

**Rule 1.8.10 Sexual Relations With Current Client
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.
- (c) If a person* other than the client alleges a violation of this rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

Comment

[1] Although this rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., rules 1.1, 1.7, and 2.1.

[2] When the client is an organization, this rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See rule 1.13.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This rule and the statute impose different obligations.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.10
(Current Rule 3-120)
Sexual Relations With Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-120 (Sexual Relations With Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.8(j). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 1.8.10.

Rule As Issued For 90-day Public Comment

The main issue considered was whether to retain California's current approach that prohibits sexual relations in limited circumstances where the relations are: (i) required as a condition of a representation; (ii) obtained by coercion, intimidation or undue influence; or (iii) cause the lawyer to perform legal services incompetently; or to adopt the approach used in most jurisdictions that follows ABA Model 1.8(j) in prohibiting all sexual relations unless the consensual sexual relationship existed at the time that the lawyer-client relationship commenced.

Proposed rule 1.8.10 substantially adopts Model Rule 1.8(j). The Commission believes that California’s current rule renders it difficult to prove a violation in the typical circumstance of consensual sexual relations¹ because the rule is not a bright-line standard. For example, where consensual sexual relations occur, the State Bar must prove that the relations caused the lawyer to perform legal services incompetently. While this might represent a regulatory policy of imposing a least restrictive prohibition on conduct protected under a constitutional right of privacy,² it imposes a complexity that is likely frustrating enforcement.³

The potential for the current rule requirements to frustrate enforcement becomes apparent upon close examination of California’s duty of competent representation that is formulated to be consistent with Supreme Court precedent. Discipline case law provides that mere negligence is not a violation of the duty of competence. In *Lewis v. State Bar* (1981) 28 Cal.3d 683 [170

¹ The current rule also prohibits sexual relations that are not consensual as well as improper conduct seeking sexual relations that may or may not result in the occurrence of any sexual relations (e.g., relations sought or obtained by coercion or as a quid pro quo for receiving legal services for a lawyer). The proposed rule would no longer include these aspects of the current rule. Lawyers would continue to be subject to discipline for such misconduct under both Business and Professions Code § 6106 (acts constituting moral turpitude) and § 6106.9 which is the statutory analog to current rule 3-120. Moving to the Model Rule standard in proposed Rule 1.8.10 is not intended to abrogate these existing statutory prohibitions.

² Although the general prohibition in the Commission’s proposed rule is more restrictive than the current rule in regards to consensual sexual relations, it is not believed to be unconstitutional. In connection with the work of the first Commission, the State Bar inquired on more than one occasion with other jurisdictions that have the same or similar rule to Model Rule 1.8(j) (most recently in 2012) as to whether their rules have been challenged based on a constitutional right to privacy. No jurisdiction indicated a constitutional challenge and the published disciplinary case law of other states do not show any such challenges.

³ There are no published California disciplinary cases applying rule 3-120.

Cal.Rptr. 634], the California Supreme Court reaffirmed this principle stating that: “This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge.” (*Lewis v. State Bar* at p. 688.) As a result of this longstanding interpretation of the duty of competence, even if a lawyer engages in consensual sexual relations that cause an act of simple negligence in the performance of a legal service, the lawyer cannot be held to have violated rule 3-120(B)(3). If the Commission’s proposed rule is adopted, this outcome would be different because all consensual sexual relations arising during the lawyer-client relationship would constitute a rule violation regardless of whether the lawyer provided competent legal services.

The Commission also believes that this bright-line prohibition will have a salutary deterrent effect that is not present in the current California rule. Public commentators in connection with the first Commission’s project provided anecdotal evidence of misconduct that was not deterred by the current rule. In addition, other professions, such as psychotherapists, have stricter rules that are more protective. By comparison with the restrictions in those professions, retaining the current rule could diminish public confidence in the legal profession.

In adopting the language of Model Rule 1.8(j), proposed rule 1.8.10 would eliminate the express exception in the current rule that permits sexual relations between lawyers and their spouses. However, the Commission notes that: (1) most other jurisdictions do not have an express spousal exception but have not experienced known problems; and (2) a spouse who later becomes a client would fall under the exception for sexual relations that predate a lawyer-client relationship.

Proposed rule 1.8.10 retains the definition of sexual relations in the current rule. This is a departure from the rule adopted in most jurisdictions but the Commission believes it is warranted because the definition promotes compliance and because the same definition appears in the statutory prohibition on sexual relations with a client (subdivision (d) of Bus. & Prof. Code § 6106.9). In addition, the proposed rule includes a new comment (Comment [3]) that provides a reference to the statutory prohibition.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised the text of paragraph (a) to include an express exception for sexual relations with a client who is the lawyer’s spouse or registered domestic partner. The Commission also added a new paragraph (c) that is intended to value the privacy rights of a client in those circumstances where a person other than the client alleges a violation of the rule. New paragraph (c) was derived in part from the Commission’s consideration of the comparable rule in Minnesota. The language in the Minnesota rule 1.8(j) provides that: “(4) if a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director of the Office of Lawyers Professional Responsibility, in determining whether to investigate the allegation and whether to charge any violation based on the allegations, shall consider the client’s statement regarding whether the client would be unduly burdened by the investigation or charge.”

In addition, in Comment [1] the Commission removed the brackets around a cross reference to rule 2.1. The brackets marked the reference to rule 2.1 as being tentative until the Commission determined whether to recommend a version of that rule. The Commission has now considered Model Rule 2.1 and is recommending that a version of that rule be a part of the State Bar’s

comprehensive revisions. Accordingly, the brackets are omitted in the current version of proposed rule 1.8.10.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.8.10 [3-120]

Commission Drafting Team Information

Lead Drafter: James Ham

Co-Drafters: Nanci Clinch, Judge Karen Clopton, Daniel Eaton

I. CURRENT CALIFORNIA RULE

Rule 3-120 Sexual Relations With Client

- (A) For purposes of this rule, “sexual relations” means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.
- (B) A member shall not:
 - (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
 - (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
 - (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.
- (C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.
- (D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

Discussion

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost

strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)

Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 1.8.10

Vote: 14 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.8.10

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.10 Sexual Relations With Client

- (a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.
- (c) If a person* other than the client alleges a violation of this rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

Comment

[1] Although this rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., rules 1.1, 1.7, and 2.1.

[2] When the client is an organization, this rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See rule 1.13.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This rule and the statute impose different obligations.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-120)

Rule 1.8.10 ~~[3-120]~~ Sexual Relations With Client

(a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(Ab) For purposes of this ~~rule~~rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.

~~(B) A member shall not:~~

~~(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or~~

~~(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.~~

~~(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.~~

~~(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.~~

(c) If a person* other than the client alleges a violation of this rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

DiscussionComment

[1] Although this rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., rules 1.1, 1.7, and 2.1.

[2] When the client is an organization, this rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. See rule 1.13.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This rule and the statute impose different obligations.

~~Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to clients. (See, e.g., *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; *Cutler v. State Bar* (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr. 172]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) The relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472 [169 Cal.Rptr. 581]; *Benson v. State Bar* (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 [77 Cal.Rptr. 657].) Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. (See, e.g., *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; *Lantz v. State Bar* (1931) 212 Cal. 213 [298 P. 497].) In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.~~

~~For purposes of this rule, if the client is an organization, any individual overseeing the representation shall be deemed to be the client. (See rule 3-600.)~~

~~Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110.~~

V. RULE HISTORY

In 1989, Assembly Bill No. 415 (Roybal-Allard) enacted Business and Professions Code § 6106.8 (Stats. 1989, ch. 1008), which required the State Bar, with the approval of the Supreme Court, to adopt a rule of professional conduct governing sexual relations between attorneys and their clients.

In 1991, a board subcommittee was appointed to study the subject. The subcommittee considered five versions of a rule of professional conduct. One version, Draft B, provided a bright-line ban similar to ABA Model Rule 1.8(j).¹ In a memorandum to the Board dated April 10, 1991, the subcommittee concluded that “a flat prohibition on lawyer-client sexual contact will not withstand constitutional challenge.” Public comment also expressed concern about the constitutional issue. The subcommittee had considered the psychotherapist prohibition in Business and Professions Code § 729 and noted that no appellate court had addressed the constitutionality of that statute.²

In May 1991, the State Bar transmitted the April 10, 1991 memorandum and the five draft rules to the California Supreme Court. The Board recommended Draft F, which provided an evidentiary presumption that lawyer-client sexual relations violate the rule’s prohibition and shifted the burden of proof to the lawyer in a disciplinary proceeding.

In a letter dated May 20, 1992, the Court directed the State Bar to provide additional legal analysis of the constitutional validity of Draft F, particularly whether the proposed rule and its rebuttable presumption were the least restrictive means of achieving the state’s interests. Before the State Bar provided a response, the Court approved Draft F with modifications deleting the evidentiary presumption. Current rule 3-120 became operative on September 14, 1992 and has not been amended since.

In 1992, the Legislature added § 6106.9 (Stats. 1992, ch. 740) to regulate lawyer-client sexual relations.³ Section 6106.9 and rule 3-120 have comparable restrictions.

¹ ABA Model Rule 1.8(j) states: “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”

² There is still no appellate court decision addressing the constitutional issue.

³ Section 6106.9 provides:

(a) It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to do any of the following:

(1) Expressly or impliedly condition the performance of legal services for a current or prospective client upon the client’s willingness to engage in sexual relations with the attorney.

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and the Comments.

Commission Response: No response required.

2. The second sentence of Comment [3] should be clearer as to its meaning.

Commission Response: The Commission declines to make the suggested change. It believes that the comment adequately and succinctly alerts lawyers to the differences between rule and statute (“This Rule and statute impose different obligations.”)

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

(3) Continue representation of a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently in violation of Rule 3-110 of the Rules of Professional Conduct of the State Bar of California, or if the sexual relations would, or would be likely to, damage or prejudice the client's case.

(b) Subdivision (a) shall not apply to sexual relations between attorneys and their spouses or persons in an equivalent domestic relationship or to ongoing consensual sexual relationships that predate the initiation of the attorney-client relationship.

(c) Where an attorney in a firm has sexual relations with a client but does not participate in the representation of that client, the attorneys in the firm shall not be subject to discipline under this section solely because of the occurrence of those sexual relations.

(d) For the purposes of this section, “sexual relations” means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(e) Any complaint made to the State Bar alleging a violation of subdivision (a) shall be verified under oath by the person making the complaint.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seventeen public comments were received. Eight comments agreed with the proposed Rule, six comments disagreed, and three comments agreed only if modified. During the 45-day public comment period, three public comments, including the above comment from OCTC, were received. Two comments disagreed with the proposed Rule and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. California's Constitutional Right to Privacy

In 1972, California voters amended Article I, § 1 of the California Constitution to provide a specific right to privacy:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

In *Am. Acad. Of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 341-342 [66 Cal.Rptr.2d 210], the California Supreme Court discussed the fundamental right of autonomy privacy, which consists of a class of interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference. Sexual privacy is included under autonomy privacy. "California's privacy protection," the Court has held, "embraces sexual relations." *Vinson v. Sup. Ct.* (1987) 43 Cal.3d 833, 841 [239 Cal.Rptr. 292][privacy protection bars discovery into plaintiff's sexual history].

However, the California Supreme Court has emphasized that the right to privacy is not absolute. *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 38 [26 Cal.Rptr.2d 834]. The Court has stated, "[e]ven when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy," and those factors must be considered when weighing personal privacy rights. *Id.* at p. 36.

The only California case that has considered the right to privacy with respect to attorney-client sexual relations, *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369 [193 Cal.Rptr. 422], was decided before current rule 3-120 was enacted. The court in *Barbara A.* held that a woman who became pregnant by her former attorney was not barred from suing the attorney for battery and deceit. *Id.* at p. 385. The woman alleged that she consented to sexual intercourse in reliance on

the attorney's knowingly false representation that he was sterile, that the lawyer-client relationship produced in her a sense of trust, and that she justifiably relied on the attorney's representation. The court of appeal allowed the suit to proceed, but declined to address the plaintiff's claim that it was an ethical breach for an attorney to induce a client to have sexual relations during the course of the representation, stating that the question was more properly directed to the State Bar. *Id.* at p. 384.

In 1991, a California appellate court found that it was a breach of fiduciary duty for an attorney to withhold legal services when his client refused to grant him sexual favors. *McDaniel v. Gile* (1991) 230 Cal.App.3d 363 [281 Cal.Rptr. 242]. Because of the attorney's "special relationship" with the client and because the attorney "was in a position of actual or apparent power over defendant," the court held that his behavior constituted outrageous conduct for the purposes of the client's claim of intentional emotional distress. *Id.* at p. 373. Because the attorney's advances were rejected, however, the court refused to address "whether sexual relations between an attorney and client constitute a per se violation of the fiduciary relationship," and there was no discussion of any state or federal constitutional right to engage in sexual relations with a seemingly willing client. *Id.* at p. 375.

2. California Law Regarding Sexual Relations in Other Professional Settings

California courts have upheld restrictions on sexual relations between physicians and their patients. See, *Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1353 [131 Cal.Rptr.3d 536], emphasis in original "the Legislature decided that the only way to stop physicians from engaging in these unethical practices was to ban 'any act of sexual abuse, misconduct, or relations' between physician and patient." And in *Barbee v. Household Auto. Fin. Corp.* (2003) 113 Cal.App.4th 525 [6 Cal.Rptr.3d 406], the court of appeal upheld a private employer's policy prohibiting "consensual intimate relationship[s] between a supervisor and any employee," concluding that there is no violation of the right to privacy because a supervisor has no "reasonable expectation of privacy in pursuing an intimate relationship with a subordinate," particularly where the supervisor had advance notice of the company's express policy regarding employee relationships. *Id.* at pp. 532-533.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct Rule 1.8(j)," revised May 13, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8j.authcheckdam.pdf [Last visited 2/6/17]

- Eighteen jurisdictions have adopted Model Rule 1.8(j) verbatim.⁴ Sixteen jurisdictions have adopted Model Rule 1.8(j) with modifications.⁵ Eight jurisdictions⁶ address this issue in a different rule or in a Comment to a different rule.⁷ Nine

⁴ The eighteen jurisdictions are: Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Idaho; Illinois; Indiana; Kansas; Kentucky; Missouri; Montana; Nebraska; New Hampshire; North Dakota; Pennsylvania; and South Dakota.

⁵ The sixteen jurisdictions are: Alabama; Alaska; Iowa; Minnesota; Nevada; New York; North Carolina; Ohio; Oklahoma; Oregon; South Carolina; Utah; Washington; West Virginia; Wisconsin; and Wyoming.

⁶ The eight jurisdictions are: California, District of Columbia; Florida; Maine; Maryland; New Mexico; Tennessee; and Vermont.

⁷ Three examples of jurisdictions that have taken a different approach in their Rules of Professional Conduct to how they regulate a lawyer's sexual relations with clients are the District of Columbia, Florida and Maine.

The District of Columbia adds several comments to its Rule 1.7 (Conflict of Interest: Current Clients):

Sexual Relations Between Lawyer and Client

[37] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest under Rule 1.7(b)(4) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.

[38] Especially when the client is an individual, the client's dependence on the lawyer's knowledge of the law is likely to make the relationship between lawyer and client unequal. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client privilege, because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. The client's own emotional involvement may make it impossible for the client to give informed consent to these risks.

[39] Sexual relationships with the representative of an organization client may not present the same questions of inherent inequality as the relationship with an individual client. Nonetheless, impairment of the lawyer's independent professional judgment and protection of the attorney-client privilege are still of concern, particularly if outside counsel has a sexual relationship with a representative of the organization who supervises, directs, or regularly consults with an outside lawyer concerning the organization's legal matters. An in-house employee in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the employee's personal involvement, and another

jurisdictions do not address sexual relations with clients at all in their Rules of Professional Conduct.⁸

representative of the organization may be required to determine whether to give informed consent to a waiver. The lawyer should consider not only the disciplinary rules but also the organization's personnel policies regarding sexual relationships (for example, prohibiting such relationships between supervisors and subordinates).

Florida has adopted Rule 8.4(i), which provides it is misconduct for a lawyer to:

(i) engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer - client relationship including, but not limited to:

- (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
- (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
- (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

Maine has added Comment [12] to its Rule 1.7 (Conflicts of Interest: Current Clients):

Maine has not adopted the ABA Model Rules' categorical prohibition on an attorney forming a sexual relationship with an existing client because such a rule seems unnecessary to address true disciplinary problems and it threatens to make disciplinary issues out of conduct that we do not believe should be a matter of attorney discipline. However, the lack of a categorical prohibition should not be construed as an implicit approval of such relationships. Attorneys have been disciplined under the former Maine Code of Professional Responsibility for entering into sexual relations with clients, and they may be disciplined for similar conduct under these rules. The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. In certain types of representations such as family or juvenile matters, the relationship is almost always unequal; thus, a sexual relationship between lawyer and client in such circumstance may involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship.

⁸ The nine jurisdictions are: Georgia; Louisiana; Massachusetts; Michigan; Mississippi; New Jersey; Rhode Island; Texas; and Virginia.

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

A. Introduction

The Commission voted to change the California rule so that it tracks more closely Model Rule 1.8(j), which establishes a bright line test prohibiting all sexual relations between client and lawyer. Current Rule 3-120 prohibits sexual relations between client and attorney only in cases involving (i) a demand for sexual relations incident to or as a condition of any professional representation; (ii) coercion, intimidation, or undue influence in entering into sexual relations with a client; or (iii) where the sexual relations cause the member to perform legal services incompetently. Consistent with the existing rule, the proposed rule does not apply to consensual sexual relations which predate the initiation of the lawyer client relationship.

B. Concepts Accepted (Pros and Cons):

1. Recommend adoption of a bright-line prohibition on sexual relations between lawyers and their clients.
 - Pros: Establishing a violation of the current rule and its statutory counterpart, Business and Professions Code section 6106.9, has been extremely difficult to prove. Consequently, improper sexual relations are not deterred by the current rule or statute because discipline is seldom imposed. The proposed broader prohibition significantly reduces enforcement obstacles and is a bright-line statement of the prohibition on sexual relations. The proposed revisions to the Rule also fulfill each of the five elements of this Commission's Charter by: (1) promoting confidence in the legal profession and ensuring adequate protection to the public; (2) setting forth a clear and enforceable disciplinary standard; (3) eliminating an unnecessary difference between California's rule, on the one hand, and the ABA Model Rule subsection and rules adopted by most of the states whose rules of conduct address this subject, on the other hand; (4) eliminating ambiguity and uncertainty in the current Rule in favor of a bright-line Rule; and (5) eliminating an unnecessary Comment to the Rule.
 - Cons: The data does not establish that it is "extremely difficult to prove" valid cases of improper sexual conduct. According to State Bar data found in the May 31, 2012 Memorandum from State Bar Staff to the Supreme Court of California regarding proposed Rule 1.8.10, 135 case files alleging sex with a client were reviewed. Although many of those cases were closed, there is no explanation for why OCTC closed the files. In point of fact, OCTC has not taken these cases to trial and there is virtually no record of any losses or successes. Further, as long as there is a "he said/she said" dispute, the proposed rule will be just as "difficult" to prove as the present rule. Indeed, the May 31, 2012 memo reports that there were only 15 cases out of more than 450 complaints where the respondent acknowledged the existence of a sexual relationship. Those cases were presumably not pursued because there was

no evidence of misconduct under the existing rule or client harm. There is no evidence showing that these cases are made “difficult” because of requirements to show undue influence, duress, etc. Rather, any difficulty arises from a denial that sexual relations occurred. That will not change under the proposed rule. As the OCTC staff noted in the May 31, 2012 memorandum, the cases are often difficult to prove “because the evidence frequently amounts to a case of ‘he said’ versus ‘she said.’” Further, “OCTC rarely receives a solid sex-with-client complaint that is not supported by another allegation that is easier to prove. The better sex-with-client cases are more easily prosecuted and proven under [B&P Code] section 6106...” There is also little policy justification for easing the legal requirements of proof to justify attorney discipline. If a case is weak or lacks evidentiary support, it does not justify prosecution. If there are proof problems in establishing a claim, the answer is not to automatically discipline attorneys because that is not fair. A bright-line prohibition is also overbroad as it applies in situations where no protection is needed, and the purposes of discipline are not furthered by the imposition of discipline.

A broad bright-line prohibition implicates a lawyer’s federal and state constitutional rights to association and privacy. The prohibition also prohibits two adults who, on the one hand, are not exerting, nor on the other, suffering from, undue influence or coercion, from consenting to an intimate relationship.

2. Recommend retaining the exceptions in current rule 3-120 for sexual relations with a client who is a spouse, updated to include a registered domestic partner, and where the sexual relationship existed prior to the formation of the lawyer-client relationship.
 - Pros: The Commission is aware of no evidence that these current exceptions have undermined the policies underlying the rule. That these exceptions do not interfere with the rule’s objectives is indicated by the fact that every jurisdiction that has adopted a specific rule regulating client sexual relations has the exceptions.
 - Cons: None identified.
3. Delete current rule paragraph 3-120(D), which provides that a violation of the rule by a lawyer is not imputed to other lawyer’s in that lawyer’s firm.
 - Pros: Paragraph (D) has been removed because the Commission is recommending the adoption of proposed Rule 1.8.11, which provides that with

the exception of proposed Rule 1.8.10, prohibitions under the rules in the 1.8 series (Rules 1.8.1 through 1.8.9) are imputed to lawyers in the same firm.⁹

- Cons: None identified.
4. Recommend adoption of new paragraph (c), derived from Minnesota Rule 1.8(j), which provides that when a third party files a complaint under the rule, a Notice of Disciplinary Charges may not be filed under the rule until the State Bar has attempted to obtain the client's statement regarding whether the client will be unduly burdened by further investigation.
- Pros: Paragraph (c) recognizes the California Constitution's express right of privacy and appropriately tailors the proposed rule to avoid a potential Constitutional infirmity. The focus is on the client's right of privacy. Further, although the client is provided with the opportunity to inform the investigation, the client does not have a veto power over the State Bar's ability to pursue a charge in the interests of public protection.
 - Cons: The provision does not go far enough to remove the potential Constitutional violations inherent in a rule that provides for an absolute prohibition on sexual relations with a client.

C. Concepts Rejected (Pros and Cons):

1. Retain the content of the first Discussion paragraph to current rule 3-120 as a Comment.
- Pros: This paragraph is necessary because it identifies the policy basis of the rule – namely that sexual exploitation by an attorney is improper. The Comment explains the circumstances that justify the state's intervention and regulation of sexual conduct between adults. The California cases cited support these underlying principles.
 - Cons: This paragraph is not necessary for guidance.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

⁹ The blackletter text of proposed Rule 1.8.11 provides:

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

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

1. The bright-line ban on sexual relations in the proposed rule is a substantially different approach from current rule 3-120, which permits lawyer-client sexual relations unless a member violates a specific prohibition in rule 3-120(B), i.e., a lawyer demanding sexual favors as a condition of representation, a lawyer employing coercion, intimidation, or undue influence in entering sexual relations with a client, or when the sexual relations cause the lawyer to perform legal services incompetently.

E. Non-Substantive Changes to the Current Rule or Clarifying Changes to Model Rule 1.8(j):

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 approximate the ABA Model Rules numbering and formatting (e.g., lower case letters). See paragraph 3, below.
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Assign the number 1.8.10 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as Rule 1.8(j).
 - Pros: The Commission agrees with the approach taken by the first Commission. The first Commission 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, the first Commission 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 jurisdictions to research California case law that might interpret and apply the rule.
4. Other non-substantive changes to the Model Rule include: the use of “lawyer-client” replaces the Model Rule’s “client-lawyer.” This conforms to state statutory language commonly used for the lawyer-client relationship. (E.g., Evid. Code § 958).
5. The verb “have” in Model Rule 1.8(j) is changed to “engage in” in proposed Rule 1.8.10(a): “A lawyer shall not engage in sexual relations with a client unless. . . .” Because the verb “have” might be misconstrued to mean that the lawyer must be the initiator or the aggressor, and that “engage in” would not suggest that the lawyer must be the initiator to trigger the prohibition, the Commission deviated from the Model Rule language. Ohio’s variation of Model Rule 1.8(j) similarly replaces “have” with “solicit or engage in.”

F. Alternatives Considered:

The only alternative considered was whether to retain the current California rule.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Ham submitted a written dissent. See attached for the full text of the dissent and the Commission’s response to the dissent.

XI. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.8.10 [3-120] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.10 [3-120] in the form attached to this Report and Recommendation.

**Commission Member Dissent, Submitted by James Ham,
on the Recommended Adoption of Proposed Rule 1.8.10**

I dissent. While I agree that sexual relations with a client is usually unwise, and that sexual relations involving a quid quo pro, coercion, intimidation or undue influence, or under circumstances where the lawyer's competence is impaired, should subject a lawyer to discipline, I do not support the proposed expansion of the rule to prohibit all sexual relations, under any circumstances, under penalty of discipline.

Without question, some attorney-client relationships involve vulnerable clients and unequal bargaining positions. The existing rule protects the public against attorney misconduct in those cases by making it cause for discipline to engage in sexual relations in exchange for legal services, or under circumstances involving coercion, intimidation, or undue influence.

The proposed rule, however, bans all sexual relations, regardless of circumstance. I agree with the views expressed by members of the public, as well as the Los Angeles County Bar Association opposing this rule, and note the lack of consensus among the members of COPRAC concerning the wisdom of the proposed total ban. The existing rule articulates a proper balance that protects the public against unethical lawyer conduct, while respecting the rights of citizens to be free from overly intrusive and overbroad regulation of private affairs between consenting adults.

There is no empirical or even reliable anecdotal evidence that a complete ban on sexual relations is needed to protect the public or regulate the legal profession effectively. If, under the existing rule, the evidence is insufficient to support attorney discipline, the answer is not to pass a rule dispensing with proof of coercion, undue influence, quid pro quo or lack of competence, and imposing discipline based merely upon the fact that sexual relations occurred. Proponents of a complete ban cannot articulate why a lawyer should be disciplined for sexual relations with a mature, intelligent, consenting adult, in the absence of any *quid pro quo*, coercion, intimidation or undue influence. Nor can the proponents establish that the existing rule presents evidentiary burdens that are unjustified and which cannot be met by complaining witnesses.

The paradigm that all attorney-client relationships involve unequal bargaining power does not apply in many legal relationships and therefore cannot supply the rationale for this rule. Likewise, any attempt to analogize the legal professional to medical professionals or to psychologists is not persuasive because the range of relationships between legal professionals and clients is vastly different, as is the nature of the work performed. A complete ban would infringe personal rights in circumstances where there is no undue influence, coercion or risk to competent representation.

The proposed rule also vests entirely too much discretion in prosecutorial authorities, who may apply the complete ban rule against some, but not others, in an unfair, arbitrary or capricious manner.

**Commission's Response to Dissent Submitted by James Ham
on the Recommended Adoption of Proposed Rule 1.8.10**

The dissent of our colleague James Ham to Proposed Rule 1.8.10 consists of a vigorous defense of the current rule that addresses sex with clients, Rule 3-120. The existing rule permits attorneys to have sex with their clients unless: (1) the attorney conditions the representation of a client on submission to sexual demands; (2) the attorney uses "coercion, intimidation, or undue influence" to get the client to submit to sexual demands; or (3) continued sexual relations with the client will cause the attorney to violate the attorney's duty to the client to perform legal services competently. (Rule of Professional Conduct 3-120(B).)

Mr. Ham asserts that the current rule "articulates a proper balance that protects the public against unethical lawyer conduct, while respecting the rights of citizens to be free from overly intrusive and overbroad regulation of private affairs between consenting adults."

But the current rule is broken and the Commission has fixed those inadequacies by proposing a revised rule that, unlike the existing rule, complies with the mandate of this Commission's charter in every respect. As an initial matter, Mr. Ham is simply incorrect when he asserts that proposed Rule 1.8.10 would prohibit an attorney from having any sexual relations with clients "under any circumstances, under penalty of perjury." In fact, the proposed rule carries forward the exceptions in the current Rule for sexual relations between lawyers and their spouses and for sexual relations which predate the establishment of the lawyer-client relationship. (Compare Rule 3-120(C) with Proposed Rule 1.8.10(a).)

The dissent's main point appears to be that there is "no empirical or even reliable anecdotal evidence that a complete ban on sexual relations is needed to protect the public or regulate the legal profession effectively." Leaving aside the mischaracterization of the proposed rule as a "complete ban," the Commission believes that our dissenting colleague misperceives our charge.

The proposed revisions to the Rule fulfill each of the five principles of the Commission's Charter by: (1) promoting confidence in the legal profession and ensuring adequate protection to the public; (2) setting forth a clear and enforceable disciplinary standard; (3) eliminating an unnecessary difference between California's rule, on the one hand, and ABA Model Rule 1.8(j) and rules adopted by the majority (31) of the jurisdictions whose rules address this subject, on the other hand; (4) eliminating ambiguity and uncertainty in the current Rule in favor of a bright-line Rule; and (5) eliminating an unnecessary comment to the Rule.

The current Rule is defective in every one of these respects. Given the mandates of our Charter, it is inconceivable that the Commission would have adopted the existing Rule from scratch. It would have been equally inconceivable, therefore, for the Commission to have retained the current Rule as the dissent proposes.

The Commission has proposed replacing a rule that frames a lawyer's sex with clients as "permitted unless" with a rule that frames a lawyer's sex with clients as "prohibited unless." The Commission believes that strikes the appropriate balance between privacy concerns and the power dynamic of the lawyer-client relationship.

The State Bar of California has tried the existing rule for 25 years and it has not worked. There are virtually no instances in which discipline has been imposed under the existing Rule. Consequently, the Commission has proposed fixing it. That fulfills the charge of this Commission and will lead lawyers more appropriately to discharge their duties to their clients.