



The State Bar of California

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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.*
- (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.

Comment

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

NEW RULE OF PROFESSIONAL CONDUCT 1.8.9
(Former Rule 4-300)
Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 4-300 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review) in accordance with the Commission Charter. California has had a variation of current rule 4-300 since 1928. However, there is no counterpart to rule 4-300 in the ABA Model Rules. The result of the Commission’s evaluation is proposed rule 1.8.9 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review).

Rule As Issued For 90-day Public Comment

The main issue considered when drafting this proposed rule was whether the proposed rule’s language should conform to the Probate Code provisions which allow an attorney to purchase a client’s property at a Probate sale under certain circumstances. Current rule 4-300 prohibits a lawyer from purchasing property at various sales under legal process¹ where the lawyer, or any other lawyer affiliated with the lawyer or the lawyer’s firm, is acting either as an attorney for a party or as an executor, receiver, trustee, administrator, guardian, or conservator. The rule also prohibits a lawyer from representing the seller at such a sale in which the buyer is a spouse or relative of the lawyer or another attorney in the lawyer’s firm or is an employee of the lawyer or the lawyer’s firm. However, current rule 4-300 conflicts with Probate Code sections 9880-9885, which do permit a lawyer for an estate’s personal representative to make *probate* purchases, upon court order authorizing the purchase, provided all known heirs and devisees are notified and consent.² Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

After careful consideration of whether to conform the current rule to the Probate Code, the Commission has approved retaining current rule 4-300, revised to incorporate the Commission’s global changes, i.e., Model Rule numbering, format and style and substitution of the word “lawyer” for “member.”

¹ These sales include a probate, foreclosure, receiver’s, trustee’s, or judicial sale.

² 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 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.

There are several reasons for the Commission's recommendation. First, when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing in which the State Bar sought Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code. Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections than the statutory provisions. 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. Lawyers have been disciplined for this misconduct.³ Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. Third, the Commission 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. The Commission believes that under appropriate circumstances the rules can and should hold lawyers to a higher standard than corresponding statutory law. Lastly, the Office of the Chief Trial Counsel on three separate occasions submitted a comment urging the prior Commission to recommend adoption of current rule 4-300's absolute prohibition on such sales despite the existence of the conflicting Probate Code sections.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 1.8.9 at its November 17, 2016 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. The Court added paragraph (c) and a Comment. Paragraph (c) and the Comment address Probate Code sections 9880 – 9885, which permit a lawyer to participate in a transaction involving a probate proceeding that concerns a client under certain circumstances.

³ 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.").

Rule ~~4-300~~1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
(Redline Comparison to the California Rule Operative Until October 31, 2018)

- (~~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.*
- (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.

Comment

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