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(August 2, 2004)

Rule 3-120. Sexual Relations With Client

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NOTE: Refer to comment no. 2002-26 (Ira Shafiroff) included in the clear public comment binder.

RULE AMENDMENT HISTORY (2004)

Rule 3-120. Sexual Relations With Client

Current Rule

Rule 3-120. Sexual Relations With Client

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

(B) A member shall not:

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

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

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

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

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

Discussion:

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

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

Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110. (Added by order of Supreme Court, operative September 14, 1992.)

RULE AMENDMENT HISTORY (2004)

Comparison of the rule as recommended by the State Bar in May 1991 to the rule as approved by the Supreme Court in August 1991

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(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.

~~(E) A member who engages in sexual relations with his or her client will be presumed to violate rule 3-120, paragraph (B)(3). This presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606.~~

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.

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Although paragraph (C) excludes representation of certain clients from the scope of rule 3-120, such exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including rule 3-110. (Added by order of Supreme Court, operative September 14, 1992.)

Excerpts From: History of the Board of Governor's Formulation of Proposed Rule 3-120.

On September 29, 1989, amended Assembly Bill No. 415 (Roybal-Allard) (see Enclosure 4) was signed by the Governor. This bill, acting to add Business and Professions Code section 6106.8, 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 cases involving, but not limited to, probate matters and domestic relations, including dissolution proceedings, child custody cases and settlement proceedings. The State Bar was to submit the proposed rule to the Supreme Court no later than January 1, 1991.

.....

Following an in-depth review and study, the Subcommittee, in conjunction with State Bar staff, developed proposed rule options which were then discussed with Assemblywoman Roybal-Allard at a meeting on April 1, 1991. Following this meeting, the Subcommittee developed a draft rule which it recommended for adoption (Draft Rule F - See Enclosure 12) and prepared a memorandum supporting its recommendation. (See Enclosure 12 for the text of the memorandum.)

Draft Rule F is substantially similar to Draft Rule E. However, Draft Rule F contains a rebuttable presumption not found in Draft Rule E. This rebuttable presumption [found in paragraph (E) of Draft Rule F] affects the burden of proof and states:

- (E) A member who engages in sexual relations with his or her client will be presumed to violate rule 3-120, paragraph (B)(3). This presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606.

The effect of paragraph (E) is to create a rebuttable presumption (upon a showing by the State Bar that the attorney engaged in sexual relations with his or her client) that the attorney represented such client in an incompetent manner in violation of rule 3-110 (Failing to Act Competently). Under Evidence Code section 606, the effect of the presumption would be to impose upon the attorney the burden of proof as to the nonexistence of the presumed fact (incompetent representation in violation of rule 3-110).

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Evidence Code section 605 states that a presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied. In its memorandum, the Subcommittee asserted that the public policy justification for the this rebuttable presumption was found in Business and Professions Code section 6106.8(a), the legislation sponsored by Assemblywoman Roybal-Allard which mandates proposed new rule 3-120. Business and Professions Code section 6106.8(a) states:

- (a) The Legislature hereby finds and declares that there is no rule that governs propriety of sexual relations between lawyers and clients. The Legislature further finds and declares that it is difficult to separate sound judgement from emotion or bias which may result from sexual involvement between a lawyer and his or her 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 interests of his or her client, a rule of professional conduct governing sexual relations between attorneys and their clients shall be adopted.

The Subcommittee asserted that the California State Legislature, through this statute, provides the public policy underpinnings necessary to support the imposition of a presumption affecting the burden of proof.

The Subcommittee further noted that there exists precedent for such presumption elsewhere in the California Rules of Professional Conduct. Under paragraph (E) of rule 1-400 (Advertising and Solicitation), the Board previously created ten standards the violation of which creates an Evidence Code section 605 and 606 presumption affecting the burden of proof. These standards were drawn from statutory and decisional law, previous Rules of Professional Conduct, disciplinary cases, actual published advertisements, rules adopted in other jurisdictions, and public comment and debate regarding attorney advertising. Their purpose is to protect the public from deception, fraud and overreaching.

The Subcommittee asserted that the recommended sex-with-client presumption, like the advertising standards presumption, serves to protect the public. This presumption responds specifically to the California Legislature's findings in Business and Professions Code section 6106.8(a) that emotional detachment is essential to the lawyer's ability to render competent legal services. This presumption also responds to the Subcommittee's study findings that instances exist where sexual relations between an attorney and the attorney's client resulted in the incompetent representation of the client. The recommended presumption creates a strong incentive for attorneys to keep their clients' interests paramount in the course of legal representation. The Subcommittee believed that the recommended presumption is justified by public policy (found in Business and Professions Code section 6106.8), by the Subcommittee's study

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findings and by the fact that there exists precedent elsewhere in the Rules of Professional Conduct for such presumption.

On April 19, 1991, the Board Committee considered Draft Rule F and the report of the Subcommittee. An aide to Assemblywoman Roybal-Allard appeared and informed the Board Committee that Assemblywoman Roybal-Allard found Draft Rule F to be acceptable. After discussion and minor amendment [language in paragraph (C) of Draft Rule F was amended in a non-substantive manner], the Board Committee determined to adopt Draft Rule F for recommendation to the Board. The Board Committee concurred with the Subcommittee's finding that Draft Rule F: 1) is constitutional; 2) provides clear disciplinary standards so that State Bar prosecutors may effectively employ the rule to discipline members and members may look to the rule for guidance; 3) addresses the concerns raised by Assemblywoman Roybal-Allard relating to consumer rights and client protection; and 4) sends the clear message to the profession and the public that while not prohibited, attorney-client sexual contact is strongly disfavored as being inherently disruptive and damaging to the attorney-client relationship.

On April 20, 1991, following review of the report of the Subcommittee and after hearing testimony from Assemblywoman Roybal-Allard supporting adoption of Draft Rule F, the Board of Governors adopted new proposed rule 3-120 (see Enclosure 1) and determined to forward the rule for approval to the Supreme Court. (See Enclosure 2 for text of Board resolution.)

[May, 1991 gold bound rule filing at pgs. 2 – 9]

Excerpt from September 27, 2001 Memorandum

DATE: **September 27, 2001**

TO: **The Commission for the Revision of the Rules of Professional Conduct**

FROM: **Mike Nisperos, Jr., Chief Trial Counsel**

SUBJECT: **Recommendations for Changes to the Rules of Professional Conduct**

15. Rule 3-120. Sexual Relations With Clients

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

Remove:

. . .

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

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

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

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

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

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

And replace with:

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

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

Discussion:

...

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Because of the significant danger of harm to the client's interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client or harm to the client's case.

Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.

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

OCTC COMMENTS:

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

CA Rule 3-120 – Sexual Relations With Client	ABA Model Rule 1.8 (j) – Conflict of Interest; Current Clients; Specific Rules	Comments
(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.		The ABA rule does not include a definition of “sexual relations”. Overall the CA rule is much more detailed than the ABA rule.
(B) A member shall not: (1) Require or demand sexual relations with a client incident to or as a condition for any professional representation; or		No ABA equivalent. The ABA just says that there should be no sexual relationship between attorney and client.
(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or		No ABA equivalent.
(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.	[18] [When the sexual relationship predates the client-lawyer relationship,] [t]he lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.	The application of the ABA rule to discipline a lawyer who engages in a sexual relationship with a client is not dependent upon the sexual relationship’s effect upon the lawyer’s competence. The fact that the sexual relationship had no effect upon the lawyer’s competence would appear to be a mitigating factor only in those situations where the sexual relationship predated the client-lawyer relationship.
(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.	(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. [18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship.	The ABA rule is a total bar to sexual relations with a client unless the relationship pre-dates the representation. The CA rule is more liberal than the ABA.

<p>(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.</p>	<p>1.8(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.</p>	<p>The effect of 1.8(k) is to impute the disqualification under 1.8(a) to (i) of any member of the firm to all the other members. Comment [8] to MR 1.10, the general imputation rule, provides that 1.8(k) controls re imputation of disqualifications under MR 1.8. As 1.8(j) is not included within 1.8(k), a disqualification for a sexual relationship is not imputed to other members of the firm. <i>See also</i> MR 1.8, cmt. [20] (“The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers”).</p>
<p>DISCUSSION: [1] 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. The relationship between 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. Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate. In all client matters, a member is advised to keep client’s interests paramount in the course of the member’s representation.</p>	<p>[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment.</p>	<p>Both rules contain similar discussion about the fiduciary relationship between attorney and client. Only the CA rule states that where there is undue influence by the attorney, discipline is appropriate.</p>
<p>[2] 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).</p>	<p>[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of</p>	<p>Both rules include a provision in the discussion for the organization as a client.</p>

	the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.	
[3] 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.		No ABA equivalent.