

Rule 1.8.10 [3-120] Sexual Relations With Client
(Commission's Proposed Rule Adopted on February 19 – 20, 2016 – Clean Version)

- (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] Although this Rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., Rules 1.1 (Competence), 1.7 (Conflicts of Interest: Current Conflicts) and 2.1 (Independent Judgment).

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

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

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Synopsis of Public Comments

TOTAL = 4 **A = 0**
D = 4
M = 0
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-2	Johnson, William (7-1-16)	N	D		This proposed rule change is terrible and may violate constitutional rights to privacy, sexual relations, free association and marriage. If a client and a lawyer fall in love, they can move in together, they can get married but they can't have sexual relations? This rule prohibits sexual relations between consenting adults when there is no apparent or actual abuse. This rule should be revised or withdrawn to avoid impinging on individual liberties and constitutionally protected rights.	The Commission considered overbreadth as well as other constitutional issues (such as freedom of association, privacy, and equal protection of the rights of the married and unmarried), but concluded a blanket prohibition was appropriate to protect the public. Eighteen jurisdictions have adopted Model Rule 1.8(j) verbatim. Another 13 have adopted a rule that is similar to MR 1.8(j), i.e., the rules in those states include an absolute ban but also includes additional language, e.g., a definition of "sexual relations." Four jurisdictions have language in the comments to another rule (e.g., Rule 1.7) that is similar to the comments to MR 1.8(j). Four jurisdictions have adopted a rule similar to the Cal. Rule, requiring that the lawyer have obtained sex through coercion, etc. or as a quid pro quo. The Commission is not aware of any published Federal or State Court opinion which has ruled on these constitutional issues in the context of this rule.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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X-2016-3	Greenlee, Bruce (7-1-16)	N	D		<p>I am not a fan of either the current rule or the proposed rule. The proposed rule of virtually total prohibition is overbroad.</p> <p>The key question to be asked is not whether [sexual relations] will interfere with an attorney's ability to perform services competently. The key question is whether the client comes to the attorney in a vulnerable position, from which a sexual relationship with the attorney will exploit that vulnerability. I recognize there are drafting challenges in defining the areas in which sex should be off limits without global prohibition. But to avoid unwarranted intrusion into both parties' right to privacy, the effort should made.</p> <p>It is not clear that the definition of "sexual relations" would prohibit oral sex as "touching" connotes only use of hands to most people.</p>	(See above response to the comment from William Johnson.)
X-2016-7	Wilson, Ken (7-4-16)	N	D		<p>The proposed rules goes beyond the professional relationship which ought to be the limits of the Bar Association and invades the private relationship of the individuals. The current rule adequately deals with this situation.</p>	(See above response to the comment from William Johnson.)

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X-2016-19a	Anderson, Mark	N	A		We need a bright-line rule here. It is unprofessional to begin an intimate/romantic/sexual relationship with a client while still in the professional relationship. Trying to carve out exceptions only gives rise to endless arguments about them. We should join the vast majority of other states in simply barring these relationships.	The Commission agrees. The proposed rule adopts a bright line test that is based on the corresponding Model Rule 1.8(j), which has been adopted in a majority of jurisdictions. (See above response to the comment from William Johnson.)
X-2016-30	Grossman, Nicholas	N	D		The proposed rule change is unnecessary. The current rule already protects the public from attorneys looking to sexually take advantage of clients. The proposed rule, preventing any sexual relations between attorneys and clients, is just plain ridiculous. Why is it anyone's business who an attorney sleeps with? There is nothing wrong if an attorney wants to date a client, provided legal work is not done in exchange for sexual services, which the current rule already covers.	(See above response to the comment from William Johnson.)
X-2016-34	Bryant, Barbara	N	A		I strongly support this revision. I have handled, studied, researched, mediated and/or taught hundreds of cases involving sexual harassment and the varying factual settings and techniques in/by which the sexual harassment was carried out. Most of the cases/situations	The Commission was not provided with quantitate data on these issues and cannot verify or confirm their accuracy. It is known that many lawsuits and claims for harassment are made on a regular basis in the courts, and various state and federal, as

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					<p>involved people in positions of power harassing people who were dependent on them for some important benefit such as salary, a dwelling, a necessary service, or a favorable outcome to a legal right. Too many of those offenders were attorneys using their position of authority and safety to pressure the client for sex. Too many subterfuges and implicit threats of desertion led to the sexual conduct.</p> <p>It is absolutely unacceptable for this conduct to occur. There needs to be a strict bright line that no sexual conduct is acceptable, that the responsibility for the conduct rests 100% on the attorney to prevent it from happening.</p> <p>I request that the proposed rule be amended further to clearly prohibit “verbal conduct of a sexual nature and/or proposals for sexual conduct.” It is often the case that a sexual harasser will start with blatant behavior to test the waters. This by itself puts undue pressure and implicit threats on the client to go along or stay quiet in the face of sexual talk, or to agree to sexual relations once the representation</p>	<p>well as private attorneys, investigate and take on such cases.</p> <p>Further, with respect to discriminatory and harassing conduct, please refer to proposed Rule 8.4.1.</p>

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					has concluded.	
X-2016-39	Thomas, Kevin	N	A		The status quo is awful. Disallowing sex with a client is a cost-free way to protect our most vulnerable citizens.	
X-2016-43a	Committee on Professional Responsibility and Conduct (COPRAC)	Y	D		<p>COPRAC does not support adoption of the proposed rule because it is inconsistent with B&P Code § 6106.9. The statute expressly sets a different standard than the proposed rule for the imposition of discipline for a lawyer who engages in a sexual relationship with a client than the one set by the proposed rule. COPRAC believes this inconsistency creates a potential trap for a lawyer. COPRAC believes merely flagging the inconsistency in the Comment to the rule does not solve the problem because it relies on the lawyer looking at the rules rather than relying on the B&P Code.</p> <p>In the event the Commission adopts the rule as proposed, at a minimum, COPRAC urges the Commission to revise Comment [3] to more clearly alert attorneys to the different standards under the rule and section 6106.9.</p> <p>There was no consensus among</p>	

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					the Committee members on the separate question of whether they would support adoption of the near blanket prohibition on sexual relations with clients expressed in proposed rule 1.8.10.	
X-2016-44	Copi, Margaret	N	A		An attorney and his or her client have unequal power in their relationship and the attorney has a fiduciary duty to take care of the interests of the client. It is not a mutual relationship in which the interests of both are equal. All such sexual activity is suspect as potentially coercive and must be avoided to preserve the integrity of the professional relationship. Both Sexual Harassment as a separate matter and consensual sexual relations must be avoided for the protection of the client. This has been standard in medical practice for many years and I find it difficult to understand that it is not also the standard in the practice of law. Dual-role relationships in any case are fraught with difficulties, but in this particular case must be forbidden absolutely for the ethical practice of law.	
X-2016-45	Peoples, Bernice	N	A		This rule should have been written into the founding rules of conduct between Attorney and Client. A sexual relationship	

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					would compromise too many cases and cause the court to get bogged down in nonsense instead of <u>real criminal cases</u> . (emphasis in caps in original)	
X-2016-37	Wade, Margena	N	A		No lawyer should have sex or personal relationship with a client, unless it's well established before or well after the case. There's too much gray area to allow this.	[Note: This comment was originally submitted for proposed Rule 1.0 but was subsequently moved to the 1.8.10 table because of the substance of the comment.]
X-2016-46	Maxine Johnson	No	M		I have a lawyer as a neighbor and he and his wife have gone throughout the neighborhood suing other neighbors. A lawyer should never have the ability to sue on behalf of a person he or she is either married to or having sex with prior to the lawsuit and benefitting from using the spouse or girlfriends name.	[Note: This comment was originally submitted for proposed Rule 1.0 but was subsequently moved to the 1.8.10 table because of the substance of the comment.]

