

**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.

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

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-120 (Sexual Relations With Client) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 1.8(j). The result of the Commission’s evaluation is proposed rule 1.8.10. This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

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

Proposed rule 1.8.10 substantially adopts Model Rule 1.8(j). The Commission believes that California’s current rule renders it difficult to prove a violation in the typical circumstance of consensual sexual relations<sup>1</sup> because the rule is not a bright-line standard. For example, where consensual sexual relations occur, the State Bar must prove that the relations caused the lawyer to perform legal services incompetently. While this might represent a regulatory policy of imposing a least restrictive prohibition on conduct protected under a constitutional right of privacy,<sup>2</sup> it imposes a complexity that is likely frustrating enforcement.<sup>3</sup>

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

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

<sup>3</sup> There are no published California disciplinary cases applying rule 3-120.

The potential for the current rule requirements to frustrate enforcement becomes apparent upon close examination of California's duty of competent representation that is formulated to be consistent with Supreme Court precedent. Discipline case law provides that mere negligence is not a violation of the duty of competence. In *Lewis v. State Bar* (1981) 28 Cal.3d 683 [170 Cal.Rptr. 634], the California Supreme Court reaffirmed this principle stating that: "This court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." (*Lewis v. State Bar* at p. 688.) As a result of this longstanding interpretation of the duty of competence, even if a lawyer engages in consensual sexual relations that cause an act of simple negligence in the performance of a legal service, the lawyer cannot be held to have violated rule 3-120(B)(3). If the Commission's proposed rule is adopted, this outcome would be different because all consensual sexual relations arising during the lawyer-client relationship would constitute a rule violation regardless of whether the lawyer provided competent legal services.

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

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

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

Finally, non-substantive aspects of the proposed rules include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

**Rule 1.8.10 [3-120] Sexual Relations With Client**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

- (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] 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 Clients) 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.

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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.

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

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

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

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

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

### Commission Drafting Team Information

**Lead Drafter:** James Ham

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

**Meeting Date:** February 19 – 20, 2016

**Action Summary Approval Date:** March 31 – April 1, 2016

### I. CURRENT CALIFORNIA RULE 3-120

#### 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*

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

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

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

### II. COMMISSION'S RECOMMENDATION AND VOTE

The Commission voted to recommend a proposed amended rule as set forth below in Section III.

At the Commission's February 19 – 20, 2016 meeting, all members present voted to recommend adoption of the proposed rule with the exception of Mr. Ham who abstained.

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

#### Rule 1.8.10 Sexual Relations With Client

- (a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person\* for the purpose of sexual arousal, gratification, or abuse.

#### Comment

[1] 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) and [2.1 (independent judgment)].

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

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

### IV. COMMISSION'S PROPOSED RULE 1.8.10 (REDLINE TO CURRENT CALIFORNIA RULE 3-120)

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

- (a) A lawyer shall not engage in sexual relations with a 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] 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) and [2.1 (independent judgment)].

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

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[organization's legal matters. See Rule 1.13.](#)

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

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

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

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

### V. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 01/12/16:**

OCTC supports rule 3-120. It neither recommends, nor opposes, prohibiting all attorney relationships with clients.

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

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

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

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

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

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

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_8j.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8j.authcheckdam.pdf) [Last visited 9/14/15]
- Eighteen jurisdictions have adopted Model Rule 1.8(j) verbatim.<sup>1</sup> Sixteen jurisdictions have adopted Model Rule 1.8(j) with modifications.<sup>2</sup> Eight jurisdictions<sup>3</sup> address this issue in a different rule or in a Comment to a different rule.<sup>4</sup> Nine jurisdictions do not address sexual relations with clients at all in their Rules of Professional Conduct.<sup>5</sup>

<sup>1</sup> The eighteen jurisdictions are: Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Idaho; Illinois; Indiana; Kansas; Kentucky; Missouri; Montana; Nebraska; New Hampshire; North Dakota; Pennsylvania; and South Dakota.

<sup>2</sup> The sixteen jurisdictions are: Alabama; Alaska; Iowa; Minnesota; Nevada; New York; North Carolina; Ohio; Oklahoma; Oregon; South Carolina; Utah; Washington; West Virginia; Wisconsin; and Wyoming.

<sup>3</sup> The eight jurisdictions are: California, District of Columbia; Florida; Maine; Maryland; New Mexico; Tennessee; and Vermont.

<sup>4</sup> Three examples of jurisdictions that have taken a different approach in their Rules of Professional Conduct to how they regulate a lawyer’s sexual relations with clients are the District of Columbia, Florida and Maine.

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

#### **Sexual Relations Between Lawyer and Client**

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

[38] Especially when the client is an individual, the client’s dependence on the lawyer’s knowledge of the law is likely to make the relationship between lawyer and client unequal. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer’s fiduciary role and thereby violate the lawyer’s basic obligation not to use the trust of the client to the client’s disadvantage. In addition, such a relationship

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presents a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client privilege, because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. The client's own emotional involvement may make it impossible for the client to give informed consent to these risks.

[39] Sexual relationships with the representative of an organization client may not present the same questions of inherent inequality as the relationship with an individual client. Nonetheless, impairment of the lawyer's independent professional judgment and protection of the attorney-client privilege are still of concern, particularly if outside counsel has a sexual relationship with a representative of the organization who supervises, directs, or regularly consults with an outside lawyer concerning the organization's legal matters. An in-house employee in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the employee's personal involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver. The lawyer should consider not only the disciplinary rules but also the organization's personnel policies regarding sexual relationships (for example, prohibiting such relationships between supervisors and subordinates).

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

- (i) engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer - client relationship including, but not limited to:
  - (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;
  - (2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or
  - (3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

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

Maine has not adopted the ABA Model Rules' categorical prohibition on an attorney forming a sexual relationship with an existing client because such a rule seems unnecessary to address true disciplinary problems and it threatens to make disciplinary issues out of conduct that we do not believe should be a matter of attorney discipline. However, the lack of a categorical prohibition should not be construed as an implicit approval of such relationships. Attorneys have been disciplined under the former Maine Code of Professional Responsibility for entering into sexual relations with clients, and they may be disciplined for similar conduct under these rules. The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. In certain types of representations such as family or juvenile matters, the relationship is almost always unequal; thus, a sexual relationship between lawyer and client in such circumstance may involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be

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

#### A. Introduction

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

#### B. Concepts Accepted (Pros and Cons):

1. Recommend adoption of a bright-line prohibition on sexual relations between lawyers and their clients.
  - Pros: Establishing a violation of the current rule and its statutory counterpart, Bus. & Prof. Code § 6106.9, has been extremely difficult to prove. Consequently, improper sexual relations are not deterred by the current rule or statute because discipline is seldom imposed. The proposed broader prohibition significantly reduces enforcement obstacles and is a bright-line statement of the prohibition on sexual relations. The proposed revisions to the Rule also fulfill each of the five elements of this Commission's Charter by: (1) promoting confidence in the legal profession and ensuring adequate protection to the public; (2) setting forth a clear and enforceable disciplinary standard; (3) eliminating an unnecessary difference between California's rule, on the one hand, and the ABA Model Rule subsection and rules adopted by most of the states whose rules of conduct address this subject, on the other hand; (4) eliminating ambiguity and uncertainty in the current Rule in favor of a bright-line Rule; and (5) eliminating an unnecessary comment to the Rule.
  - Cons: The data does not establish that it is "extremely difficult to prove" valid cases of improper sexual conduct. There is also little policy justification for easing the legal requirements of proof to justify attorney discipline. If a case is weak or lacks evidentiary support, it does not justify prosecution. If there are proof problems in establishing a claim, the answer is not to automatically discipline attorneys because that is not fair. A bright-line prohibition is also overbroad as it applies in situations

unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship.

<sup>5</sup> The nine jurisdictions are: Georgia; Louisiana; Massachusetts; Michigan; Mississippi; New Jersey; Rhode Island; Texas; and Virginia.

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where no protection is needed, and the purposes of discipline are not furthered by the imposition of discipline.

- A broad bright-line prohibition implicates a lawyer's federal and state constitutional rights to association and privacy. The prohibition also prohibits two adults who, on the one hand, are not exerting, nor on the other, suffering from, undue influence or coercion, from consenting to an intimate relationship.
2. Retain in paragraph (b) the definition of "sexual relations" as provided in both current rule 3-120 and section 6106.9(d).
    - Pros: Maintaining the same definition provides guidance to lawyers and avoids confusion as to what definition to apply. Eight other jurisdictions use a similar definition in their rule counterpart.<sup>6</sup>
    - Cons: None identified.
  3. Delete paragraph (D) from the current rule.
    - Pros: Paragraph (D) has been removed pending the Commission's consideration of a provision similar to Model Rule 1.8(k), which provides that with the exception of Model Rule 1.8(j), conflicts that arise under Model Rule 1.8 provisions are imputed to lawyers in the same firm.<sup>7</sup>
    - Cons: None identified.
  4. Delete the spousal exception contained in paragraph (C) of the current rule.
    - Pros: A spouse who later becomes a client is within the exception for sexual relations that predate the lawyer-client relationship.
    - Cons: This omission may have an impact in the event a client becomes a spouse after the lawyer-client relationship has commenced.

### C. Concepts Rejected (Pros and Cons):

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

<sup>6</sup> The eight jurisdictions are: Maine, New York, North Carolina, Oklahoma, Oregon, Utah, West Virginia, and Wisconsin.

<sup>7</sup> RRC1 adopted a similar provision, denominated as Rule 1.8.11, which provided:

#### **Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9**

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

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

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

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

1. Substitute the term “lawyer” for “member”.
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to approximate the ABA Model Rules numbering and formatting (e.g., lower case letters). See paragraph 3, below.
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Assign the number 1.8.10 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as rule 1.8(j).
  - Pros: The drafting team agrees with the approach taken by RRC1. RRC1 proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, RRC1

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recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

- Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other jurisdictions to research California case law that might interpret and apply the rule.
4. Current rule 3-120(C) contains an exception for a spouse who later becomes a client. Although the reference to a spousal exception is eliminated from the proposed rule, a spouse who later becomes a client comes within the exception for sexual relations that pre-date the lawyer-client relationship.
  5. Other non-substantive changes to the Model Rule include: the use of “lawyer-client” replaces the Model Rule’s “client-lawyer.” This conforms to state statutory language commonly used for the lawyer-client relationship. (E.g., Evid. Code § 958).
  6. The verb “have” in Model Rule 1.8(j) is changed to “engage in” in proposed rule 1.8.10(a): “A lawyer shall not engage in sexual relations with a client unless. . . .” When approving the first Commission’s proposed rule 1.8.10, the State Bar Board of Trustees believed “have” might be misconstrued to mean that the lawyer must be the initiator or the aggressor, and that “engage in” would not suggest that the lawyer must be the initiator to trigger the prohibition. Ohio’s variation of Model Rule 1.8(j) similarly replaces “have” with “solicit or engage in.”

### F. Alternatives Considered:

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

## VIII. COMMISSION RECOMMENDATION FOR BOARD ACTION

### Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed amended Rule 1.8.10 [3-120] in the form stated above for purposes of public comment authorization as a part of the Commission’s proposed comprehensive revisions to the Rule.

## IX. FINAL COMMISSION VOTE/ACTION

Date of Vote: February 19 – 20, 2016

Action: Approve Rule 1.8.10 [3-120] as revised during the meeting.

Vote: 15 (yes) – X (no) – 1 (abstain)