BACKGROUND AND HISTORY OF CURRENT RULE 3-120; POLICY CONSIDERATIONS AND CONCERNS RELATED TO PROPOSED RULE 1.8.10

INTRODUCTION

This memorandum provides a brief background and overview of the issues related to proposed Rule 1.8.10. It is provided as an adjunct to the drafting team's Report & Recommendation and is intended to flesh out the different policy concerns the drafting team took into consideration in reaching its decision to recommend to the Commission proposed Rule 1.8.10, which constitutes a significant departure from the manner in which sexual relations with a client are currently regulated in California.

Part I provides background on how the State Bar developed the current rule, the experience it has had in applying it, and how that experience informed the first Commission's recommended blackletter Rule, which is identical to the drafting team's recommended rule. Part II provides a summary of the potential Constitutional issues that implicated in implementing a bright-line prohibition on a lawyer's sexual relations with clients and summarizes how California regulates such conduct in other professions. Part III sets forth arguments that were made against the first Commission's proposed Rule 1.8.10.

I. BACKGROUND

A. History of Current Rule 3-120

In 1989, Assembly Bill No. 415 (Roybal-Allard) enacted Business and Professions Code section 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 State Bar 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 prohibition 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 section 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 would violate the

[1] ABA Model Rule 1.8(j) provides: "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.

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.

B. **Business and Professions Code section 6106.9**

In 1992, the Legislature added section 6106.9 (Stats. 1992, ch. 740) to regulate lawyer-client sexual relations.[3] Section 6106.9 and rule 3-120 have comparable restrictions but adds a requirement that complaints to the State Bar alleging violations of § 6106.9 "shall be verified under oath by the person making the complaint." (§ 6106.9(e))

C. **ABA Model Rule 1.8(j)**

[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.
>
> (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.

As originally adopted by the ABA House of Delegates in 1983, the Model Rules did not include a standalone rule or rule provision that expressly addressed a lawyer's sexual relations with a client. Nevertheless, the conduct was subjected to discipline by applying rules addressing conflicts of interest (e.g., a state's equivalent of Model Rule 1.7 [Current Client Conflicts]), interference with the lawyer's independent professional judgment (e.g., Model Rule 2.1), or misconduct (i.e., a state's equivalent of Model Rule 8.4).[4] However, in 2002, the House of Delegates adopted Model Rule 1.8(j) in its current form.[5]

D. **State Bar Disciplinary Data and Experience**

In early 2010, State Bar staff reviewed OCTC complaint statistics and files in which the complainant alleged either a rule 3-120 or a Business and Professions Code § 6106.9 violation. Files were reviewed to see if the contents would reveal any additional information about investigation or prosecution of these allegations that could not be inferred from the statistical data the State Bar is required to compile.[6]

OCTC's statistical data reveal that between September 1992 (when rule 3-120 was made operative) and December 31, 2009, there were 205 investigated complaints alleging a violation of either rule 3-120 or section 6106.9. Of the 205 investigated complaints, 135 files were available for review. The review of investigated files and OCTC statistics showed the following:

(1) Of 205 complaints, discipline was imposed for a violation of rule 3-120 or section 6106.9 (and other violations) in only one complaint;

(2) Of 205 complaints, only three complaints were closed with a non-disciplinary warning letter or directional letter relating to rule 3-120 or section 6106.9;

(3) Of the 201 remaining complaints, in five complaints suspension was imposed, and in three complaints a private or public reproval was imposed, for misconduct unrelated to sex with a client;

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[4] See, e.g., See, e.g., *In re Rinella*, 677 N.E.2d 909 (Ill. 1997) (conflict and impairment of independent judgment); *In re Berg*, 955 P.2d 1240 (Kan. 1998) (conflict, impairment of independent judgment, and misconduct); see also Restatement (Third) of the Law Governing Lawyers § 16 cmt. (e) (2000) (lawyer may not engage in a sexual relationship with client that would impair lawyer's independent judgment).

[5] As noted in Section VII of the Report & Recommendation, Eighteen jurisdictions have adopted Model Rule 1.8(j) verbatim. Sixteen jurisdictions have adopted Model Rule 1.8(j) with modifications. Eight jurisdictions[5] address this issue in a different rule or in a Comment to a different rule. Nine jurisdictions do not address sexual relations with clients at all in their Rules of Professional Conduct.

[6] Bus. and Prof. Code § 6092.5(d) requires the State Bar to compile disciplinary statistics, including a log of all complaints and complaint dispositions. OCTC compiles information on violations alleged by a complainant and complaint dispositions, such as closure in OCTC. When a complaint leads to formal disciplinary charges filed in the State Bar Court, the administrative office of the State Bar Court compiles statistics on the disposition of disciplinary proceedings, such as private reprovals or suspensions. However, neither office compiles statistics on the specific violations for which discipline is imposed.

(4) All remaining complaints were closed outright, with the exception of three files that were still open and pending as of 2012;

(5) In a number of closed complaints, the insufficient evidence of sexual relations consisted of a "he said" accusation by a client versus a "she said" denial by the lawyer;

(6) In some closed complaints, the alleged victim had credibility issues;

(7) In fifteen closed complaints where there was an indication of a sexual relationship, in many instances the attorney acknowledged the sexual relationship but claimed it was consensual;

(8) Eight accused lawyers had more than one complaint with an allegation of improper sexual relations; and

(9) In five closed complaints, a husband or wife complained that the lawyer had sexual relations with the complainant's spouse during the lawyer's representation of one or both spouses.[7]

E. **First Rule Revision Commission's Proposed Rule 1.8.10**

The first Commission proposed, and the State Bar Board of Trustees adopted, a rule that substantially tracks ABA Model Rule 1.8(j), which prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship pre-dated the lawyer-client relationship. The difference between the Model Rule and the current California rule is that the Model Rule effectively bans sexual relations between lawyers and their clients, while the California rule prohibits sexual relations with a client only under certain circumstances.

The State Bar of California summarized the concerns with current rule 3-120 as follows:

> In 1992, rule 3-120 was viewed as the least restrictive means of achieving the state's interest in protecting clients from sexual exploitation by their lawyers. Since then, however, the State Bar's Office of Chief Trial Counsel ("OCTC") has found that the prohibited conduct is difficult to define and prove. At the same time, the rule does not provide clear guidance to lawyers and clients as to what is acceptable and what is not. Indeed, there are no published cases of a rule 3-120 violation to provide guidance. These difficulties and the scarcity of discipline are evidence that rule 3-120 is not effective in achieving the state's interest.[8]

F. **Prior Comments from OCTC Regarding Rule 3-120**

In 2001, OCTC wrote to the Commission that rule 3-120 does not work because the rule requires proving both the sexual relationship and that the sexual relationship caused the lawyer to violate the competency rule or that coercion or undue influence was used. In 2010, OCTC supplemented its earlier comments with more specific observations on the

[7] See, pages 18-19 of the memorandum re proposed rule 1.8.10, the rule adopted by the first Commission and the Board in 2010, and filed with the Supreme Court in 2012.

[8] See, page 6 of the memorandum re proposed rule 1.8.10, the rule adopted by the first Commission and the Board in 2010, and filed with the Supreme Court in 2012.

difficulties it has experienced with rule 3-120. In particular, OCTC noted that frequently the evidence of a sexual relationship only consisted of a "she said" accusation versus a "he said" denial; lawyers generally will not stipulate to a violation of rule 3-120; and the defense of consent has been an issue.

II. CONSTITUTIONAL ISSUES & CALIFORNIA REGULATION OF SEXUAL RELATIONS IN OTHER PROFESSIONS

A. California's Constitutional Right to Privacy

In 1972, California voters amended Article I, section 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, 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 [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.* (1997) 7 Cal.4th 1, at p. 38. 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, was decided before current Rule 3-120 was enacted. The court in *Barbara A.* held that a woman who became pregnant by her former lawyer 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 lawyer'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 a lawyer 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 a lawyer to withhold legal services when his client refused to grant him sexual favors. *McDaniel v. Gile* (1991) 230 Cal.App.3d 363. 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," (*Id*. at p. 375), and there was no discussion of any

state or federal constitutional right to engage in sexual relations with an allegedly willing client..

B. California Law Regarding Sexual Relations in Other Professional Settings

The prohibition of sexual relations for physicians and psychotherapists in contained in Business and Professions Code section 729. Section 729 provides, in part:

> (a) Any physician and surgeon, psychotherapist, alcohol and drug abuse counselor or any person holding himself or herself out to be a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor, who engages in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a patient or client, or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, unless the physician and surgeon, psychotherapist, or alcohol and drug abuse counselor has referred the patient or client to an independent and objective physician and surgeon, psychotherapist, or alcohol and drug abuse counselor recommended by a third-party physician and surgeon, psychotherapist, or alcohol and drug abuse counselor for treatment, is guilty of sexual exploitation by a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor.
>
> (b) …For purposes of subdivision (a), in no instance shall consent of the patient or client be a defense…
>
> (c) For purposes of this section:
>
> * * * * *
>
> (3) "Sexual contact" means sexual intercourse or the touching of an intimate part of a patient for the purpose of sexual arousal, gratification, or abuse.
>
> (4) "Intimate part" and "touching" have the same meanings as defined in Section 243.4 of the Penal Code.
>
> * * * * *
>
> (e) This section does not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship.

Section 729 makes a sexual exploitation a criminal offense. Another statute, section 726, provides that behavior banned by section 729 "constitutes unprofessional conduct and grounds for disciplinary action . . . ."

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, 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, 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.

III. **ARGUMENTS IN OPPOSITION TO THE FIRST COMMISSION'S BRIGHT-LINE PROHIBITION AGAINST LAWYER-CLIENT SEXUAL RELATIONs**

A. Constitutional Concerns

A prospective ban on sexual relations between an attorney and his or her client is not narrowly tailored to a compelling state interest, and therefore violates the individual's federal and California constitutional rights.

In California, opponents assert that the proposed rule violates an attorney's right to privacy, which is provided for in Article I, section 1 of the California Constitution (see above). In addition, a member of drafting team has raised concerns about the proposed rule violating an individual's freedom of association under the U.S. Constitution.[9]

B. A Prospective Bright-Line Prohibition Is Too Restrictive

The proposed rule does not allow for two individuals, when neither of whom are suffering from or inflicting undue influence or coercion, and the attorney is not failing to perform legal services with competence, from consenting to an intimate relationship for themselves. If we amend the current rule it should permit a sexual relationship between the attorney and client under certain circumstances. There is no evidence of sexual predation among lawyers in California, and the existing rule is more than effective in addressing any legitimate and valid claim.

C. The Proposed Rule Would Conflict with Existing State Law

Adopting a rule that results in a prospective ban on sexual relations between the attorney and the client would result in a conflict with Business and Professions Code section 6106.9, which limits, but does not ban, sexual relations between lawyers and clients. Current rule 3-120 is consistent with section 6106.9.

D. The State Bar Is Not the "Bedroom Police"

The Rules of Professional Conduct should focus on the regulation of the conduct of individuals as lawyers. The current rule properly prohibits the abuse of a lawyer's "power position" over a client by demanding or obtaining sexual favors incident to, or as a condition of, any professional representation. Lawyers should be disciplined when they engaged in such conduct. However, not every lawyer-client relationship is of such

[9] Although the First Amendment does not explicitly reference freedom of association, the United States Supreme Court stated that the right to associate is protected by the First Amendment. *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 617-618. See also, *Griswold v. Connecticut* (1965) 381 U.S. 479; *Lawrence v. Texas* (2003) 539 U.S. 558; *In re Marriage Cases* (2008) 43 Cal.4th 757 [cases addressing federal and California constitutional rights of sexual privacy].

a nature. Outside of having a deleterious effect on a lawyer-client relationship, the social habits of lawyers that do not reach the level of moral turpitude should not be the subject of disciplinary action by the State Bar. Concern properly arises where such a relationship occurs under circumstances where the professional relationship is compromised. Current rule 3-120 addresses this problem.

In addition, there is concern that merely banning sexual relations without requiring some nexus to a lawyer's professional duties may encourage dissatisfied clients to use the existence of a sexual relationship with a lawyer as retaliation against the lawyer for some perceived slight or offense. The State Bar disciplinary system should not be a venue for jealous romantic partners to seek vengeance.

E. The Proposed Rule is Unduly Paternalistic

Arguments such as "the attorney-client relationship is almost always unequal," and that "it is unlikely a client can provide informed consent due to the 'client's own emotional involvement,'" are overly simplistic conclusions offered to explain complex social interactions, as well as unduly paternalistic. To the extent these conditions exist in a given relationship resulting from the use of coercion, quid pro quo demands, or causing harm to the attorney-client relationship, current rule 3-120 bans the conduct.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-120 [1.8.10]

Lead Drafter: Ham
Co-Drafters: Clinch, Clopton, Eaton
Meeting Date: January 22 – 23, 2016

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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

A majority of the drafting team members voted to recommend a proposed amended rule as set forth below in Section III. The vote was 3-1 in favor of making the recommendation.

III. PROPOSED RULE 1.8.10 [3-120] (CLEAN)

Rule 1.8.10 Sexual Relations With Client

(a) A lawyer shall not engage in sexual relations with a client 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.

COMMENT

[1] This Rule is not applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, 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 relationship. See Rules 1.7(a)(2) (conflicts of interest)], 1.1 (competence) and 2.1 (independent judgment).

[2] When the client is an organization, this Rule is applicable 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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-120 [1.8.10]

Lead Drafter: Ham
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IV. PROPOSED RULE 1.8.10 (REDLINE TO CURRENT CALIFORNIA RULE 3-120)

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

(a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(~~A~~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.

~~(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~~COMMENT

~~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.~~

[1] This Rule is not applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship because issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the lawyer-client relationship. However, 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 relationship. See Rules 1.7(a)(2) (conflicts of interest)], 1.1 (competence) and 2.1 (independent judgment).

~~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.)~~[2] When the client is an organization, this Rule is applicable 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.

~~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. PUBLIC COMMENTS SUMMARY

- **Leonard C. Hart Nibbrig, 06/04/15**

  This rule should permit an opposing party to raise the issue of an attorney-client sexual relationship to the court out of concern for how that attorney's credibility may affect the outcome of the matter.

- **Bar Association of San Francisco, 06/17/15**

  Concerned that rule subjective and subject to misinterpretation. Recommend adoption of a bright-line rule similar to MR 1.8(j).

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

  [Insert summary of comments.]

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- **RUSSELL WEINER, OCTC, 6/15/2010:**

  1. Comment 1 is too long and seems more appropriate for a treatise, law review, or ethics opinion. The Commission, however, might want to advise the attorneys in a Comment of Business & Professions Code section 6106.9, which also covers sexual relations between attorneys and clients.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

  OCTC's recommends simplifying the rule regarding sexual relations with a client to prohibit sexual relations with a client unless they predate the commencement of the lawyer-client relationship or occur after the lawyer-client relationship has ended.

  Remove:

  . . .

  ~~(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.~~

  And replace with:

  <u>(B) A member shall not have sexual relations with a client unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced.</u>

  <u>(C) While lawyers are associated in a firm, this prohibition applies to any one of them, regardless of whether or not they are working on the case for the relevant client.</u>

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-120 [1.8.10]

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Discussion:

. . .

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can 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. Because of the significant danger of harm to the client's interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client or harm to the client's case.

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, 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 relationship.

When the client is an organization, this Rule prohibits a lawyer for the organization (whether inside or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with the lawyer concerning the organization's legal matters, unless the relationship existed before the commencement of the lawyer-client relationship.

OCTC COMMENTS:

OCTC believes that the current rule regarding sexual relations with a client does not work. It requires the State Bar to prove both the sexual relationship and that it caused the lawyer to act incompetently or that coercion or undue influence was used. Yet, such a relationship appears to create conflicts and a host of problems. These issues are best resolved, as the ABA does in proposed Model Rule 1.8(j) by prohibiting all sexual relationships with a client, unless they predate the commencement of the attorney-client relationship.

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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-120 [1.8.10]

Lead Drafter: Ham
Co-Drafters: Clinch, Clopton, Eaton
Meeting Date: January 22 – 23, 2016

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

- **Pennsylvania Rule 1.8(j)** is identical to Model Rule 1.8(j):

  Pennsylvania Rule 1.8(j) Conflict of Interest: Current Clients: Specific Rules

  (j) A lawyer shall not have sexual relations with a client unless a consensual relationship existed between them when the client-lawyer relationship commenced.

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 9/14/15]

- Eighteen jurisdictions have adopted Model Rule 1.8(j) verbatim.[1] Sixteen jurisdictions have adopted Model Rule 1.8(j) with modifications.[2] Eight jurisdictions[3] address this issue in a different rule or in a Comment to a different rule.[4] Nine jurisdictions do not address sexual relations with clients at all in their Rules of Professional Conduct.[5]

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[1] 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.

[2] 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.

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

[4] 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 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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-120 [1.8.10]

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

A. Introduction

A companion memo to this Report and Recommendation has been prepared to provide a brief background and overview of the issues related to proposed Rule 1.8.10. The memo fleshes out the different policy concerns the drafting team took into consideration in reaching its decision to recommend to the Commission proposed Rule 1.8.10, which constitutes a significant departure from the manner in which sexual relations with a client are currently regulated in California. The drafting team recommends reading that memo. References to "Memo," below, are to that memo.

B. Concepts Accepted (Pros and Cons):

1. Recommend adoption of a bright-line prohibition on sexual relations between lawyers and their clients.
   - o Pros: Establishing a violation of the current rule and its statutory counterpart, Bus. & Prof. Code § 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. (See Memo, Section I.D.) The proposed revisions to the Rule also fulfill each of the five elements of this Commission's Charter by: (1)

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.

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

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.

- o Cons: The data does not establish that it is "extremely difficult to prove" valid cases of improper sexual conduct. 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.
- o 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. (See Memo, Sections II.A and III.)

2. Retain in paragraph (b) the definition of "sexual relations" as provided in both current rule 3-120 and section 6106.9(d).
   - o Pros: Maintaining the same definition provides guidance to lawyers and avoids confusion as to what definition to apply. Eight other jurisdictions use a similar definition in their rule counterpart.[6]
   - o Cons: None identified.
3. Delete paragraph (D) from the current rule.
   - o Pros: Paragraph (D) has been removed pending the Commission's consideration of a provision similar to Model Rule 1.8(k), which provides that with the exception of Model Rule 1.8(j), conflicts that arise under Model Rule 1.8 provisions are imputed to lawyers in the same firm.[7]
   - o Cons: None identified.
4. Delete the spousal exception contained in paragraph (C) of the current rule.
   - o Pros: A spouse who later becomes a client is within the exception for sexual relations that predate the lawyer-client relationship.

[6] The eight jurisdictions are: Maine, New York, North Carolina, Oklahoma, Oregon, Utah, West Virginia, and Wisconsin.

[7] RRC1 adopted a similar provision, denominated as Rule 1.8.11, which provided:

> **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.

- Cons: This omission may have an impact in the event a client becomes a spouse after the lawyer-client relationship has commenced.

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..

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. (See Memo, Sections I.A, B & D.)

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.

- o 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).
   - o Pros: The drafting team agrees with the approach taken by RRC1. RRC1 proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, RRC1 recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.
   - o 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. Current rule 3-120(C) contains an exception for a spouse who later becomes a client. Although the reference to a spousal exception is eliminated from the proposed rule, a spouse who later becomes a client comes within the exception for sexual relations that pre-date the lawyer-client relationship.
5. 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).
6. 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. . . ." When approving the first Commission's proposed rule 1.8.10, the State Bar Board of Trustees believed "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. Ohio's variation of Model Rule 1.8(j) similarly replaces "have" with "solicit or engage in."

F. Alternatives Considered:

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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-120 [1.8.10]

Lead Drafter: Ham
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IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Ham

- 1/4/16: After giving this rule a great deal of thought, and considering our discussions, I have concluded that both the vulnerable and those who have done nothing wrong need to be protected. The vulnerable need to be protected for obvious reasons. Those who have done nothing wrong also need to be protected from overreach, unfairness, and arbitrary or political agency action. I do not see a sound basis for imposing government sanction on an individual for having engaged in a consensual relationship where there is no indicia of harm or improper conduct.

  I have concluded that the optimum rule is one that contains a presumption affecting the burden of proof, where an attorney has presumptively violated the rule if it is established that sexual relations with a client occurred. The presumption may be overcome, however, by evidence that the sexual relationship did not involve coercion, intimidation, or undue influence, and was not required or demanded incident to or as a condition of any professional representation. This seems like basic fairness. I think the serious issues of substantive as well as procedural due process, as well as the First Amendment rights might also be addressed by this approach.

Clinch

- [Date]: Email Comment
- [Date]: Email Comment

Clopton

- [Date]: Email Comment
- [Date]: Email Comment

Eaton

- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-120 [1.8.10] in the form attached to this report and recommendation.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-120 [1.8.10]

Lead Drafter: Ham
Co-Drafters: Clinch, Clopton, Eaton
Meeting Date: January 22 – 23, 2016

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-120 [1.8.10] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

[None or insert a dissent from a member of the Drafting Team].

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 3-120
"Sexual Relations With Client"

I. Text of Current Rule:

(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. (Added by order of Supreme Court, operative September 14, 1992.)

II. Background/Purpose:

A. History of Rule 3-120

In 1989, Assembly Bill No. 415 (Roybal-Allard) enacted Business and Professions Code section 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 section 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.

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[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.

B. Enactment of Business and Professions Code Section 6106.9

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

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

A. 2015 Comment

In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 3-120:

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

B. 2010 Comments

In a June 15, 2010 Memo to the first Commission, OCTC provided the following comment on the first Commission's proposed Rule 1.8.10:[4]

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[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.

(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.

Comment 1 is too long and seems more appropriate for a treatise, law review, or ethics opinion. The Commission, however, might want to advise the attorneys in a Comment of Business & Professions Code section 6106.9, which also covers sexual relations between attorneys and clients.[5]

C. 2001 Comments

In a September 27, 2001 Memo to the first Commission, OCTC provided the following comment on rule 3-120:

> OCTC recommends simplifying the rule regarding sexual relations with a client to prohibit sexual relations with a client unless they predate the commencement of the lawyer-client relationship or occur after the lawyer-client relationship has ended.
>
> Remove:
>
> . . .
>
> ~~(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~~

---

[4] The black letter of the first Commission's proposed Rule 1.8.10 provided:

> **Rule 1.8.10 Sexual Relations With Client**
>
> (a) A lawyer shall not engage in sexual relations with a client 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.

[5] Comment [1] of proposed Rule 1.8.10 carried forward Discussion ¶.1 of rule 3-120 nearly verbatim and added the following sentence:

> The paragraph (a) prohibition applies equally whether the lawyer is the moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.

~~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.~~

And replace with:

(B) A member shall not have sexual relations with a client unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced.

(*C) While lawyers are associated in a firm, this prohibition applies to any one of them, regardless of whether or not they are working on the case for the relevant client.*

Discussion:

. . .

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can 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. Because of the significant danger of harm to the client's interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client or harm to the client's case.

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, 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 relationship.

When the client is an organization, this Rule prohibits a lawyer for the organization (whether inside or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or

regularly consults with the lawyer concerning the organization's legal matters, unless the relationship existed before the commencement of the lawyer-client relationship.

OCTC COMMENTS:

OCTC believes that the current rule regarding sexual relations with a client does not work. It requires the State Bar to prove both the sexual relationship and that it caused the lawyer to act incompetently or that coercion or undue influence was used. Yet, such a relationship appears to create conflicts and a host of problems. These issues are best resolved, as the ABA does in proposed Model Rule 1.8(j) by prohibiting all sexual relationships with a client, unless they predate the commencement of the attorney-client relationship.

IV. Potential Deficiencies in the Current Rule:

A. See above **2001 input from OCTC**.

B. Would it be more effective to adopt a rule that expressly bans, rather than limits, sexual relations between lawyers and their clients?

C. Is the current rule's definition of "sexual relations" sufficient?

D. Is this current Discussion paragraph describing how the rule applies to a client who is an organization sufficient? Should this description be moved into the rule itself?

V. California Context:

A. California's Constitutional Right to Privacy

In 1972, California voters amended Article I, section 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.

B. <u>California Law Regarding Sexual Relations in Other Professional Settings</u>

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.

VI. Approach In Other Jurisdictions (National Backdrop):

ABA Model Rule 1.8(j). Not including California, eighteen states have adopted Model Rule 1.8(j) verbatim.[6] Sixteen states have adopted Model Rule 1.8(j) with modifications.[7] Seven jurisdictions[8] address this issue in a different rule or in a Comment to a different rule.[9] Nine states do not address sexual relations with clients at all in their Rules of Professional Conduct.[10]

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

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

[8] The seven jurisdictions are: District of Columbia; Florida; Maine; Maryland; New Mexico; Tennessee; and Vermont.

[9] Three examples of jurisdictions that have taken a different approach in their Rules of Professional Conduct to regulating 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 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

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 9/14/15]

VII. Public Comment Received by the First Commission:

The clean text of proposed rule 1.8.10 drafted by the first Commission and adopted by the Board to replace rule 3-120 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 3-120, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 3-120 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

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

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the

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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.

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

drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether to extend the rule to sexual relations occurring after the lawyer-client relationship terminates.

(2) Business and Professions Code section 6106.9(b) exempts relationships with "spouses or persons in an equivalent domestic relationship." Current rule 3-120(C) only exempts "spouses." In light of United States Supreme Court decision in *Obergefell v. Hodges* (2015) 135 S.Ct. 2584, is the term "spouse" sufficient to cover same-sex marriages.

(3) Business and Professions Code section 6106.9(a)(1) addresses relationships with *prospective* clients, whereas Rule 3-120(B)(1) addresses only actual clients. Should the proposed rule be harmonized with the statute?

(4) Business and Professions Code section 6106.9(e) requires any party alleging a violation of the statute to submit a verified complaint to the State Bar. Should the proposed rule be harmonized with the statute?

(5) Whether to retain rule 3-120 as a standalone rule or to include it as part of another rule, similar to what has been done in other jurisdictions, (e.g., Florida Rule 8.4(i)).

IX. Research Resources:

- Barbara A. v. John G. (1983) 145 Cal.App.3d 369
- McDaniel v. Gile (1991) 230 Cal.App.3d 363
- Orange County Bar Association Opinion – 2003-02 (Attorney-Client Sexual Relations)
- ABA Formal Ethics Opinion 92-364 (Sexual Relations With Clients)
- California State Bar Formal Opinion 1987-92

Power and Control: Lawyer-Client Relationship
Abuse and Psychological Assault

Using Coercion and Threats
Making or carrying out threats to do something to harm the client • threatening to withdraw as counsel of record on the client's case • threatening to commit incompetent or unethical practice by violating the State Bar disciplinary rules of professional conduct • threatening to request the court to order a psychological evaluation of the client without just reason • ambushing and railroading the client to prevent informed decisions • exaggerating the harmful outcomes to the client • pressuring the client to accept a plea deal offer • pressuring the client to do illegal things.

Using Terrorism and Assault
Making the client afraid by using looks, tones, demeanors, gestures, actions • staging temper tantrums • violating rules of politesse; rules of orderly, fair meetings; and the State Bar ethics code • displaying weapons or other objects or images of violence • terrorizing the client • sadistically manipulating the client • psychologically assaulting the client.

Using Emotional Abuse
Putting the client down • making the client feel bad about herself or himself • calling the client names • making the client think she or he is crazy • playing mind games • humiliating the client • making the client feel guilty.

Using Isolation and Guilt
Isolating the client and forbidding client to consult with other lawyers without permission • using presumed guilt or suspicion of guilt of client to justify abuse • using private meetings instead of telephone, mail and email communications • refusing to state the purpose of meetings.

Minimizing, Denying and Blaming
Making light of the abuse and not taking client's concerns about it seriously • saying the abuse didn't happen • shifting responsibility for abusive behavior • saying the client caused the abuse.

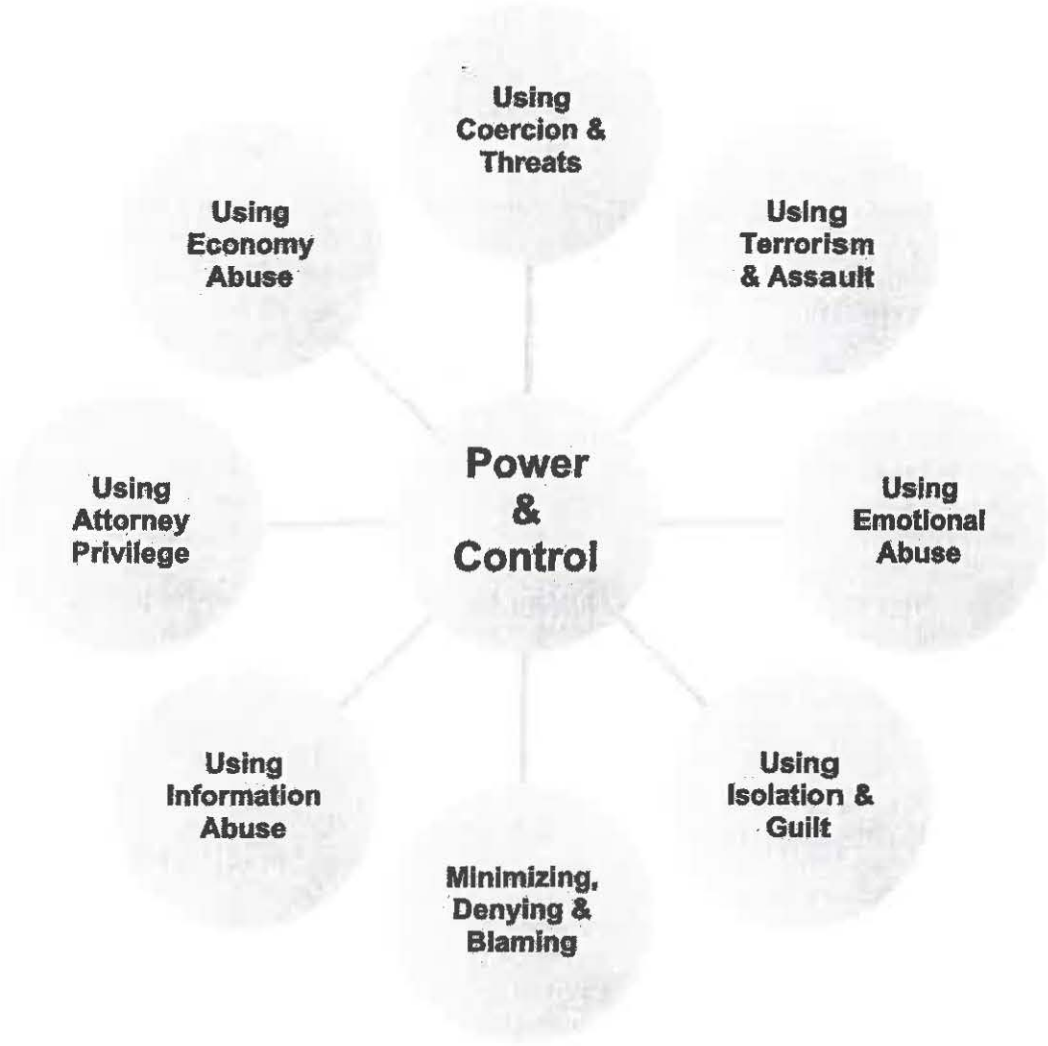
Using Information Abuse
Misrepresenting the experience and specialized knowledge of the lawyer • using asymmetric information to mislead the client • preventing client from seeing all the evidence • providing insufficient information for client to make an informed decision • using misrepresentation, double-talk, stonewalling and obfuscation to prevent informed decisions • not informing the client about public access to the case file at the Court house • refusing to communicate, explain and clarify in writing • failing to disclose State Bar ethics rules existence and contact information.

Using Attorney Privilege
Acting like the boss • treating the client like a servant • making the big decisions • ignoring client's instructions, decisions and best interests • failing to get client's consent • being the one to define lawyers' and clients' roles • not writing a fee contract • preventing preview of contract before signing • making unilateral changes to contract after initial agreement • using vague, ambiguous, ineffective language that protects the lawyer but not the client • refusing arbitration.

Using Economy Abuse
Making the client pay more money • not refunding client's money if not used for the stipulated purpose or if not earned • using bait-and-switch tactics after receiving advance fee payment.

Power and Control: Lawyer-Client Relationship

Abuse and Psychological Assault



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Power and Control Wheel: A Tool for Recognizing Abusive Behavior

The power and control wheel for the lawyer-client relationship is adapted with permission from the wheel diagram of Domestic Abuse Intervention Project, www.TheDuluthModel.org, developed by formerly battered women to describe their experiences. The lawyer-client wheel diagram illustrates forms of abuse and psychological assault that may be inflicted on clients by their lawyers. Psychological assault is a criminal offense in law.