

**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)]<sup>1</sup>.

[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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<sup>1</sup> The Rules Revision Commission has not made a recommendation to adopt or reject a counterpart to ABA Model Rule 2.1. This bracketed reference is a placeholder pending a recommendation from the Commission. Consideration of Model Rule 2.1 is anticipated for the Commission's August 26, 2016 meeting.



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**Synopsis of Public Comments**

**TOTAL = 17**     **A = 8**  
**D = 6**  
**M = 3**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response A = 12
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 This rule should be revised or withdrawn to avoid impinging on individual liberties and constitutionally protected rights.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.

<sup>1</sup> 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 response to the comment from William Johnson, X-2016-2, above.)
X-2016-7	Wilson, Ken (7-4-16)	N	D		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.	(See response to the comment from William Johnson, X-2016-2, above.)

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X-2016-19a	Anderson, Mark (8-1-16)	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 (8-3-16)	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 response to the comment from William Johnson, X-2016-2, above.)
X-2016-34	Bryant, Barbara (8-9-16)	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	<b>[ALT1]</b> The Commission thanks the commenter for her support. With respect to the commenter's suggestion re discriminatory and harassing conduct, please refer to proposed Rule 8.4.1.  <b>[ALT2]</b> The Commission was

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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>	not provided with quantitative 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 well as private attorneys, investigate and take on such cases.

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					has concluded.	
X-2016-39	Thomas, Kevin (8-14-16)	N	A		The status quo is awful. Disallowing sex with a client is a cost-free way to protect our most vulnerable citizens.	No response required.
X-2016-43a	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (8-12-16)	Y	D		<p>1. COPRAC does not support adoption of the proposed rule because it is inconsistent with B&amp;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&amp;P Code.</p> <p>2. In the event the Commission adopts the rule as proposed, at a minimum, COPRAC urges the Commission to revise Comment</p>	<p>1. The Supreme Court can establish rules of conduct independent from those established in the Business &amp; Professions Code. See, e.g., <i>In re Lavine</i>, 2 Cal. 2d 324, 328, <i>reh'g denied and opinion modified</i>, 2 Cal. 2d 324 (1935). The proposed rule is not in conflict with B&amp;P Code Section 6106.9. While Section 6106.9 prohibits sexual relations only under certain specified circumstances, the proposed rule bans sexual relations entirely, and is more strict than Section 6106.9. Further, subdivision (e) of that section applies only to a complaint made pursuant to subdivision (a), not to a complaint made pursuant to Rule 1.8.10. Therefore, the rules are not inconsistent.</p> <p>2. The Commission declines to make the suggested change. It believes that the comment adequately and</p>

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					<p>[3] to more clearly alert attorneys to the different standards under the rule and section 6106.9.</p> <p>3. There was no consensus among 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.</p>	<p>succinctly alerts lawyers to the differences between rule and statute ("This Rule and statute impose different obligations.")</p> <p>3. No response required.</p>
X-2016-44	Copi, Margaret (8-15-16)	N	A		<p>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</p>	No response required.



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					particular case must be forbidden absolutely for the ethical practice of law.	
X-2016-45	Peoples, Bernice (8-16-16)	N	A		This rule should have been written into the founding rules of conduct between Attorney and Client. A sexual relationship 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)	No response required.
X-2016-37	Wade, Margena (8-10-16)	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.	[ <u>Note</u> : 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.]  No response required.
X-2016-46	Johnson, Maxine (8-16-16)	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.	[ <u>Note</u> : 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.]  The comment does not raise any issues regarding proposed Rule 1.8.10. The comment appears to raise a concern about a lawyer engaging in vexatious litigation practices. Please see proposed Rule 3.1 [3-200].

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X-2016-58	Thompson, Irene (9-1-16)	N	A		It's shocking that this rule does not already exist. Attorneys having sex with clients? Are you kidding? What could possibly go wrong?	No response required.
X-2016-63	Edwards, Lisa (9-15-16)	N	M		<p>I do not think clients and attorneys should be completely barred from dating or sexual relations. I had some incredible attorneys along the way both civil and family law. If down the road I wanted to date them who are you to tell me no. I believe at least 1 year preferably two and drop dead minimum 6 months waiting period from the time the case is completely done or another attorney hired should be in place.</p> <p>Now the married attorney who kissed me while working on my case or the one helping me defend myself from a stalker and telling me he could understand my stalker because he "wouldn't give me up for all the tea in China" need to be held accountable or retrained. I handled it another way but that behavior is abhorrent and clients should know what they can do for assistance.</p>	The reference in the rule to "client" is to a current client. The proposed rule does not regulate sexual relations after the termination of the attorney-client relationship.

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X-2016-66h	San Diego County Bar Association (Riley) (9-15-16)	Y	A		<p>1. We commend and support the Commission's adoption of a rule that prohibits a lawyer having a sexual relationship with a client, unless that relationship pre-existed the attorney-client relationship. Current Rule 3-120, with its "if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110," could be simply an excuse for the rationalization of conduct that should be prohibited unless the individuals had a personal relationship before the lawyer was engaged.</p> <p>2. We observe, however, that neither the proposed rule nor any Comment addresses how long the prohibition lasts— until the conclusion of the matter for which the attorney is engaged; for some period after the attorney-client relationship ends; whether formal indicia of termination of the attorney-client relationship are required or preferred? We believe some guidance would be helpful, especially given the often volatile mix of professional and personal relationships.</p>	<p>1. No response required.</p> <p>2. The Commission understands the commenter's request for further guidance on the duration of the rule's effect in prohibiting sexual relations between lawyer and client. However, the Commission's Charter directs the Commission to minimize the number of comments. The guidance issues raised by the commenter are better left for ethics opinions.</p>
X-2016-76f	Los Angeles County Bar Association Professional Responsibility and Ethics	Y	M		1. PREC opposes the adoption of Proposed Rule 1.8.10 in its current form. While the proposed	1. See response to the comment from William Johnson, X-2016-2, above.

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	Committee (PREC) (9-23-16)				<p>rule is consistent with the ABA Model Rule, it is much more restrictive than our current rule on sexual relations (Rule 3-120), and prohibits ALL sexual relations with clients, except for those that existed at the time the attorney-client relationship commenced (contrasted with our current rule, which essentially prohibits coercion, intimation and undue influence in entering into sexual relations with a client).</p> <p>While such a bright line test might make sense in certain practice areas (e.g., criminal law and family law cases), it is patronizing to clients and unreasonably prohibitive where the client is sophisticated and not vulnerable.</p> <p>2. Proposed Rule 1.8.10 is also inconsistent with the State Bar Act: Section 6106.9 of the California Business &amp; Professions Code tracks with current Rule 3-120, and only provides (in subsection (a)) for the imposition of discipline where an attorney does any of the following (emphasis added):</p> <p>“(1) Expressly or impliedly <i>condition the performance of legal services for a current or</i></p>	<p>2. See response to COPRAC, X-2016-43a, above.</p>

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					<p><i>prospective client upon the client's willingness to engage in sexual relations with the attorney.</i></p> <p><i>(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.</i></p> <p><i>(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.</i></p> <p>3. Further, as provided in Comment [2], the extension of the proposed rule in this form to all corporate clients – and especially in-house lawyers – is particularly unreasonable and unnecessary. These are not the situations where one would typically find the type of vulnerable clients this rule is intended to protect. Also, because the only exception to the application of the proposed rule is with respect to a consensual sexual relationship that exists</p>	<p>3. The Commission disagrees that a sexual relationship with a client should be equated with or treated the same as a business relationship with a client.</p>

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					<p>between the lawyer and the client “when the lawyer-client relationship commenced,” the proposed rule would prohibit sexual relations between a client and a lawyer if the client and lawyer had been in a previous relationship but were no longer in the relationship at the time the representation commenced. Thus, discipline could be imposed under this strict bright line test if the client and lawyer reengage in sexual relations following a situation where the client seeks out the lawyer for legal advice.</p> <p>The rules regulating business relationships with a client are intended to ensure that the clients are treated fairly and the lawyers’ judgment is not impaired. Under our current rule 3-300 (as well as ABA Model Rule 1.8), there is no strict prohibition on a lawyer entering into a business transaction with a client. These rules permit business relations so long as the relationship is fair and consensual (among other requirements). In our view, the rule relating to sexual relations should be similar: provided the relationship is consensual, and</p>	

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					<p>not based on coercion, undue influence or intimidation, and provided the lawyer is otherwise in compliance with the rules (e.g., with respect to competence and conflicts of interest), there should be no total prohibition on sexual relations.</p> <p>PREC believes that the rule should prohibit sexual relations based on coercion, undue influence or intimidation, not merely on just whether an attorney engages in sexual relations with a client with whom he or she was not already involved sexually at the time the representation commenced.</p>	
X-2016-93c	Los Angeles County Public Defender (Brown) (9-23-16)			D	<p>Current Rule 3-120 is nuanced and balanced, with an understanding of the nature of human relations. The proposed rule is a blanket prohibition on all sexual relations unless the consensual sexual relationship existed at the time the lawyer-client relationship commenced. The proposed rule may be easier to enforce, but it is unrealistic in the real world.</p> <p>The current rule correctly recognizes that sex does occur, and the rule prohibits sex that is</p>	See response to the comment from William Johnson, X-2016-2, above.

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					non-consensual, is coerced, is a condition of representation, or results in incompetent representation. The Commission's real complaint is not that lawyers and clients are engaging in sexual relations, it is that the current Rule is too difficult to enforce without proof of harm or misconduct. The <i>only</i> evidence the Commission can muster that the current Rule is ineffective in the executive summary is anecdotal. We oppose this revision.	
X-2016-104v	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	A	Cmt. [3]	<p>1. Supports adoption of proposed Rule 1.8.10.</p> <p>2. Second sentence of comment [3] should be clearer as to meaning.</p>	<p>1. No response required.</p> <p>2. The Commission declines to make the suggested change. It believes that the comment adequately and succinctly alerts lawyers to the differences between rule and statute ("This Rule and statute impose different obligations.")</p>
X-2016-120k	LGBT Bar Association of Los Angeles (King) (9-27-16)	Y	A		We support the proposed revisions to this rule.	No response required.



## **MEMORANDUM**

TO: State Bar Rules Revision Commission 2

FROM: Daniel E. Eaton

DATE: October 11, 2016

RE: Constitutional and Statutory Issues Related to Proposed Rule of Professional Conduct 1.8.10 (Sexual Relations with Clients)

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The State Bar Rules Revision Commission 2 (“RRC 2”) has proposed Rule of Professional Conduct 1.8.10. Subparagraph (a) of the proposed Rule reads: “A lawyer shall not engage in sexual relations with a client unless a consensual relationship existed between them when the lawyer-client relationship commenced.” RRC 2 adopted this proposed Rule unanimously except for one abstention at its February 19, 2016 meeting. This subparagraph is virtually identical to ABA Model Rule 1.8(j): “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”

The proposed Rule would replace existing Rule of Professional Conduct 3-120 addressing the same issue. Current RPC 3-120 reads, in pertinent part: “(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.” The current rule became operative on September 14, 1992, ten years before the American Bar Association adopted Model Rule 1.8(j).

The corresponding provision of the State Bar Act is Business and Professions Code section 6106.9. That provision reads in pertinent part: “(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.

At the August 26, 2016 Commission meeting, as a member of the drafting team majority that proposed the new rule that the full Commission had adopted, I volunteered to address constitutional and statutory concerns that had been raised by members and staff of the Commission and members of the public. This memorandum relies significantly on an earlier circulated Memorandum on the same topic dated October 9, 2012 that was prepared by Randall Difuntorum and the State Bar Office of the General Counsel in connection with the work of the First Rules Revision Commission proposing a similar revised Rule. The Memorandum is hereafter cited as “10/9/12 State Bar Memo.”

A. The Proposed Rule’s Inconsistency with the Corresponding Provision of the State Bar Act Does Not Preclude Enactment of the Proposed Rule.

In a letter dated August 12, 2016, Merri A. Baldwin, current Chair of the State Bar Committee on Professional Responsibility and Conduct (“COPRAC”), expressed opposition to the proposed Rule because it imposes different obligations from those in Business and Professions Code section 6106.9. She added: “In the event that the Commission adopts the proposed rule, 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.” Ms. Baldwin concluded her letter by disclosing that “[t]here was no consensus among 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 Rule 1.8.10.”

In a letter dated September 27, 2016, Gregory Dresser, Interim Chief Trial Counsel, supports the proposed Rule. Like COPRAC, however, he asks that the second sentence of comment [3] be made clearer.

Ms. Baldwin is correct that the proposed Rule and Business and Professions Code section 6106.9 impose different obligations. Comment [3] recognizes that, stating: “This Rule and the statute [B&P § 6106.9] impose different obligations.” The proposed Rule imposes obligations on the lawyer that go beyond the limited circumstances set out in the Business and Professions Code provisions under which lawyer-client sexual relations are prohibited.

It is well-established, however, that as part of its general authority to regulate the legal profession, the California Supreme Court may impose obligations on lawyers through the Rules of Professional Conduct that are stricter than those imposed by the Business and Professions Code. (See e.g., *In re Lavine* (1935) 2 Cal.2d 324, 328, holding that requirements for admission to the bar imposed by the Business and Professions Code “are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications as are prescribed by legislative enactment are sufficient. The requirements of the Legislature in this particular are restrictions on the individual and not limitations on the courts. They cannot compel the courts to admit to practice a person who is not properly qualified or whose moral character is bad. In other words, the courts in the exercise of their inherent power may demand more than the Legislature has required.” Citations omitted. See also, *Howard v. Babcock* (1993) 6 Cal.4th 409, 419, California

Supreme Court may impose higher standards on lawyers than are imposed on other professions. For further discussion of this issue, see 10/9/12 State Bar Memo, pp. 30, 45-46.)

The area of sexual relations with clients is an area where the California Supreme Court should exercise that authority. A desirable consistency between the Rule addressing this area and the legislative provision does not preclude enactment of an effective new Rule now.

## B. The Proposed Rule Passes Constitutional Muster

Several members of this Commission and of the public have raised concern that the proposed Rule would infringe the fundamental constitutional right of the lawyers and their clients to sexual privacy and related constitutional rights. Some 31 jurisdictions have rules that are substantially similar to the Proposed Rule. Some of those rules have been in place for ten or more years, since around the time of the enactment of the Model Rule provision in 2002. Exhaustive electronic research has uncovered no case from any jurisdiction addressing a constitutional challenge to a rule based on the ABA Model Rule provision. A review of established constitutional principles, as well as the analysis of these issues in the October 2012 State Bar Memorandum at pages 33-45, has convinced us that such a challenge would and should fail.

### 1. The Proposed Rule Satisfies Rational Basis Review

Regulations not implicating fundamental rights are subject to the deferential rational review standard under which regulation will be upheld if it is "rationally related" to a "legitimate" government interest. (See e.g., *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.)

One commenter has made a respectable argument that the proposed Rule does not implicate the constitutional right to sexual privacy. (Note, "Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule." (1992) 92 Colum.L.Rev. 887, 919 (hereafter "Note").) The Note was written when an earlier, substantially different version of what was eventually adopted as California Rule of Professional Conduct 3-120 was being re-circulated for additional public comment. (Note, footnote 159.) The commenter proposed a rule barring a lawyer from "commenc[ing] sexual relations with a client during the legal representation." (*Id.* at 916.) The proposed rule, thus, would not apply to a sexual relationship that predated the attorney-client relationship. (*Ibid.*) The commenter argued that such a rule "does not restrict with whom an attorney may engage in consensual sexual activity [or whom a person may marry]; the rule, like other professional rules, merely regulates whom the attorney may represent. Thus, the rule does not transgress an attorney's autonomy or privacy rights. If the attorney and client agree to commence sexual activity, the only requirement is that the attorney no longer provide concurrent legal representation." (Note, at 919.)

Proposed Rule 1.8.10 would be upheld under rational basis review on several potential grounds, including among others, the Rule's rational relationship to the state's legitimate and compelling interest "in protecting clients from exploitation or injury caused by their attorneys" (10/9/12 State Bar Memo, p. 43, citation omitted) and its relationship to the state's interest in ensuring "the objective detachment that is often demanded for adequate representation." (ABA Formal Op. 92-364 "Sexual Relations with Clients.")

### 2. The Proposed Rule Survives Strict Scrutiny Review

Laws and regulations disturbing fundamental rights receive strict scrutiny and will be upheld if they are “narrowly tailored to serve a compelling state interest.” (*Reno v. Flores* (1993) 507 U.S. 292, 302.) The right to privacy concerning consensual sexual activity, whether the individuals are married or unmarried, is protected by both the federal and California constitutions. (*Lawrence v. Texas* (2003) 539 U.S. 558, 567-579; Cal. Const., art. I, § 1; *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841.) Courts have not been clear about whether the strict scrutiny analysis that applies to laws and regulations that encumber other fundamental rights applies to laws or regulations that affect the right to private sexual relations. (10/9/12 State Bar Memo, p. 42.)

In *Ohralik v. Ohio State Bar Ass'n* (1978) 436 U.S. 447, 464–67, the U.S. Supreme Court rejected a constitutional free speech challenge to two disciplinary rules of the Ohio Code of Professional Responsibility. Disciplinary Rule 2-103(A) of the Ohio Code (1970) provided: “A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.” Disciplinary Rule 2-104(A) provided in relevant part: “A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: “(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.” (*Id.* at note 9.)

Taken together, these disciplinary rules prohibited a private practitioner from engaging in direct, in-person solicitation of clients for monetary gain. Justifications for the rules were that they “serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer’s exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.” (*Ohralik*, 436 U.S. at 461.)

The lawyer challenging the rules was appealing his discipline for the in-person solicitation of two automobile accident victims. The attorney conceded that the state had a legitimate, even compelling interest in “preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct.’” (*Id.* at 462, quoting Appellant’s Brief.)

Writing for the Court, Justice Lewis F. Powell, Jr., a former President of the ABA, rejected the constitutional challenge to these disciplinary rules. Applying what was later recognized as the intermediate level of scrutiny applicable to commercial speech, the Court found that the Ohio rules were “prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.” (*Id.* at 464.) The Court continued:

The efficacy of the State’s effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in

circumstances like those of this case, the State were required in addition to prove actual injury. Unlike the [attorney] advertising [of which the Court approved] in *Bates*, in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the solicitation that he could not recall specific details at a later date. If appellant's view were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession, in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

(*Id.* at 466-467, footnotes omitted. See also, *Kitsis v. State Bar* (1979) 23 Cal.3d 857, 963-864, applying *Ohralik* to reject constitutional challenge to similar California Rules of Professional Conduct. Cf. *In re Primus* (1978) 436 U.S. 412, 423, holding application of similar disciplinary rules to solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression and political association constitutes unconstitutional infringement of expressive and associational conduct under the First Amendment protection. The government could regulate such conduct only with narrow specificity not demonstrated in that case.)

Like the constitutionally sanctioned virtual ban on in-person solicitation for monetary gain, an effective ban on even consensual sexual relations between lawyers and clients except where the sexual relationship predated commencement of the legal relationship will serve the compelling state interest in preventing the harm to clients from the prohibited attorney conduct before it occurs. The virtual ban may well serve other compelling interests as well.<sup>1</sup>

The proposed bright-line rule is narrowly tailored to serve the stated interest. Current Rule 3-120 hasn't worked. The current Rule does not adequately identify the conduct that is prohibited. That is clear because, during the nearly 25 years it has been in effect, Rule 3-120 has generated a substantial number of complaints, but a scant record of discipline. (See 10/9/12 State Bar Memo, pp. 44-45.) A regulation affecting a fundamental right will survive strict scrutiny where a more limited state policy has proven to be unworkable or ineffective. (See *Fisher v. Univ. of Texas at Austin* (2016) \_\_ U.S. \_\_, 136 S. Ct. 2198, 2214, upholding consideration of race in public university admissions where state had attempted race-neutral policy without success and where person challenging revised policy failed to show any available or workable alternatives that could have accomplished state's educational goals.)

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<sup>1</sup> The omission of a spousal exception is concisely addressed at page 13 of the October 9, 2012 State Bar Memo: "A spouse who later becomes a client is covered by the exception for sexual relations that predate a lawyer-client relationship. Omission of a spousal exception is relevant only when a client becomes a spouse. While the implication is that a lawyer who marries a client will risk disciplinary consequences, lack of an exception is not known to be a problem in other states. None of the recent published disciplinary cases on sex-with-client misconduct in other jurisdictions have disciplined a lawyer for sexual relations with a spouse." (Footnote omitted.) I have nothing to add to this. If the Commission feels strongly that this issue needs to be addressed in the Rule explicitly, the following underlined revision may be made to subparagraph (a): "A lawyer shall not engage in sexual relations with a client who is not the lawyer's spouse unless a consensual relationship existed between them when the lawyer-client relationship commenced."

### C. Conclusion

The way the Commission resolves what kind of rule we should propose in this area will not be driven by constitutional and statutory principles. Instead, our decision will be driven by judgment based on experience and common sense. Members of sister professions are subject to restrictions similar to the one in the proposed Rule. (See e.g., Bus. & Prof. Code, § 729, addressing sexual relations between health care professionals and their patients.) We should not, whether out of an illusion of superiority or in reliance on strained distinctions between the nature of our professional relationships and theirs, adopt a lower, less workable ethical standard for ourselves.

In its protection of the public, its clarity, its enforceability, and its alignment with the rules of the vast majority of other jurisdictions, the proposed Rule adheres to the stated principles of the Commission's Charter. The statutory and constitutional concerns raised in the course of the development of this proposed Rule are legitimate and serious, but they are not insurmountable. The proposed Rule, already adopted by the Commission, should be forwarded to the California Supreme Court for its consideration.

## **DISSENT OF JAMES HAM FROM THE SUBSTITUTION OF PROPOSED RULE 1.8.10 FOR CURRENT RULE 3-120 IN THE REVISED RULES**

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

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

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

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

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

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





# **PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.10**

## **Sexual Relations with Client**

### **TABLE OF CONTENTS**

<b>EXECUTIVE SUMMARY .....</b>	<b>v</b>
<b>I. CURRENT RULE 3-120, RULES OF PROFESSIONAL CONDUCT .....</b>	<b>1</b>
A. Text Of Current Rule 3-120, Clean Version .....	1
B. History Of Rule 3-120.....	3
C. Enactment Of Business And Professions Code Section 6106.9 ....	5
D. Summary Of Concerns With Current Rule 3-120 And Related Statute .....	6
<b>II. PROPOSED RULE 1.8.10.....</b>	<b>6</b>
A. Text Of Proposed Rule 1.8.10, Clean Version.....	6
B. Proposed Rule 1.8.10, In A Redlined Version Of Rule 3-120 .....	8
C. Summary Of the State Bar’s Recommendations .....	11
<b>III. NATURE OF PROPOSED ACTION .....</b>	<b>12</b>
A. Substantive Change – The Bright-Line Prohibition Results In Change In Lawyer’s Professional Duty .....	12
B. Omission Of Spousal Exemption .....	13
C. Non-Substantive Changes .....	14
D. Definition Of “Sexual Relations” Unchanged .....	14
E. Alternatives Considered And Rejected.....	15
<b>IV. POLICY CONSIDERATIONS UNDERPINNING THE COMMISSION’S CHARGE AS RELATED TO PROPOSED RULE 1.8.10 .....</b>	<b>16</b>

A.	Eliminating Ambiguities And Uncertainties To Facilitate Compliance And Enforcement .....	16
B.	State Bar Disciplinary Data And Experience.....	17
C.	Confidence In The Legal Profession And The Administration Of Justice .....	20
D.	Eliminating Unnecessary Differences Between Rules In California And Other Jurisdictions To Foster A National Standard Of Professional Responsibility .....	21
E.	Establishing Consistency With Regulation Of Other Professionals In California.....	23
V.	PROPOSED COMMENTS TO THE RULES .....	25
A.	Comment [1] .....	26
B.	Comment [2] .....	27
C.	Comment [3] .....	27
VI.	DISSENTING COMMISSION VIEWS .....	28
A.	Rules Should Regulate Conduct As Lawyers.....	28
B.	Disgruntled Clients Could Use The Proposed Rule For Retaliation And It Is Questionable Whether A Broad Rule Would Protect The Public.....	29
C.	The Proposed Rule Conflicts With Business And Professions Code Section 6106.9.....	30
D.	The Proposed Rule Implicates A Lawyer’s Privacy Rights.....	31
VII.	PUBLIC COMMENT.....	31
VIII.	CONSTITUTIONAL ISSUES .....	33
A.	Board Of Trustees Consideration Of The Constitutional Issues .....	33
B.	Summary Of Constitutional Issues .....	34

C.	The Permissible Scope Of Laws Governing Attorney Conduct.....	35
D.	The Conflict Between Proposed Rule 1.8.10 And Business And Professions Code Section 6106.9.....	45
IX.	CROSS-REFERENCES TO AND FROM OTHER RULES .....	46
X.	IMPLICATIONS FOR OTHER SOURCES OF RULES OF PROFESSIONAL CONDUCT .....	47
XI.	CONCLUSION .....	47

## **SUPPORTING DOCUMENTS**

<b>Attachment 1: Proposed Rule 1.8.10, Clean Version .....</b>	<b>48</b>
<b>Attachment 2: Letter from Supreme Court dated May 20, 1992.....</b>	<b>50</b>
<b>Attachment 3: Table, Redline Comparison of Model Rule 1.8(j) to the Proposed Rule 1.8.10 with Brief Explanation of Each Change .....</b>	<b>51</b>
<b>Attachment 4: Chart, Recent Cases from Other States Regarding Successful Prosecutions of Sex-With-Client Misconduct .....</b>	<b>56</b>
<b>Attachment 5: State Bar Information Regarding Disciplinary Complaints Alleging Violation of Rule 3-120 or Business and Professions Code Section 6106.9 .....</b>	<b>66</b>
<b>Attachment 6: Excerpt of OCTC’s Letter dated September 27, 2001, Supporting the Model Rule Concept of a Broad Ban on Lawyer-Client Sexual Relations.....</b>	<b>71</b>
<b>Attachment 7: Full Text of Comments Received on Proposed Rule 1.8.10 (Draft B) .....</b>	<b>75</b>
<b>Attachment 8: ABA Chart, CPR Policy Implementation Committee “Variations of the ABA Model Rules of Professional Conduct, Rule 1.8(j)”, as of October 1, 2010 .....</b>	<b>88</b>
<b>Attachment 9: Synopsis Chart of Public Comment Received (including excerpted public hearing testimony by Carol M. Langford) on Draft A of Proposed Rule 1.8.10, which Conformed to Current Rule 3-120 .....</b>	<b>96</b>
<b>Attachment 10: Synopsis Chart of Public Comment Received on Draft B of the Proposed Rule 1.8.10, which Conformed to Model Rule 1.8(j) .....</b>	<b>115</b>
<b>Attachment 11: ABA Formal Ethics Op. 92-364 (July 6, 1992) .....</b>	<b>119</b>

## **PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.10**

### **Sexual Relations with Client**

#### **EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) and the State Bar of California’s Board of Trustees (“Board”) have reviewed and considered current rule 3-120<sup>1</sup> while taking into consideration developments in attorney professional conduct since 1992.

Unfortunately, the narrow, three-prong prohibition of rule 3-120 has not achieved the state’s interest in protecting the public. Difficulty in framing clear, enforceable restrictions has made violation of rule 3-120 extremely difficult to establish and prove. Sexual relations resulting from an attorney’s undue influence have not been deterred and discipline has seldom been imposed. At the same time, attorneys and clients have difficulty knowing what is prohibited and what is not. Twenty years of disciplinary experience with the current rule and the experience of other states in enforcing a bright-line rule demonstrate that a broader prohibition is needed.

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<sup>1</sup> Rule 3-120 prohibits a lawyer from doing any of the following: (1) requiring or demanding sexual relations with a client incident to or as a condition of any professional representation; (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client; or (3) continuing representation if the sexual relations cause the lawyer to perform legal services incompetently in violation of rule 3-110. The rule is not intended to apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relations which predate the initiation of the lawyer-client relationship.

In proposed rule 1.8.10,<sup>2</sup> the State Bar recommends a change to a bright-line prohibition against lawyer-client sexual relations, unless consensual sexual relations predated the lawyer-client relationship. Proposed rule 1.8.10 is better than rule 3-120 in protecting the public and promoting confidence in the legal profession.

The proposed rule is similar to ABA Model Rule of Professional Conduct, rule 1.8(j) and counterpart rules adopted in twenty-seven jurisdictions. It is consistent with California statutes deterring sexual relations between health professionals and their patients. (See, e.g., Bus. & Prof. Code, § 729.)

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<sup>2</sup> A clean version of proposed rule 1.8.10 is provided at Attachment 1.

**I. CURRENT RULE 3-120, RULES OF PROFESSIONAL CONDUCT**

**A. Text Of Current Rule 3-120, Clean Version**

**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* current 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.

**B. History Of Rule 3-120**

California appellate courts recognize that the state has a fundamental right to enact laws that promote public health, welfare and safety, even though the laws may affect the constitutional right of privacy. (*See Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 380-381 [193 Cal.Rptr. 422]; *People v. Mills* (1978) 81 Cal.App.3d 171, 181 [146 Cal.Rptr. 411].)

In 1989, Assembly Bill No. 415 (Roybal-Allard) enacted Business and Professions Code<sup>3</sup> section 6106.8 (Stats. 1989, ch. 1008), which requires 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 proposed rule 1.8.10. In a memorandum to the Board dated April 10, 1991, the subcommittee concluded that

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<sup>3</sup> Unless otherwise stated, statutory references are to the Business and Professions Code.

“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 section 729 and noted that no appellate court had addressed the constitutionality of that statute.<sup>4</sup>

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

In a letter to the Board 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. (A copy of the Court’s May 20, 1992 letter is provided at Attachment 2.) Before the State Bar provided a response, the Court approved Draft F with modifications deleting the evidentiary presumption. Current rule 3-120 became operative in September 1992. (See Supreme Court file number S021253.)

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<sup>4</sup> There is still no appellate court decision addressing the constitutional issue.

**C. 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.<sup>5</sup> Section 6106.9 and rule 3-120 have comparable restrictions.

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<sup>5</sup> Section 6106.9 provides in relevant part:

- (a) It shall constitute cause for the imposition of discipline of an attorney . . . 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 . . . alleging a violation of subdivision (a) shall be verified under oath by the person making the complaint.

**D. Summary Of Concerns With Rule 3-120 And The Related Statute**

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 the 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.

**II. PROPOSED RULE 1.8.10**

**A. Text Of Proposed Rule 1.8.10, Clean Version**

**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 prohibits 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 lawyer must keep clients' interests paramount in the course of the lawyer's representation. 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.

[2] 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).)

[3] 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.)

**B. Proposed Rule 1.8.10, In A Redlined Version Of Rule 3-120**

(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.

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

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

~~(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or~~

- ~~(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or~~
- ~~(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.~~
- ~~(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.~~
- ~~(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.~~

**Discussion:** COMMENT

[1] This Rule ~~3-120 is intended to prohibit~~prohibits 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~~ lawyer must keep clients' interests paramount in the course of the ~~member's~~ lawyer's representation. 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.

~~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.~~

[2] 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).)

[3] 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.)

### **C. Summary Of The State Bar's Recommendations**

The bright-line prohibition in proposed paragraph (a) is substantially the prohibition in model rule 1.8(j).<sup>6</sup>

Unlike rule 3-120(C), proposed rule 1.8.10 does not provide an exception for sexual relations with a spouse. The exception for a pre-existing consensual sexual relationship covers a spouse who becomes a client.

Proposed rule 1.8.10 omits the concept in rule 3-120(D) because the prohibited conduct is personal and does not involve associated lawyers. As stated in Comment [1] of proposed rule 1.8.11 (Imputation of Prohibitions Under

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<sup>6</sup> See Attachment 3 for a comparison table showing changes to model rule 1.8(j) with a brief explanation of each change.

rules 1.8.1 to 1.8.9): “This Rule [1.8.11] does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and not applied to associated lawyers.”

Immediately following the text of the proposed rule, three proposed comments provide guidance for interpreting and applying the rule.

### **III. NATURE OF PROPOSED ACTION**

#### **A. Substantive Change – The Bright-Line Prohibition Results In Change In Lawyer’s Professional Duty**

The bright-line ban on sexual relations in proposed rule 1.8.10 is a dramatically different approach from rule 3-120, which allows lawyer-client sexual relations unless a member violates a specific prohibition in rule 3-120(B).

The prohibition in rule 3-120(B)(3) is problematic. Rule 3-120(B)(3) prohibits a lawyer from continuing to represent a client if sexual relations cause the lawyer to violate the competency rule 3-110. However, a single act of simple negligence is not a violation of rule 3-110. In *Lewis v. State Bar* (1981) 28 Cal.3d 683 [170 Cal.Rptr. 634], this Court reaffirmed that a lawyer's single act of ordinary negligence does not suggest that the lawyer is unfit to practice law, and that the discipline system should not be burdened with conduct that is best addressed as a civil issue: “This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge.” (*Lewis v. State Bar* at

p. 688.) Accordingly, a lawyer could engage in exploitative sexual relations that cause an act of simple negligence without violating rule 3-110 or rule 3-120.

The restriction in rule 3-120(B)(1) appears to apply even if no sexual relations result from a request or demand of sexual relations as a condition of professional representation. Although arguably proposed rule 1.8.10 would not protect clients against a demand that does not result in sexual relations, the bright-line prohibition should inhibit lawyers from seeking sexual relations and should cause clients to question the motive of any lawyer who has the temerity to demand sexual relations.

Changes in Duties. The duty changes to ban sexual relations with a client initiated during a lawyer-client relationship. A lawyer's duty is no longer limited to the narrow restrictions of rule 3-120(B).

**B. Omission Of Spousal Exemption**

A spouse who later becomes a client is covered by the exception for sexual relations that predate a lawyer-client relationship. Omission of a spousal exception is relevant only when a client becomes a spouse. While the implication is that a lawyer who marries a client will risk disciplinary consequences, lack of an exception is not known to be a problem in other states. None of the recent published disciplinary cases on sex-with-client misconduct in other jurisdictions have disciplined a lawyer for sexual relations with a spouse.<sup>7</sup>

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<sup>7</sup> Attachment 4 provides a chart of published decisions from other states that have disciplined attorneys for sex-with-client misconduct based on either their

### **C. Non-Substantive Changes**

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. (See, e.g., Bus. & Prof. Code, § 6180.10 & Evid. Code, § 958.)

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. . . .” The Board Committee on Regulation and Admissions (“RAC”) thought “have” might be misconstrued to mean that the lawyer must be the initiator or aggressor, and that “engage in” would not suggest that the lawyer must be the initiator in order to trigger the prohibition. Ohio’s variation of model rule 1.8(j)<sup>8</sup> similarly replaces “have” with “solicit or engage in.”

### **D. Definition Of “Sexual Relations” Unchanged**

The definition of “sexual relations” in proposed rule 1.8.10(b) is the same as the definition in rule 3-120(a) and section 6106.9(d). Maintaining the same

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(footnote continued...)

current sex-with-client rule or an alternative rule, such as conflict of interest or conduct prejudicial to the administration of justice. The Board did not see the chart, which was prepared for the Court’s consideration of the proposed rule.

<sup>8</sup> Ohio’s rule 1.8(j), effective February 1, 2007, is posted online at: <http://www.sconet.state.oh.us/legalresources/rules/profconduct/profconductrules.pdf> (Last accessed on October 5, 2012. A copy is on file with the State Bar.)

definition avoids confusion as to what definition to apply. Eight other states use a similar definition in their rules.<sup>9</sup>

**E. Alternatives Considered And Rejected**

First, the definition of “sexual relations” refers to “touching.” An option of expanding the definition to encompass sexual gratification or abuse without actual touching was considered then rejected because the expansion could lead to ambiguities and overbreadth in the definition. (See *In the Matter of Inglimo* (Wis. 2007) 305 Wis.2d 71 [740 N.W.2d 125] [lawyer did not engage in prohibited sexual relations by having sex with third party who was simultaneously having sex with the lawyer's client when the lawyer did not touch or have sex with the client.] )

Next, RAC asked the Commission to consider whether to extend the rule to sexual relations occurring after the lawyer-client relationship terminates. This alternative was attempted but not pursued because of difficulty with anticipating comprehensively the variety of situations that could develop and formulating a standard without ambiguities and overbreadth.

Finally, the physician and psychotherapist prohibition in section 729 was a possible alternative.<sup>10</sup> The language of proposed rule 1.8.10 was favored in the interest of conforming to the national standard.

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<sup>9</sup> The states are: Maine; New York; North Carolina; Oklahoma; Oregon; Utah; West Virginia; and Wisconsin.

**IV. POLICY CONSIDERATIONS UNDERPINNING THE**  
**COMMISSION’S CHARGE AS RELATED TO PROPOSED RULE 1.8.10**

**A. Eliminating Ambiguities And Uncertainties To Facilitate Compliance**  
**And Enforcement**

Proposed rule 1.8.10 will facilitate compliance and enforcement. The ban will have a salutary deterrent effect not provided by rule 3-120. The proposed rule eliminates the ambiguous requirements of rule 3-120(B) and consent is not a defense. The proposal provides clear guidance and, being conceptually similar to section 729, it brings the legal profession into alignment with the regulatory standard for physicians and psychotherapists.

There are no published cases under rule 3-120 or section 6106.9 to provide guidance to lawyers and the public.<sup>11</sup> In contrast, there are published decisions disciplining physicians. (See, e.g., *Roy v. Superior Court* (2011) 198 Cal.App.4th 1337 [131 Cal.Rptr.3d 536] [Although a passive participant, a physician was disciplined for sexual relations with a patient.]) and nine jurisdictions with model rule 1.8(j) or a variation of it have published case law. (See Attachment 4 for a chart of recent cases in other states imposing discipline for sex-with-client misconduct.)

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<sup>10</sup> Section 729 is recited in part, *infra*, at subsection E of section IV, “Regulation Of Other Professionals In California.”

<sup>11</sup> This includes cases published in the California State Bar Court Reporter, which contains the published opinions of the Review Department of the State Bar Court.

**B. State Bar Disciplinary Data And Experience**

Twenty years of disciplinary experience with rule 3-120 demonstrate that a bright-line prohibition is needed to protect the public and clients and to foster confidence in the legal profession.<sup>12</sup>

**1. State Bar Data And Disciplinary Records**

The State Bar is required to compile disciplinary statistics, including a log of all complaints and complaint dispositions. (See Bus. and Prof. Code, § 6092.5(d).) 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 reprovls or suspensions. Neither office, however, compiles statistics on the specific violations for which discipline is imposed. A member's misconduct is summarized, however, in legal periodicals and the State Bar's California Bar Journal.

After the Board conditionally adopted proposed rule 1.8.10 in January 2010, State Bar staff reviewed OCTC complaint statistics and files in which the complainant alleged improper sexual relations. Files were reviewed to see what

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<sup>12</sup> The following information is taken from a memorandum provided at Attachment 5, which was prepared in 2012 for the Court. Neither the Commission nor the Board had the memorandum during their consideration of a proposed rule.

the contents would show about investigation and prosecution of such allegations that could not be gleaned from the statistical data.<sup>13</sup>

OCTC's statistical data show that between September 1992 (when rule 3-120 was operative) and December 31, 2009, there were 205 investigated complaints alleging violation of 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:

- (a) Of 205 complaints, discipline was imposed for violation of rule 3-120 or section 6106.9 (and other violations) in only one complaint;
- (b) Of 205 complaints, only three complaints were closed with a nondisciplinary warning letter or directional letter relating to rule 3-120 or section 6106.9;

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<sup>13</sup> Using data to establish a substantial state interest was critical to the United States Supreme Court's upholding an attorney advertisement and solicitation rule in *Florida Bar v. Went For It, Inc.* (1995) 515 U.S. 618 [115 S.Ct. 2371]. Before proposing a change to its rule, the Florida Bar conducted a two-year study that included statistical and anecdotal evidence. This evidence was cited in *Went For It, Inc.* to support the Florida Bar's contention that the public viewed direct mail solicitations immediately following accidents as a source of distress and an intrusion of privacy that caused the public to lose respect for the legal profession. The Court applied intermediate scrutiny and the commercial speech framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* (1980) 447 U.S. 557 [100 S.Ct. 2343] in determining that the evidence satisfied one of the prongs of *Central Hudson* by demonstrating that the advertisement restriction advanced the Bar's interest in a direct and material way.



- (c) Of the 201 remaining complaints, in five complaints suspension was imposed, and in three complaints a private or public reproof was imposed, for misconduct unrelated to sex with a client;
- (d) With the exception of three files still open and pending, all remaining complaints were closed outright;
- (e) In a number of closed complaints, the insufficient evidence of sexual relations consisted of a “he said” accusation by the client versus a “she said” denial by the lawyer;
- (f) In some closed complaints, the alleged victim had credibility issues;
- (g) In fifteen closed complaints where there was indication of a sexual relationship, in many instances the attorney acknowledged the sexual relationship but claimed it was consensual;
- (h) Eight accused lawyers had more than one complaint with an allegation of improper sexual relations; and
- (i) 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.

## 2. OCTC’s Experience With Rule 3-120 And Section 6106.9

OCTC has experienced difficulties in proving a violation. In 2001, OCTC wrote 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. Yet, OCTC

believes that a sexual relationship creates conflicts and a host of problems. OCTC believes that a rule like model rule 1.8(j) best resolves these issues. (See Attachment 6, excerpt of OCTC's memorandum, dated September 27, 2001.)

In 2010, OCTC supplemented its earlier comments with more specific observations on the difficulties it has experienced with rule 3-120. Among the observations, OCTC noted that frequently the evidence of a sexual relationship only consisted of a "she said" allegation versus a "she said" denial; lawyers generally will not stipulate to violating a restriction in rule 3-120; and the defense of consent has been an issue. The memorandum at Attachment 5 includes a summary of OCTC's supplemental comments.

**C. Confidence In The Legal Profession And The Administration Of Justice**

The scarcity of discipline undermines confidence in the legal profession. Rule 3-120 has proven ineffective in preventing exploitative lawyer-client sexual relationships. What constitutes prohibited conduct is not clear. Because of the private nature of a sexual relationship and the causation nexus to rule 3-120(B), seldom is there clear and convincing evidence of a violation. There are no published cases to show that rule 3-120 has been working.

Proposed rule 1.8.10 has a clear ban that should deter exploitative conduct and foster confidence in the legal profession. Currently, even if a client's case is not prejudiced as a result of sexual relations, the client may still feel violated.

HALT, a nonprofit public interest group with a special interest in the civil justice system, commented that the proposed rule is “a substantial improvement over [rule] 3-120.” (HALT’s public comment letter is provided at Attachment 7.) HALT’s view is shared by other commenters.

**D. Eliminating Unnecessary Differences Between Rules In California And Other Jurisdictions To Foster A National Standard Of Professional Responsibility**

Twenty-seven states have adopted model rule 1.8(j) or a variation of it. An ABA chart reporting on the implementation of model rule 1.8(j)<sup>14</sup> shows seventeen states have model rule 1.8(j);<sup>15</sup> six have substantially similar rules;<sup>16</sup> and four have a variation.<sup>17</sup> Seventeen states either do not have a sexual misconduct rule or take a different approach.<sup>18</sup>

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<sup>14</sup> The chart, captioned: “ABA CPR (Center on Professional Responsibility) Policy Implementation Committee – Variations of the ABA Model Rules, Rule 1.8(j)”, as of October 21, 2010, is provided at Attachment 8.

<sup>15</sup> These states are: Arizona; Arkansas; Colorado; Connecticut; Delaware; Idaho; Illinois; Indiana; Kansas; Kentucky; Missouri; Montana; Nebraska; New Hampshire; North Dakota; Pennsylvania; and South Dakota.

<sup>16</sup> These states are: Iowa; Minnesota; Nevada; Ohio; Wisconsin; and Wyoming.

<sup>17</sup> These states are: Alaska; Oklahoma; Oregon; and Washington.

<sup>18</sup> Florida’s rule prohibits a lawyer from engaging in sexual conduct with a client that exploits or adversely affects the client’s interest, including continuing to represent a client if the sexual relations cause the lawyer to render incompetent representation.

A review conducted in March 2012 of published disciplinary cases in other states (see the chart in Attachment 4) showed that nine jurisdictions have disciplined attorneys for violation of their rule based on model rule 1.8(j).<sup>19</sup> Indiana, Minnesota and Ohio have more than one case in which the attorney stipulated to lawyer-client sexual relations. In other cases, the lawyer admitted the sexual relationship. In several cases, the client's spouse reported the sexual relationship. In contrast, California lawyers are reluctant to stipulate to a violation; have offered consent as a defense; and have not been disciplined even though the client's spouse complained.<sup>20</sup>

The State Bar asked other states in February 2007 and February 2012 whether their rules have been challenged based on a constitutional right to privacy. No jurisdiction indicated that it has had a constitutional challenge. The published disciplinary cases of other states do not show any such challenge.

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<sup>19</sup> These states are: Delaware; Indiana; Iowa; Minnesota; New York; North Dakota; Ohio; South Carolina; and Wisconsin. Other states on the chart prosecuted sex-with-client cases as a conflict of interest (model rule 1.7) or as conduct prejudicial to the administration of justice (model rule 8.4), which have been alternative approaches. The Florida case involving James Tipler is unusual. For the same misconduct, which was captured on videotape, in California Tipler stipulated to a rule 3-120(b)(1) violation. (*See* the stipulation filed in S158221; *see also* a notation of Tipler's misconduct in the memorandum at Attachment 5, footnote 1.)

<sup>20</sup> See the memorandum at Attachment 5 regarding California's experience.

**E.     Establishing Consistency With Regulation Of Other Professionals In**  
**California**

The physicians and psychotherapists prohibition in section 729 provides in part that:

- (a)     Any physician and surgeon, psychotherapist, alcohol and drug abuse counselor...who engages in an act of sexual intercourse ... 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....
- (b)     ...For purposes of subdivision (a), in no instance shall consent...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 . . . .

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 . . . .”

The legislative history of an amendment of these statutes in 1993<sup>21</sup> included a then-recent study by the University of California, San Francisco, finding that nearly one in ten physicians admitted to having had sex with one or more patients even though the sexual relations were prohibited by the Hippocratic Oath and held to be unethical by the American Medical Association.<sup>22</sup> Statistics from the Medical Board of California showed that between October 1990 and September 1992 twenty-two physicians were disciplined for sexual misconduct with patients. In supporting the bill, the Department of Consumer Affairs

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<sup>21</sup> The amendment in 1993 moved physicians from a narrower prohibition in section 726 to the broad prohibition in section 729. The amendment was in response to *Gromis v. Med. Bd. of Cal.* (1992) 8 Cal.App.4th 589 [10 Cal.Rptr.2d 452], which held that a physician may only be disciplined if the sexual misconduct bore a relationship to the physician’s qualifications, functions, or duties and that a physician is not ipso facto unfit to practice merely because of sexual relations with a patient. (*Id.* at pp. 597-599; *see also Poliak v. Bd. of Psychology* (1997) 55 Cal.App.4th 342 [63 Cal.Rptr.2d 866]. [Under former section 2960, Board improperly revoked the license of a psychologist who engaged in a sexual relationship with a former patient.].)

<sup>22</sup> Senate Bill 743, Bill Analysis for the Assembly Committee on Public Safety, July 13, 1993. The UCSF report found that almost twenty-five percent of physicians had at least one patient who reported sexual contact with another physician, which was an indication that sexual abuse was even more widespread than the one in ten figure; that ninety-four percent of physicians opposed sexual contact with current patients; and that forty-two percent of the physicians who admitted to sexual relations with patients had contact with more than one patient, which was indication of an unhealthy pattern of exploiting patients.

concluded that “[c]urrent laws regarding sexual misconduct are not working as a deterrence to exploitation of patients.” (Dept. of Consumer Affairs, Enrolled Bill Rep. on Sen. Bill No. 743 (1993-1994 Reg. Sess. Sept. 17, 1993, p. 2.)

There are regulatory provisions similar to section 729 for professionals such as psychologists (section 2960), educational psychologists (section 4989.58), psychiatric technicians (section 4521.2), marriage and family therapists (section 4982) and respiratory therapists (section 3752.7). Some provisions, such as section 2960, are similar to an earlier version of section 726 in that they only prohibit sexual relations “that is substantially related to the qualifications, functions or duties of a psychologist. . . .”

## **V. PROPOSED COMMENTS TO THE RULES**

Each proposed comment appearing after the text of proposed rule 1.8.10 is intended to provide guidance for interpreting and applying the rule. The Court’s options for action on the proposed comments include, but are not limited to: (1) approval of the proposed rule with all of the comments, (2) approval of the proposed rule without any comments, (3) approval of the proposed rule only, leaving it to the State Bar to publish the comments as hortatory guidance in the form of legislative history, or (4) approval of the proposed rule with some, but not all, of the comments, leaving the remaining comments to the State Bar to publish as legislative history.

**A. Comment [1]**

Proposed Comment [1] states the state's interest in protecting against sexual exploitation and is substantially the first paragraph of the Discussion to rule 3-120. Comment [1] cites California cases for the basic principle that sexual relations during a lawyer-client relationship implicate the duty of loyalty and pose a risk of the lawyer taking advantage of a client's potential emotional vulnerability. A common meaning of "exploitation"<sup>23</sup> conveys the sense that the rule is intended to prohibit exploitative sexual relations that violate the lawyer's duty of loyalty and cause inherent harm to client trust and confidence. The

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<sup>23</sup> One definition of "exploitation" is: "Utilization of another person or group for selfish purposes." (www.thefreedictionary.com.) (Last accessed on October 5, 2012.) A copy is on file with the State Bar.) In the context of lawyer-client sexual relations, one commentator has described "sexual exploitation" as including situations where the lawyer is not the initiator:

Of course, the attorney is not always the initiator of a sexual relationship. Nevertheless, because of the power the attorney possesses and the client's vulnerability, dependency and trust in her attorney, it remains the attorney's responsibility to prevent a sexual relationship from developing. *I maintain that true consent to sexual intercourse during an attorney-client relationship will rarely occur.* I believe that there are women clients who are capable of such consent, and that there are attorneys who are capable of retaining the necessary objectivity to ethically and effectively represent their client's interests while engaging in a sexual relationship. However, I also believe that it is the extraordinary situation where neither the client's interests nor the attorney's professional conduct are adversely affected by their sexual relationship. As a result, far more often than not, attorneys who have sex with their clients are guilty of, at a minimum, sexual exploitation. Their clients are indeed victims.

Forell, *Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues*, (1992) 22 Golden Gate U.L. Rev. 611, 621.



counterpart model rule 1.8, Comment [17] lacks case law citations. Finally, a new sentence is added at the end to clarify that the prohibition applies regardless of whether the lawyer or client initiates the sexual relations.

**B. Comment [2]**

Proposed Comment [2] is substantially Comment [18] of model rule 1.8. The first sentence explains that in a pre-existing consensual sexual relationship, issues of exploitation of the fiduciary relationship and client dependency are diminished. Non-substantive edits restate the model rule language in active voice to conform to a California rule-drafting convention. The second sentence of Comment [2] cautions that before proceeding with representation, a lawyer should consider whether the lawyer's representation might be impaired. The caution carries the concept stated in the last Discussion paragraph of rule 3-120 but uses the model rule language of Comment [18] for national uniformity and adds cross references to other rules that might apply.

**C. Comment [3]**

Proposed Comment [3] carries the clarification of the second paragraph of the Discussion to rule 3-120 that the rule applies when an organization is the client, but uses substantially the language of Comment [19] of model rule 1.8 for national uniformity. A cross reference to proposed rule 1.13 (Organization as Client) is comparable to a cross reference in the Discussion paragraph.

## **VI. DISSENTING COMMISSION VIEWS**

### **A. Rules Should Regulate Conduct As Lawyers**

Dissenting commissioners asserted that professional conduct rules should focus on regulating lawyer conduct; that rule 3-120 properly prohibits the abuse of a lawyer's "power position" over a client; but that not every lawyer-client relationship is of such a nature. The State Bar is not the "bedroom police"; outside of a deleterious effect on a lawyer-client relationship, social habits of lawyers that do not constitute moral turpitude should not be subject to discipline.

State Bar response. The State Bar agrees that the primary focus of the rules should be the conduct of members as lawyers, but disagrees with the view that only private conduct constituting moral turpitude warrants discipline. Public protection includes regulating "other misconduct" that does not constitute moral turpitude, such as multiple instances of driving under the influence because that private conduct nevertheless impacts a person's fitness to practice law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].) There is an even stronger interest in regulating lawyer-client sexual relations because there is an inherent relationship to the lawyer's practice of law given the dual role of the client as a sexual partner.

**B. Disgruntled Clients Could Use The Proposed Rule For Retaliation And It Is Questionable Whether A Broad Rule Would Protect The Public**

Dissenting commissioners argued that unless a nexus to a lawyer's professional duties is required, disgruntled clients could use a sexual relationship to retaliate against a perceived personal slight or offense, and use the disciplinary system for vengeance. They believed there is a paucity of empirical evidence from the discipline system suggesting that rule 3-120 is not working and that it is highly questionable that a virtual ban would further protect the public.

State Bar response. The State Bar agrees that sexual relations may be benign at first but later lead to discord and acrimony. This potential is a reason for recommending proposed rule 1.8.10 as a conflict of interest rule. The unifying policy of the conflicts of interest rules is that representation of adverse interests is regulated when there is a potential for prejudice to the lawyer-client relationship.

The Commission minority view about a paucity of empirical evidence is contradicted by OCTC's position that the rule is not working. (See Attachment 6 for an excerpt from OCTC's memorandum dated September 27, 2001.) Also, HALT's public comment supports proposed rule 1.8.10, stating that: "There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients." (The full text of the public comment is provided at Attachment 7.) While HALT's comment letter does not explain the basis for its assertion, the perception of abuses is a valid concern arising from the current rule.

**C. The Proposed Rule Conflicts With Business And Professions Code**  
**Section 6106.9**

Dissenting commissioners asserted that proposed rule 1.8.10's conflict with section 6106.9 is "a denigration of the legislative process."

State Bar response. The State Bar disagrees. First, if this Court approves proposed rule 1.8.10, the State Bar will seek the Legislature's and the Governor's consideration of conforming changes to section 6106.9. The Legislature has previously given consideration to the Model Rules in making policy concerning lawyers. (See, e.g., repealed section 6103.7 (Sen. Bill No. 254, Stats. 1994, ch. 868), which required the State Bar to develop a rule of professional conduct governing trial publicity and directed the State Bar to consider the ABA's model rule 3.6 [regarding trial publicity].)

Second, the Supreme Court can impose stricter ethical standards on lawyers than existing legislative standards. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 602 [79 Cal.Rptr.2d 836]; *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889-890 [123 Cal.Rptr. 101]; and *In re Lavine* (1935) 2 Cal.2d 324, 328 [41 P.2d 161].) Because this Court has the inherent and primary authority to regulate the conduct of lawyers under *In re Attorney Discipline System, supra*, 19 Cal.4th at 582, a rule that is stricter than statutory law is a natural result of the legal profession falling under the primary jurisdiction of the judicial branch, not a "denigration of the legislative process."

**D. The Proposed Rule Implicates A Lawyer’s Privacy Rights**

Finally, dissenting commissioners believe that the broad bright-line prohibition implicates a lawyer’s federal and state constitutional right to privacy.

State Bar response. See the discussion, *infra*, at section VIII, “Constitutional Issues.”

**VII. PUBLIC COMMENT**

In 2006, the Commission circulated a preliminary draft rule (“Draft A”) based on rule 3-120 for public comment. Two comments supported Draft A as properly focusing on whether the attorney provided competent legal counsel, but four comments preferred a “bright line” ban regardless of whether the client received competent representation. (A synopsis of the public comments received on Draft A is provided at Attachment 9.)

At a Commission public hearing on Draft A, an attorney urged moving to model rule 1.8(j) because rule 3-120 results in too little discipline. The attorney spoke of her experience in representing lawyers who had had sex with a vulnerable client but were not disciplined because the requirements of rule 3-120 are difficult to prove. (Attachment 9 includes a transcript of the testimony.)

After considering the public comments and hearing testimony, for the reasons stated in section IV (“Policy Considerations Underpinning the Commission’s Charge”) of this memorandum, the Commission voted 8 to 6 to recommend a rule based on model rule 1.8(j) (“Draft B”).

In January 2010, the Board voted unanimously to conditionally adopt Draft B, subject to a 90-day public comment period on all rules to be recommended to the Court. During the 90-day comment period, the State Bar received seven comments on Draft B. (The full text of comments on Draft B is provided at Attachment 7. A synopsis of the public comments on Draft B is provided at Attachment 10.) HALT and another commenter supported Draft B, valued its clarity and believed the rule would improve client protection. Three comments opposed Draft B, stated that rule 3-120 is effective, and expressed discomfort with a ban on sexual relations in every instance.

Two comments proposed modification. One of these comments sought clarification on whether the rule applies after a lawyer-client relationship ends. The Commission discussed the suggestion but made no change because it believed that the facts of each situation would determine whether the purpose of the rule was implicated by sexual relations occurring after the lawyer-client relationship concluded. By analogy, the Commission considered the decision in *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362 [243 Cal.Rptr. 699], which found that a conflict of interest rule applicable to a lawyer's relationship with a current client could, under certain facts, govern a former client relationship.<sup>24</sup>

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<sup>24</sup> Compare Business and Professions Code section 729(a) which, in part, states: "Any physician . . . who engages in an act of sexual intercourse . . . or sexual contact with . . . a former patient . . . when the relationship was terminated primarily for the purpose of engaging in those acts, unless the physician . . . has referred the patient or client to an independent and objective physician . . . is guilty of sexual exploitation. . . ." See also *Poliak v. Board of Psychology* (1997)

OCTC suggested deleting Comment [1] as too long and adding a comment cross-reference to section 6106.9. The Commission declined both suggestions. Comment [1] provides valuable guidance and the State Bar intends to work with law makers to consider statutory amendments if proposed rule 1.8.10 is approved.

For the reasons previously stated, the Commission voted 6 to 5 (with one abstention) in favor of Draft B. On July 23, 2010, without discussion, RAC unanimously recommended Draft B. On July 24, 2010, the full Board unanimously adopted Draft B and recommends it to this Court.

## **VIII. CONSTITUTIONAL ISSUES**

### **A. Board Of Trustees Consideration Of The Constitutional Issues**

When RAC considered the proposed rule in November 2009 and January 2010, it considered the constitutional right to privacy issue.<sup>25</sup> Some Board members doubted that there is in fact a constitutional issue. Generally, Board

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(footnote continued...)

55 Cal.App.4th 342 [63 Cal.Rptr.2d 866] [Former statute prohibiting sexual contact with a patient did not extend to a psychologist's sexual contact with a "former patient."].

<sup>25</sup> The analysis of the constitutional issue has been further developed for this memorandum. The Board was provided a substantially similar analysis, which included the information in section I "Current Rule of Professional Conduct 3-120", subsections B-C, and a preliminary indication of OCTC's statistical data. The Board did not have the chart regarding discipline imposed in other states (Attachment 4) or the memorandum on State Bar information regarding disciplinary complaints (Attachment 5).

members expressed that: 1) proposed rule 1.8.10 provides more public protection than rule 3-120 and therefore is worth supporting despite possible constitutional implications; 2) the physician standard in section 729 is preferable to rule 3-120; 3) there has not been a constitutional challenge to statutes like section 729 and it is questionable whether the proposed rule really poses a constitutional issue; and 4) the competency provision of rule 3-120(B)(3) is a problem.

After discussion, in January 2010, RAC voted 6 to 2 for Draft B, and the Board voted unanimously to conditionally adopt it. In July 2010, the Board confirmed its prior adoption of proposed rule 1.8.10.

#### **B. Summary Of Constitutional Issues**

The argument against the constitutionality of proposed rule 1.8.10 is that a flat prohibition is not narrowly tailored to a compelling state interest. Proposed rule 1.8.10 is unlike current rule 3-120, section 6106.9, and section 729, all of which contain exceptions that allow the attorney or physician in a consensual, non-exploitative relationship to avoid discipline. Since there is an explicit right to privacy in Article I, section 1 of the California Constitution, opponents assert that proposed rule 1.8.10 infringes on an attorney's right of privacy, even though as members of a regulated profession, attorneys' rights may be curtailed in ways that those of a private citizen cannot be.

The State Bar's response is twofold. First, it is by no means clear that a right to have sex with clients is included within the constitutional right of privacy recognized by the state and federal Constitutions. None of the twenty-seven jurisdictions that



have rules similar to proposed rule 1.8.10 has produced a case in which constitutional privacy implications were addressed. Second, even if the proposed rule did affect fundamental privacy rights, California's history with rule 3-120 demonstrates that a bright-line rule is necessary. The number of complaints compared to the paucity of discipline is strong evidence that rule 3-120 has been insufficient to satisfy the state's interest in protecting clients and maintaining confidence in the legal profession.

**C. The Permissible Scope Of Laws Governing Attorney Conduct**

Although attorneys are entitled to constitutional protections, their constitutional rights are often weighed against state interests involving the practice of law under a different standard than that which is applied to the general public.

The United States Supreme Court said that membership in the State Bar “‘is a privilege burdened with conditions.’” (*Gentile v. State Bar of Nev.* (1991) 501 U.S. 1030, 1066 [111 S.Ct. 2720] (quoting *In re Rouss* (1917) 221 N.Y. 81, 84 [116 N.E. 782].).) Courts have consistently held that “[a] lawyer belongs to a profession with inherited standards of propriety and honor[.] . . . He who would follow that calling must conform to those standards.” (*In re Sawyer* (1959) 360 U.S. 622, 646 [79 S.Ct. 1376] (conc. opn. of Stewart, J.).)

Part of the obligation to conform to professional standards may involve surrendering rights enjoyed by the general population, such as free speech rights. (*Gentile v. State Bar of Nev.*, *supra*, 501 U.S. at pp. 1071-1072.) On the other hand, Justice Kennedy, joined by three other justices, wrote that “disciplinary rules governing the legal profession cannot punish activity protected by the First

Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law.” (*Id.* at p. 1054.)<sup>26</sup>

As discussed below, case law involving sexual relations between professionals and their clients appears to favor the state’s regulatory interests even more than the First Amendment cases discussed above. Although courts have recently held that intimate sexual relationships are protected privacy interests, constitutional protection is limited or nonexistent in situations where the relationship is inherently unequal, such as that between lawyer and client or physician and patient. This is true under both state and federal law.

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<sup>26</sup> See also *Florida Bar v. Went For It, Inc.* (1995) 515 U.S. 618, 622-623, 628-629 [115 S.Ct. 2371] [discussing Supreme Court cases affording some constitutional protection to attorney commercial speech; upholding Florida’s 30-day ban on targeted solicitations of mass-accident victims.]; *Standing Com. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1442 (citing *Gentile, supra*, 501 U.S. at pp. 1074-1075) (although “speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice,” because of the significant burden the rule places on otherwise protected speech, “prejudice to the administration of justice must be highly likely before speech may be punished.”) California courts have issued similar decisions. (See *Kitsis v. State Bar* (1979) 23 Cal.3d 857, 863-867 [153 Cal.Rptr. 836] (prohibition against use of runners and cappers does not violate an attorney’s right to free speech, given the state’s interest in protecting clients from in-person solicitations); see also *Shea v. Bd. of Medical Examiners* (1978) 81 Cal.App.3d 564, 576-577 [146 Cal.Rptr. 653] [First Amendment does not impede state in regulating professional conduct of health professions in order to protect citizens.].)

1. The United States Supreme Court's Ruling In *Lawrence v. Texas*

Although the United States Supreme Court has decided a number of cases that implicate sexual privacy rights,<sup>27</sup> for purposes of a rule of professional conduct a discussion of sexual privacy rights begins with *Lawrence v. Texas* (2003) 539 U.S. 558 [123 S.Ct. 2472]. The *Lawrence* Court invalidated the convictions of two adults for consensual sexual intimacy in their home under a Texas statute that criminalized “deviate sexual intercourse” between individuals of the same sex, holding that the statute furthered no legitimate state interest that justified intrusion into the personal and private life of the individual. (*Id.* at pp. 567-579.) The Court affirmed that individual decisions concerning the intimacies of a physical relationship are a form of “liberty” protected by the due process clause of the Fourteenth Amendment and that this protection extends to intimate choices by unmarried as well as married persons. (*Id.* at p. 578.)

The Court suggested, however, that in other situations the state may have a legitimate interest in cases involving “injury to a person or abuse of an institution the law protects.” (*Id.* at p. 567.) The Court noted that the case before it “does not involve persons who might be injured or coerced or who are situated in

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<sup>27</sup> See *Carey v. Servs. Int.* (1977) 431 U.S. 678, 684-685 [97 S.Ct. 2010] [sale of non-medical contraceptives]; *Roe v. Wade* (1973) 410 U.S. 113, 152-153 [93 S.Ct. 705] [overruled in part on other grounds by *Planned Parenthood v. Casey* (1992) 505 U.S. 833 [112 S.Ct. 2791]]; *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453-554 [92 S.Ct. 1029] [use of contraception]; *Stanley v. Georgia* (1969) 394 U.S. 557, 564 [89 S.Ct. 1243]; *Griswold v. Connecticut* (1965) 381 U.S. 479, 483-485 [85 S.Ct. 1678].

relationships where consent might not easily be refused.” (*Id.* at p. 578.) Thus, although *Lawrence* provides strong grounds for the constitutional protection of consensual sexual relationships between two adults, the distinguishing language arguably applies to the relationship of an attorney and a vulnerable client, creating a constitutional exception for the concerns that the proposed rule seeks to address.

The State Bar has found only one post-*Lawrence* case invalidating a regulatory prohibition against consensual sexual relationships as infringing on privacy rights. *Caddy v. Department of Health, Bd. of Psychology* (Fla. Dist. Ct. App. 2000) 764 So.2d 625, involved a state rule prohibiting some mental health professionals from having sexual relations with former clients in perpetuity. Although the court recognized that the state has a compelling interest in protecting its citizens’ mental health and in protecting the integrity of the medical profession, it held that a bright-line rule deeming the professional relationship to continue in perpetuity, and therefore prohibiting sexual relations after the patient relationship had ended, was not the least intrusive means to protect those interests, and was overbroad and violated Florida’s constitutional privacy amendment. (*Id.* at 629-630.)

By contrast, in *Cawood v. Haggard* (E.D. Tenn. 2004) 327 F.Supp.2d 863, a federal district court in Tennessee determined that an attorney did not have a protectable privacy interest in what began as a consensual sexual relationship with his client but ended with the client complaining to the state Board of Professional

Responsibility and law enforcement that the attorney was improperly exchanging discounted fees for sex.

2. California's Constitutional Right To Privacy

The state's voters amended Article I, section 1 of the California Constitution in 1972 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.

This Court has noted that the state right is broader than the federal right. (*Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326-328 [66 Cal.Rptr.2d 210]; *Committee To Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 263 [172 Cal.Rptr. 866]; *White v. Davis* (1975) 13 Cal.3d 757, 773-76 [120 Cal.Rptr. 94].)

In *Am. Acad. of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at pp. 341-342, the 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.].)<sup>28</sup>

State courts emphasize, however, that the right to privacy is not absolute. (*Hill, supra*, 7 Cal.4th at p. 38.) Thus, “[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 in weighing personal privacy rights. (*Hill, supra*, 7 Cal.4th 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., supra*, 145 Cal.App.3d at p. 369, was decided before 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. (*Id.* at pp. 374.) 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

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<sup>28</sup> In 2009, this Court applied strict scrutiny to the state’s marriage statutes not only because the statutes treated persons differently on the basis of sexual orientation, which it determined was a “suspect classification” under the state Constitution’s equal protection clause, but also because the statutes significantly impinged on the fundamental privacy interests of same-sex couples. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 844-845, 846-847 [76 Cal.Rptr.3d 683].) The Court’s principal focus was on the equal protection analysis, however, as opposed to the privacy interest analysis. (*Id.* at pp. 847-848.)

during the course of the representation, stating that the question was more properly directed to the State Bar. (*Id.* at p. 384.)

In addition, 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 infliction of 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.)

However, California courts have upheld restrictions on sexual relations between physicians and their patients. (See *Roy v. Superior Court*, *supra*, 198 Cal.App.4th at p. 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 [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.) The same is, of course, true of an attorney’s privacy interest in having sexual relations with a client.

Thus, although no case is directly on point, case law suggests the following:

1. An attorney’s right of privacy and association is protected under the state and federal Constitutions. (See, e.g., Cal. Const., art. I, § 1; *Roberts v. U.S. Jaycees*, *supra*, 468 U.S. at pp. 617-618.)
2. That right of privacy extends to private consensual sexual relations. (*Lawrence v. Texas*, *supra*, 539 U.S. at pp. 567-579; *Vinson v. Sup. Ct.*, *supra*, 43 Cal.3d at p. 841.) For example, a state could not enact a law that attorneys may not have sex unless they are married.
3. The courts have not been clear, however, about the level of scrutiny that should be applied to statutes or regulations that affect the right to private consensual sexual relations. In *Lawrence v. Texas*, for example, the majority did not identify what level of scrutiny it used to strike down the Texas statute criminalizing same sex conduct.
4. Even if strict scrutiny applies, a rule of professional conduct that limits sexual relations between attorneys and their clients will be upheld if it is narrowly tailored to protect a compelling state interest.



(See, e.g., *Gentile v. State Bar of Nev.*, *supra*, 501 U.S. at p. 1076; *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at p. 792.)

5. States have a compelling interest in regulating the practice of law and in protecting clients from exploitation or injury caused by their attorneys. (See *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at p. 792; *Kitsis v. State Bar*, *supra*, 23 Cal.3d at pp. 863-867.)

These principles favor a bright-line rule prohibiting lawyer-client sexual relations. The first thing to consider is the nature of the state interest at stake. The state's primary interest is to protect vulnerable clients from the sexual advances of their lawyers, but there are other interests as well. A 1992 ABA Formal Opinion notes that "a lawyer who engages in a sexual relationship with a client during the course of representation risks losing the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment." (ABA Formal Ethics Op. 92-364 (1992) p. 6. See Attachment 11.)<sup>29</sup> A sexual relationship may also present conflicts of interest, such as in divorce proceedings where the fact of the relationship could affect the client's ability to obtain custody of children. A conflict of interest could also arise in a corporate setting, where a sexual

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<sup>29</sup> The Legislature appears to concur with the ABA opinion. Section 6106.8(a) in part states: ". . . The Legislature further finds and declares that it is difficult to separate sound judgment from emotion or bias which may result from sexual involvement between a lawyer and . . . client during the period that an attorney-client relationship exists, and that emotional detachment is essential to the lawyer's ability to render competent legal services. Therefore, in order to ensure that a lawyer acts in the best interest of his or her client, a rule of professional conduct governing sexual relations . . . shall be adopted."

relationship develops between the lawyer and the corporate client's representative and the lawyer learns of information detrimental to the representative that should be disclosed to the representative's superiors. Finally, there is danger that lawyer-client communications may be compromised. As the ABA opinion points out, "[c]lient confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship," and "courts will not protect confidences given as part of a personal relationship" unless they are within the marital privilege. Because "there is no privilege for lovers," expectations of confidences "will be forced to rest on ever shifting sands." (ABA Formal Ethics Op. 92-364 (1992) p. 8. See Attachment 11.)

Next, one must consider what means are available to meet the state's interest, beginning with the current rule. Rule 3-120 does not adequately put members or clients on notice of what type of conduct is prohibited. For example, what does it mean that a lawyer shall not "employ . . . undue influence in entering into sexual relations with a client," given that the relationship is inherently unequal? Lack of clarity also puts too much focus on the client's behavior, making clients vulnerable to being "put on trial" for their role in the relationship should they make a complaint. This may deter some clients from filing complaints because they fear they will not be believed and there are too many hurdles of proof for them to demonstrate that the relationship was coercive or otherwise improper.

Finally, rule 3-120 fails to provide unambiguous enforcement standards. Perhaps because of its lack of clarity, the rule is not working. It does not deter

California lawyers from engaging in troubling client relationships, as indicated by the large number of complaints noted in the memorandum at Attachment 6. The scant record of discipline and difficulties in proving a violation are evidence that a brighter line standard is needed. Jurisdictions with the model rule or something similar do not face the ambiguity and proof issues of rule 3-120.

The proposed rule is intended to be as least restrictive as possible, given that rule 3-120 has been tried without success. Proposed rule 1.8.10 excludes pre-existing sexual relationships, but whether the rule could apply after the professional representation has ended has been left open. An argument can be made that a proposal restricted to an existing lawyer-client relationship would be the least restrictive rule to achieve the state's interests. If necessary, the rule could be modified to restrict its application to sexual relations occurring during an existing lawyer-client relationship. Whether that limitation is necessary will depend upon whether a court finds that the rule is subject to strict scrutiny. If it is not, then the least restrictive requirement does not apply.

**D. The Conflict Between Proposed Rule 1.8.10 And Business And Professions Code Section 6106.9**

Proposed rule 1.8.10 goes considerably further than section 6106.9 in regulating sexual relations. Proposed Comment [3] applies the prohibition even if the client initiates the relations. Section 6106.9 is silent on this point, but it could make a difference under section 6106.9 if the client initiated the sexual relations.

Although the proposed rule is hard to reconcile with the statute, if the Court wishes, it can approve a standard stricter than the statute. (See *In re Att’y Discipline, supra*, 19 Cal.4th at p. 602 (courts’ inherent authority to regulate the practice of law permits them to demand more than the Legislature has required).) The question is whether the Court will want to exercise the authority, which it has done only rarely. (*Id.* at p. 603 [“on rare occasions we have invalidated legislative enactments that materially impaired our inherent power over admission and discipline”]; *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 543 [28 Cal.Rptr.2d 617] [cases in which Court used its inherent authority to regulate practice of law “are few and far between.”].) If the Court concurs with the State Bar’s belief that there is an urgent and real need for a higher standard and adopts proposed rule 1.8.10, the State Bar could then sponsor an amendment of section 6106.9.

## **IX. CROSS-REFERENCES TO AND FROM OTHER RULES**

Proposed rule 1.8.10 is cross-referenced in two proposed rules, as noted below (emphasis added).

Rule 1.7 (Conflicts of Interests: Current Clients), Comment [12]:

“A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the lawyer-client relationship. **See Rule 1.8.10.**”

Rule 1.8.11 (Imputation of Prohibitions under rules 1.8.1- 1.8.9), Comment [1]:

“ . . . This Rule does not apply to **Rule 1.8.10** since the prohibition in that Rule is personal and is not applied to associated lawyers.”

Proposed rule 1.8.10 cross-references to four proposed rules. Comment [2] refers to proposed rules 1.7(a)(2); proposed rule 1.1; and proposed rule 2.1. Comment [3] refers to proposed rule 1.13.

## **X. IMPLICATIONS FOR OTHER SOURCES OF RULES OF PROFESSIONAL CONDUCT**

Section 6106.9 is substantially different from proposed rule 1.8.10.

California Rules of Court, Appendix C (Guidelines for Family Law Information Centers) refers to rule 3-120.

## **XII. CONCLUSION**

The Board of Trustees requests that this Court approve proposed Rule of Professional Conduct 1.8.10 in the form set forth in Attachment 1 and as a part of the State Bar's recommendation for a comprehensive new set of Rules of Professional Conduct.

Dated: October 9, 2012

