any other legal work for the client; and (4) the nature of the respective advantages and risks to both the attorney and the client in the transaction. Comment, *Borrowing Money from a Client: The Harsh and Demanding Responsibilities of an Attorney*, 20. J. LEGAL PROF. 385, 390 (1995/1996) (citing C. Wolfram, MODERN LEGAL ETHICS at 484–85). The attorney should not assume that he or she has complied with the disclosure provision of WRPC 1.8(a) simply because the client may in fact understand the nature of the transaction. *See, e.g.*, *In re Gillingham*, 126 Wn.2d 454, 896 P.2d 656 (1995); *Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895 (Iowa 1982).

(4) Consent

The Washington version of rule 1.8 requires that the disclosures described above be in writing, but does not require that the client's consent be in writing. *Compare* ABA Model Rule 1.8(a)(3). Nonetheless, good practice dictates that the attorney should always obtain the client's consent in writing.

(5) Independent counsel

As part of an attorney's written disclosure to a client concerning a business transaction, the attorney should expressly recommend that the client seek the advice of an independent attorney. Courts have held that the failure of an attorney to advise a client to seek outside counsel in

connection with a business transaction is a violation of the attorney's ethical duties. *See, e.g.*, *Ritter v. State Bar of California*, 709 P.2d 1303 (Cal. 1985). As part of that recommendation, attorneys should also be sure to include a written explanation of the attorney's conflict of interest in the transaction and the reasons why the client should seek the advice of independent counsel. *See, e.g.*, *In re Singer*, 865 P.2d 315 (Nev. 1993); *Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895 (Iowa 1982). Moreover, referring attorneys should avoid participation in meetings or consultations involving the client and the referred attorney to ensure that the advice the client receives is truly independent. *See Committee on Professional Ethics & Conduct of the Iowa State Bar v. Carty*, 515 N.W.2d 32 (Iowa 1994).

§4.3 BRIEF ILLUSTRATIONS

(1) Loans

(a) *Facts*. Attorney and Client become friends during the course of a professional relationship spanning in excess of ten years. Attorney starts a wine importing business, and Client offers to give a gift of $25,000 to Attorney towards the business. Attorney agrees to accept the money, but only as a loan and only if Client draws up a repayment schedule, which Client does. Although the loan is not secured, the terms of the loan transaction are otherwise fair and reasonable to Client. Attorney repays the loan in full with interest.

Analysis. Attorney's conduct is a violation of WRPC 1.8(a) because Attorney did not disclose and transmit in writing to Client the terms of the loan. Although the loan was repaid and Client suffered no actual injury in connection with the transaction, Attorney's failure to provide the written disclosure required by rule 1.8(a) still constituted a violation of the rule. *See In re Gillingham*, 126 Wn.2d 454, 896 P.2d 656 (1995).

(b) *Facts*. Client is a reasonably prudent investor. Attorney asks Client for a loan, which will be secured by a deed of trust on Attorney's home. Attorney tells Client that Attorney's home is worth approximately $125,000, a reasonably accurate figure. Client is aware that Attorney is unable to repay an earlier loan made by Client. Client also knows that Attorney is hard pressed financially, is desperate for money, and that the loan is risky. Attorney did not advise Client to seek independent counsel, although Client has the opportunity to do so. Client makes the loan.

Analysis. Attorney has violated WRPC 1.8(a) by failing to give adequate written disclosures concerning his financial condition. Despite the fact that Client had knowledge of Attorney's financial desperation and believed the loan to be risky, Attorney violated the rule by failing to provide to Client complete written financial statements and a written appraisal and title report on Attorney's home. *See In re Johnson*, 118 Wn.2d 693, 826 P.2d 186 (1992).

(c) *Facts*. Client, an 84-year-old woman with a lack of financial sophistication, hires Attorney to assist Client in breaking a trust of which Client is a lifetime beneficiary. In response to concerns expressed by the trustee, Attorney proposes forming an informal trust and placing the trust funds in an account requiring both Client's and Attorney's signatures.

Attorney is in a precarious financial position and arranges for a $30,000 unsecured loan from Client. Attorney drafts a promissory note calling for 12 percent interest. The note contemplates interest-only payments for three years, with the balance due at the end of that term. Attorney prepares for Client a disclosure document containing the details of the transaction, including

certain positive benefits (the high rate of return) and negative attributes (the unsecured status) of the loan. The disclosure also advises Client to seek independent counsel. Client signs the disclosure, and the loan is funded from the informal trust.

Eight months later, Attorney takes a second unsecured loan for $10,000 with terms nearly identical to the first loan. Attorney prepares a disclosure similar to that prepared for the first loan, which Client signs. The second loan is also funded from the informal trust.

Sixteen months later, Attorney prepares a new promissory note to replace the original two notes. The interest rate is nine percent, and the note has no maturity date; however, assuming straight amortization, the note would be repaid in ten years. Another disclosure form similar to the first two was prepared by Attorney and signed by Client.

Analysis. Attorney has violated WRPC 1.8(a). Despite Attorney's attempt to comply with the rule by providing Client with written disclosure and obtaining Client's written consent, Attorney failed to disclose to Client Attorney's precarious financial condition and the fact that Attorney was not a good credit risk. Moreover, the terms of the loans were not fair and reasonable to Client because Attorney, having undertaken a fiduciary duty with respect to Client's funds, placed 64 percent of such funds in a risky, long-term unsecured loan inappropriate for Client, who was elderly and financially unsophisticated. *See In re McMullen*, 127 Wn.2d 150, 164, 897 P. 2d 1281 (1995).

(2) Corporate/partnership arrangements

(a) *Facts*. Client, a high-tech, start-up Internet company, retains Attorney to incorporate the company and to provide additional legal services. Client proposes an arrangement by which Client will pay for Attorney's services with shares of Client's common stock. Attorney agrees and prepares a written fee letter memorializing the arrangement, which Client signs. Attorney then incorporates Client, and Client issues to Attorney five percent of Client's outstanding shares. The value of the shares approximately equals the value of the attorney's services.

Analysis. Attorney has violated the rules because he failed to recommend that Client obtain independent counsel. WRPC 1.8(a) applies to this situation because Attorney's acquisition of Client's stock amounts to entering into a business transaction with Client. Although such transactions are not per se unethical, Attorney must still comply with all of the requirements of WRPC 1.8(a). Attorney should also give proper consideration to whether Attorney's fee is reasonable (WRPC 1.5), and whether Attorney's representation of Client will be limited by Attorney's own interests (WRPC 1.7(b)). *See, e.g.*, Utah Ethics Opinion No. 98-13 (1998); Mississippi Ethics Opinion No. 230 (1995).

(b) *Facts*. Attorney, Client, and Architect form a corporation for the purpose of developing land owned by Client. Attorney provides no written disclosures to Client and makes no recommendation that Client seek independent counsel. In exchange for their respective shares in the corporation, Client contributed the land, Attorney contributed legal services, and Architect contributed engineering services. Attorney gives the corporation an interest-free demand note to represent his services. Attorney performs over $6,000 in legal services and expends $900 in out-of-pocket costs. The corporation is subsequently unable to obtain financing, and the development plans falter. Client dies, and Attorney conveys all of his shares back to the corporation pursuant to a prior oral agreement with Client. Attorney has made no profit on the transaction and seeks no payment for the services rendered.

Analysis. Attorney has violated the rule because he failed to give the required disclosures and recommendation for independent counsel. Although Attorney is forthright and honest, that does not relieve him of his responsibilities under the rules. *See Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895 (Iowa 1982) (decided under DR 5-104(A)).

(c) *Facts*. Attorney C represents and is one of the three owners of ABC Corporation. B approaches Attorney C with a new opportunity in the same line of business as ABC Corporation and asks Attorney C to form BC Corporation without informing A or giving A an opportunity to participate, either personally or through ABC Corporation. Because B is the driving force behind ABC Corporation and because A has never treated him with respect, Attorney C does so.

Analysis. Even if A is not an individual client of Attorney C pursuant to the "reasonable expectations" test (see §2.2 of this book), Attorney C may well be subject to discipline and to civil liability for helping B as well as himself to usurp ABC Corporation's corporate opportunities and breach fiduciary duties owed to ABC Corporation. *See, e.g.*, *In re Kinsey*, 660 P.2d 660 (Or. 1983); *Granewich v. Harding*, 985 P.2d 788 (Or. 1999); *In re Pappas*, 768 P.2d 1161 (Ariz. 1988). *But cf. In re Owens* 581 N.E.2d 633 (Ill. 1991) (no ethics violation found as to entry into business transaction with nonclient).

(3) Purchases of real property

(a) *Facts*. Client mentions to Attorney that Client wants to sell a house. Attorney is aware of an appraisal that had been done on the house that valued the house at $9,000; however, since the appraisal, the condition of the house had deteriorated. Attorney offers to help Client find a purchaser, then offers to purchase it himself. Attorney offers to draw up the necessary papers to save on attorney fees. Attorney then purchases the house by real estate contract for $8,500. A year later, attorney sells the house by real estate contract for $14,500. Despite the higher price, because of the differing payment terms, it is not possible to determine the relative value of each contract. Client is not harmed by the transaction.

Analysis. Attorney has violated the rules because Attorney did not provide adequate disclosures to Client concerning the purchase, including, among other things, information about the appraisal that had previously been done. Attorney also failed to show that Client could not have found a buyer on the same terms under which Attorney purchased the house, and failed to recommend that a new appraisal be done. Although the purchase measured against ordinary standards might be entirely proper, it did not meet the strict standards imposed upon attorneys dealing with clients. *See In re McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983).

(b) *Facts.* Client is having financial difficulties and has become unable to meet her mortgage payments on a piece of real property she owns. Attorney, who is representing Client in a civil action, is looking for a place to live. Seeking to assist Client with her financial problems, Attorney and Client negotiate and Attorney drafts a lease/purchase agreement for the property under which Attorney was to make payments directly to the mortgagee. However, neither party pays the mortgagee for amounts then in arrears. The mortgagee threatens to foreclose, and at the same time, Attorney and Client begin to differ on the strategy to be used in the civil action. Client pays the arrearages and locks Attorney out of the property.

Analysis. Attorney violated the rules because he failed to make adequate disclosure to Client and failed to afford her an opportunity to obtain independent counsel. This is true even though Attorney intended no harm and was in fact trying to aid Client with her financial difficulties. Because the parties had differing interests in the transaction, Attorney should have provided complete disclosures to Client, including disclosures about any potential adverse effects of the transaction, and advised Client to seek independent counsel. *See West Virginia State Bar v. Cometti*, 189 W. Va. 262, 430 S.E.2d 320 (1993).

(4) Investments

(a) *Facts*. Attorney is a corporate secretary and a director of Corporation, but has no ownership interest in Corporation. Attorney encourages Client, an unsophisticated investor, to invest in Corporation by purchasing five $10,000 certificates of deposit and pledging them as collateral for Corporation's line of credit. Corporation paid Client $1,000 per month as compensation for supplying the collateral. Prior to the investment, Attorney advises Client to consult with a named stock broker, investment counselor, and the Attorney's CPA; however, Attorney never advises Client to seek independent legal counsel. Corporation falls on hard times, and Client loses about $25,000 of her investment.

Analysis. Attorney violated the rules because he failed to advise Client to seek independent legal counsel and failed to make proper disclosures concerning the transaction. Even though Attorney had no ownership interest in Corporation, Attorney and Client had differing interests in the transaction, and as a result, Attorney had a duty to provide the required disclosures and to otherwise comply with the rules. *See In re Luebke*, 301 Or. 321, 722 P.2d 1221 (1986).

(5) Referrals of independent counsel

Facts. Attorney is in the process of entering into a transaction with Client involving the assignment of a real estate contract by Attorney to a corporation owned by Client. Recognizing the conflict of interest, Attorney suggests that Client contact another attorney, Referral, who is familiar with Client and who is also a very close personal friend of Attorney. Attorney, Client, and Referral attend a meeting to discuss the assignment. Attorney sits in on the meeting and expresses his opinions. No other meeting between Referral and Client is held.

Analysis. Attorney has not met the independent counsel requirement. Although Attorney recognized the conflict and recommended Referral as counsel for Client, Attorney's friendship with Referral and Attorney's attendance at the only meeting between Referral and Client made it improbable that Referral could be truly independent. Attorney should have insisted that Client secure independent counsel. *See Committee on Professional Ethics and Conduct of the Iowa State Bar v. Carty*, 515 N.W.2d 32 (Iowa 1994).

§4.4 DETAILED HYPOTHETICAL ANALYSIS—INVESTING IN A BUSINESS PARTNERSHIP THE ATTORNEY REPRESENTS

(1) *Facts*

Two long-term clients ask a lawyer to invest with them in a real estate development. The three would form a general partnership to acquire property and construct town houses. According to the proposal, each would have an equal interest in the partnership.

(2) *Analysis*

A lawyer is generally prohibited from entering into business transactions with a client or acquiring financial interests adverse to a client. WRPC 1.8(a) describes the four conditions necessary for an exception to this general prohibition: (1) the transaction and terms are fair and reasonable to the client; (2) there is a full disclosure transmitted in writing to the client in a manner reasonably understood by the client; (3) the client is given a reasonable opportunity to seek independent counsel; and (4) the client consents. Overlaying these conditions is the additional burden imposed upon attorneys to show that (1) there was no undue influence; (2) the attorney gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.

Under the circumstances considered here, it appears at first blush relatively easy for the attorney to meet the rigors of WRPC 1.8(a). On the face of it, equal investments by all three parties in exchange for equal shares in the partnership looks inherently “fair and reasonable.” But even in that simple example, the weave of the story almost invariably becomes more complex.

Although the attorney initially may be sought as a source of investment capital, usually the lawyer’s professional skills are also viewed as an available asset. When the two clients ask the lawyer to draft even a simple partnership agreement, the opportunity for later dispute about “fair and reasonable” terms begins to loom. If the lawyer drafts a bare-bones partnership agreement and the lawyer is later favored by the absence of buy-and-sell provisions, the lawyer may be accused not only of neglect, but of self-dealing. On the other hand, if the lawyer attempts to guide the two clients through the maze of issues typically addressed by complex partnership agreements, the chances for later second-guessing about what is “fair and reasonable to the client” may be multiplied. Of course, if the lawyer does become involved in the drafting of the partnership agreement, WRPC 1.7 and 2.2 may also apply, even if the clients are given a reasonable opportunity to seek independent counsel.

Assume that the attorney carefully explains to both clients the requirements of WRPC 1.8(a). The lawyer asks the two clients whether they are prepared to suffer the inconveniences of compliance with the rule, or whether they wish to find another partner or another lawyer. After the clients again express the wish to proceed, the parties sit down and outline the terms of a simple partnership agreement, which the lawyer prepares and insists must be reviewed by independent counsel. A prudent attorney might also insist that the independent counsel write an opinion that the lawyer’s interest in the partnership is fair and reasonable under all the circumstances relative to the two clients. Finally, before proceeding, the lawyer should obtain written acknowledgement from both clients of their consultation with the independent counsel. Only after all the steps are complete can the lawyer confidently write a check for the investment.

Most often, lawyers confront the prospect of investing in a client's business in much more complex circumstances. Several adjustments to the original hypothetical will show how quickly the bramble can grow. For instance, suppose the lawyer is taking an interest in the real estate development in lieu of a fee for legal services. Originally, the possibility for abuse looked remote because the lawyer was investing a proportional amount of money with the clients and was paid independently for any legal services. When those events merge, however, compliance with the "fair and reasonable" standard becomes elusive. Suppose also that the lawyer has a longstanding relationship with one of the two clients, but has only recently become acquainted with the other partner. In such a case, the partner who has known the lawyer for a brief time may be quick to question the value of the lawyer's contribution to the partnership and the implications of the lawyer's relationship to the partner who brought the attorney into the transaction.

If the lawyer chooses to brave the perils, the disclosure required to the two partners should include such things as the nature, extent, and terms of the lawyer's participation, the lawyer's possible inability to represent the partnership in either internal or external disputes, and the nature of the lawyer's interest and its effect on the lawyer's loyalty and independence of judgment. The risks and advantages of the transaction must be disclosed to all members of the partnership, as well as the benefits of obtaining independent counsel. The disclosure must be couched in terms that can be understood by everyone who has an interest in the partnership which, if the interest is community property, includes the spouses.

Although consultation by the clients with independent counsel provides some protection to the lawyer, it is not a guarantee of safe passage. Hindsight will be a hard taskmaster if the deal goes sour or, ironically, too well.

Although the Washington version of rule 1.8 requires that the disclosure to the client be in writing, there is no similar writing requirement for the consent of the client. In contrast, ABA Model Rule 1.8 does require that the consent be in writing. It is advisable that such documentation be obtained, particularly when there are a number of partners to the investment, some of whom do not have a prior relationship with the attorney. Effective consent presupposes fairness and reasonableness of the transaction, clear disclosure, and an opportunity to seek advice of independent counsel.

§4.5 CARDINAL POINTS

1. Because of the fiduciary relationship between an attorney and his or her client, business transactions between attorneys and their clients are closely scrutinized by the courts.
2. In addition to WRPC 1.8(a), attorneys entering into business transactions with clients should pay special attention to the requirements of WRPC 1.7(b).
3. Business transactions with clients must, at a minimum, be objectively fair and reasonable; however, violations of WRPC 1.8(a) can occur even when a transaction is fair and causes no harm to the client.
4. An attorney entering into a business transaction with a client must provide full and complete written disclosure to the client concerning all material aspects of the proposed transaction to enable the client to fully assess whether to continue with the transaction despite the attorney's conflicting self-interest.

5. An attorney should always obtain his or her client's consent in writing prior to entering into a business transaction.
6. An attorney must expressly recommend that the client obtain the advice of independent counsel prior to entering into a business transaction with the attorney. That recommendation should be in writing.
7. The referral for independent advice must be a bona fide referral and not a sham. There must be substantive discussions between the referred attorney and the client outside the presence of the referring attorney.
8. An attorney should evaluate whether the particular transaction is appropriate for the client given the client's particular personal and financial circumstances.
9. Fee arrangements by which an attorney agrees to accept stock or another financial interest in a client as payment for legal services are business transactions subject to WRPC 1.8(a), along with WRPC 1.5 and 1.7(b).

Comment: Undoubtedly, an attorney's safest course of action with respect to rule 1.8(a) is to avoid completely all business transactions with clients. In this regard, Professor Marianne M. Jennings suggests a simple rule to substitute for rule 1.8. "Just title the rule: '1.8 Business Transactions with Clients.' Then underneath the title put, 'NO!'" Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, 1246. Barring that, attorneys contemplating entering into a business transaction with a client should carefully comply with all aspects of rule 1.8(a) and should keep in mind the high level of scrutiny with which such transactions are reviewed. *See Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 988 P.2d 467 (1999).