

<b>Rule 1.8.10 Sexual Relations With Client. [Sorted by Commenter]</b>						TOTAL = ___ Agree = ___ Disagree = ___ Modify = ___ NI = ___
No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Janis E. Eggleston	M	No		Rule 1.8.10 is ambiguous in that it does not identify whether lawyers will be prevented from having sexual relations with a client after the representation has concluded. Given that our duty of loyalty and confidentiality continue to exist after the conclusion of the representation, those same continuing duties might apply to sexual relations. The rule should clarify if, or under what terms, sexual relations with clients could exist after the representation has concluded.	Where the rules intend to apply to persons or entities who are no longer clients of the lawyer, the rules refer to them as "former clients." Thus, the Commission feels that the use of the term "client" in this rule is not ambiguous.
2	Stephen Kent Rose	D	No		Sexual relationships should not be the Bar's business. Given that anybody who asks for or receives any legal information is potentially a client this would seriously limit either sex or conversation.	This comment reflects the minority position which has been rejected by a majority of the Commission.
3	Pascal Anastasi	D	No		The existing rule and prohibition has legitimacy because it is effective when circumstances exist that are likely to cause adverse effects in the representation in the representation of the attorney's client. This makes perfect sense as the rules should be formed to protect the clients. The prohibitions pertain in situations when sex is: (1) required as a condition of a representation; (2) obtained by coercion, intimidation or undue influence; or (3) cause the lawyer to perform	This comment reflects the minority position which has been rejected by a majority of the Commission.

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

**Rule 1.8.10 Sexual Relations With Client.  
[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>services incompetently. The latter is obviously the core issue ... causing poor representation.</p> <p>But a complete ban on all sex in every situation is improper. I may not approve, you may not approve, but the question should be has any harm been incurred.</p> <p>Please adopt rules that have a legitimate purpose, not just a "politically correct" or other "holier than thou" purpose.</p>	
4	Robert K. Rogers	D	No		<p>I believe the current rule adequately covers the areas of real concern regarding sexual relations with clients. I disagree with government (i.e. State Bar) involvement in personal morals and social norms, and I believe the Proposed Rule crosses that line.</p> <p>The current rule prohibits conduct that is coercive and addresses the potential for the relationship to interfere with the attorney's ability to perform to the best of his or her ability. This would prohibit a relationship from developing in, for example, a situation in which the attorney and client are involved in real estate or other purely financial transactions or disputes. I see nothing wrong, generally, in two people developing a personal relationship that arises out of a professional one, and I think that the State</p>	This comment reflects the minority position which has been rejected by a majority of the Commission.

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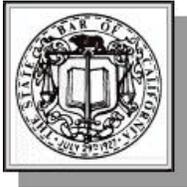
No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Bar should limit itself to situations in which there is a real danger that the attorney/client relationship will be harmed. This Proposed Rule is too broad in its scope, and too confining in its proscription.	
5	COPRAC	A	Yes	Comment [2]	Comment [2] uses the term “adversely affected” which language derived from a prior draft of Rule 1.7. Now that the current draft of Rule 1.7 uses the “materially limited” test, the phrase “adversely affected” should be replaced with “materially limited.” This would be consistent with the ABA Model Rule. Also, in Comment [2], the reference to 1.7(d) should be changed as the current version of 1.7 no longer has a subsection (d).	The Commission agrees with this comment and is recommending the suggested change to conform this rule to the latest draft of rule 1.7
				Comment [3]	Comment [3] contains a reference to Rule 1.13. COPRAC does not see the point of this reference, and believes that it could be confusing. Accordingly, we propose to delete it.	The cross-reference to Rule 1.13, refers the lawyer to that Rule for further guidance on the intricacies of representing an organization, to assist the lawyer in complying with this rule.



## Rule 1.8.10 – Public Comment – File List

X-2010-405 Stephen Kent Rose [1.8.10]	1
X-2010-406 Pascal Anastasi [1.8.10]	2
X-2010-411 Janis Eggleston [1.8.10]	4
X-2010-416a Robert Rogers [1.8.10]	5
X-2010-421a COPRAC [1.8.10]	6





# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

\* Select the Proposed Rule that you would like to comment on from the drop down list.

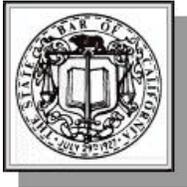
Rule 1.8.10 Sexual Relations With Client [3-120]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

Our sex lives are none of your business. Given that anybody who asks for or receives any legal information is potentially a client this would seriously limit either sex or conversation. Why don't the people who have free time to draft rules know these things?



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I have been an licensed attorney since 1986 (no disciplinary actions) and I agree with most of the proposed changes to the Code of Ethics. But they are "rules". I see two two proposals that I take issue with.

"Sex with clients is just plain wrong"...why?

What do you mean "wrong". You mean you are offended? Do you mean you would not do it? Neither have I. So what does that mean? Why is it "wrong" in every situation? Please explain.

The existing rule and prohibition has legitimacy because it is effective when circumstances exist that are likely to cause adverse effects in the representation of the attorney's client. That makes perfect sense. That is what rules are for...protecting the clients. The prohibitions pertain in situations when sex is:

1. required as a condition of a representation;
2. obtained by coercion,

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A complete ban on all sex in every situation no matter what? Why? Is all sex in every situation harmful to the representation of that client? Honestly, I suspect the answer is "no". For example, a client wants to form a corporation. The attorney forms the corporation and a dinner meeting turns into a situation involving..."sex". Oh my God! Now the State Bar is going to discipline, suspend or disbar the member? Are you serious? This sounds absolutely stupid. I may not approve. You may not approve, but really, has any harm been incurred?

By the way, what is sex? Are you planning to define that too?

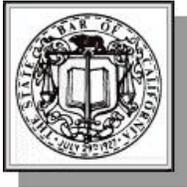
What about a client and the attorney who go hunting, camping, fishing, vacationing, wine tasting...oh my God, another personal relationship is formed. Maybe no kissing or "sex" occurred, but a special personal bond was created. Maybe even an unbreakable, great friendship was formed. I admit, I do have many of those. Is that inappropriate contact too?

Why not ban that special relationship too? Disbar the lawyer. Same ridiculous logic. Make the ban "complete"; no relationship of any kind. Next stop, check emails for excessive "friendliness".

Wake up!

The ABA claims as the slogan, "Defending Liberty, Pursuing Justice". They obviously have a peculiar definition of "Liberty". Does the California State Bar recognize true "Liberty"? What is your definition?

Please adopt rules that have a legitimate purpose, not just a "politically correct" or other "holier than thou" purpose.



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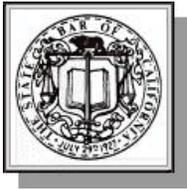
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Rule 1.8.10 is ambiguous in that it does not identify whether lawyers will be prevented from having sexual relations with a client after the representation has concluded. Given that our duty of loyalty and confidentiality continue to exist after the conclusion of the representation, those same continuing duties might apply to sexual relations. The rule should clarify if, or under what terms, sexual relations with clients could exist after the representation has concluded.



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I believe the current rule adequately covers the areas of real concern regarding sexual relations with clients. I disagree with government (i.e. State Bar) involvement in personal morals and social norms, and I believe the proposed rule crosses that line. The current rule prohibits conduct that is coercive and addresses the potential for the relationship to interfere with the attorney's ability to perform to the best of his or her ability. That is as far as it should go. This would prohibit a relationship from developing in, for example, a situation in which the attorney and client are involved in real estate or other purely financial transactions or disputes. I see nothing wrong, generally, in two people developing a personal relationship that arises out of a professional one, and I think that the State Bar should limit itself to situations in which there is a real danger that the attorney/client relationship will be harmed. This proposed rule is too broad in its scope, and too confining in its proscription.



**THE STATE BAR  
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

May 5, 2010

Harry B. Sondheim, Chair  
Commission for the Revision of the  
Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Proposed Rule 1.8.10

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.8.10. COPRAC supports the proposed rule and offers the following comments.

Comment [2] uses the term "adversely affected" which language derived from a prior draft of Rule 1.7. Now that the current draft of Rule 1.7 uses the "materially limited" test, the phrase "adversely affected" should be replaced with "materially limited." This would be consistent with the ABA Model Rule. Also in Comment [2], the reference to 1.7(d) should be changed as the current version of 1.7 no longer has a subsection (d).

Comment [3] contains a reference to Rule 1.13. COPRAC does not see the point of this reference, and believes that it could be confusing. Accordingly, we propose to delete it.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC

# Proposed Rule 1.8.10 [RPC 3-120] “Sexual Relations With Client”

(Draft #7, 09/12/09)

**Summary:** Proposed Rule 1.8.10 substantially adopts ABA Model Rule 1.8(j), which prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship pre-dated the lawyer-client relationship. The proposed Rule differs from the Model Rule in adding a definition of “sexual relations” in paragraph (b), which is imported verbatim from existing California Rule of Professional Conduct 3-120.

<b>Comparison with ABA Counterpart</b>	
<b>Rule</b>	<b>Comment</b>
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

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### Primary Factors Considered

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Existing California Law

Rule	RPC 3-120
Statute	Bus. & Prof. Code §§ 6106.8 & 6106.9
Case law	

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Fewer than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 6

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

See Introduction.

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.8.10\* Sexual Relations With Client

December 2009

(Draft rule revised following consideration of public comment and direction from a board committee)

### *INTRODUCTION:*

Proposed Rule 1.8.10 substantially adopts Model Rule 1.8(j), which prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship pre-dated the lawyer-client relationship. As the comparison chart illustrates, unlike current California rule 3-120, the Commission has proposed a rule that follows Model Rule 1.8(j) which effectively bans, rather than limits, sexual relations between lawyers and their clients. The Commission's proposed rule differs from the Model Rule in that the proposed rule includes a definition of "sexual relations", which is derived from current California rule 3-120 and Business and Professions Code § 6106.9.

The version of the Rule that was originally circulated for public comment closely followed current California rule 3-120 in that it limited, but did not ban, virtually all sexual relationships. The Commission originally passed this version of the rule by a vote of 8 to 1.

The Commission received four written public comments in favor of a broad Model Rule-type ban and two written comments in favor of the narrower limitation in the current California rule. Also, an attendee at the public hearing spoke in favor of the direction of the Model Rule. After reviewing the public comment, the Commission voted 7 to 6 not to retain the Rule as sent out for public comment. Instead, the Commission voted 8 to 6 to adopt a rule that is identical to Model Rule 1.8(j) in prohibiting all sexual relationships between lawyer and client except for consensual relationships that predate the lawyer-client relationship. At its September 2009 meeting, the Commission confirmed this decision by a 7 to 6 vote.

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\* Proposed Rule, Draft 8 (11/30/09).

*INTRODUCTION (Continued):*

In considering the alternatives, the majority observed that the professions of medicine and psychology have absolute bans similar to the Model Rule, and there is no suggestion that these bans have caused any of the personal or constitutional problems raised by the minority. There also is no suggestion of any such problem in any of the other jurisdictions that have adopted the Model Rule ban. The proponents of the Model Rule ban also argued that a ban would foster public trust in the legal system and that, whether or not one can fairly say that the lawyer-client relationship almost always is unequal, the public naturally will assume the worst about the lawyer's conduct whenever a lawyer engages in a sexual relationship that would be banned by the Model Rule.

The majority also notes that the minority's reliance on the argument that the proposed Rule will conflict with Business and Professions Code § 6106.9 and thus is "a denigration of the legislative process," is misplaced. The Supreme Court can impose a higher standard on lawyers than the legislature has done. Thus, there is no "conflict" with § 6106.9 merely because the proposed Rule and the statute would impose different standards of conduct. There is no need, as the minority asserts, to go to the Legislature to "fix" the statute.

Those members of the Commission who adhered to its original 8-1 recommendation to retain the concepts underlying current rule 3-120 argued that a virtual ban like that in Model Rule 1.8(j) conflicted with Business and Professions Code § 6106.9, which limits, but does not ban, sexual relations between lawyers and clients. Current rule 3-120 is consistent with § 6106.9. At the public hearing, it was suggested by a member of the public that the Legislature "does not really understand how the rule works," and that it can "fix" the statute to conform to the rule. The Commission minority disagrees and considers this a denigration of the legislative process. However, the fact remains that adoption of 1.8(j) would expand on, and in the view of some members of the Commission, conflict with existing state law.

The minority also noted the paucity of empirical evidence suggesting that the current rule is not working in the sense that clients are complaining about improper sexual relationships with their lawyers but not receiving support from State Bar prosecutors, or failing to complain because of enforcement concerns. Therefore, it is highly questionable that enacting a virtual ban on such relationships would provide further protection to the public.

*INTRODUCTION (Continued):*

The minority also notes that the proper focus of the ethical rules is the regulation of conduct of individuals as lawyers. The present Rule quite properly prohibits the abuse of a lawyer's "power position" over a client by demanding or obtaining sexual favors; but not every lawyer-client relationship is of such a nature. For example, if an actuary working on employee benefits becomes romantically involved with a lawyer working for the same company on like matters, the power relationship is likely to be equal; or if the chief executive and the chief counsel of a public corporation become romantically involved before their eventual marriage, how is that the business of the Bar? But unlike the present rule, the proposed rule would ban both of these – and many other – relationships, which are clearly not the business of the Bar. We are not the bedroom police. Outside the context of having a deleterious effect on a lawyer-client relationship, the social habits of lawyers that do not reach the level of moral turpitude should not be the subject of disciplinary action by the State Bar. Concern properly arises where such a relationship occurs under circumstances where the professional relationship is compromised. Current rule 3-120 addresses this problem.

The minority notes the same criticism can be leveled at the unsupported claim by the State Bar's Committee on Professional Responsibility and Conduct ("COPRAC") that making it easier to prove a violation would also have a salutary effect by inhibiting attorneys from entering into such relations. Apparently, the thinking is that making enforcement incrementally more difficult encourages lawyers to have sexual relations with clients. However, inhibiting lawyers and clients from exercising the right to choose their personal and sexual partners is not necessarily a good thing. There is more than a trivial public interest furthered in not over-regulating consenting sexual relationships between attorneys and clients. For every non-coerced sexual relationship that does not produce a deleterious effect on the attorney's representation, a client is making a choice that presumably is enhancing his or her life. In some cases it may turn out that the personal relationship that develops ultimately between client and attorney transcends in importance the professional relationship. To the extent clients benefit from having the freedom to choose to engage in a sexual relationship with an attorney that does not result in actual harm to their legal matter, a bright-line ban similar to that in Model Rule 1.8(j) will have a chilling effect on that freedom.

Additionally, the minority argues that merely banning sexual relations without requiring some nexus to a lawyer's professional duties could encourage personally dissatisfied clients to use the existence of a sexual relationship with a lawyer as retaliation against the attorney for some perceived personal slight or offense. They pointed out that the State Bar disciplinary system should not be a venue in which jealous romantic partners seek vengeance.

*INTRODUCTION (Continued):*

As noted, the COPRAC letter concludes with approving references to ABA commentary developed during the discussion concerning Model Rule 1.8(j). Comments such as “the attorney-client relationship is almost always unequal,” and that “it is unlikely a client can provide informed consent due to the ‘client’s own emotional involvement,’” appear to some Commission members to be hyperbolic, overly simplistic conclusions offered to explain complex social interactions, as well as being unduly paternalistic. To the extent these conditions exist in a given relationship resulting from the use of coercion, quid pro quo demands, or causing harm to the attorney-client relationship, current rule 3-120 bans the conduct.

The minority also argues that the purported reasons for the new prohibition of sexual relations between lawyer and client are inconsistent with the only exception to the proposed Rule. If it is adopted, a lawyer may represent a client with whom she or he has an existing sexual relationship, regardless of whether the lawyer’s performance of legal services will adversely be affected by that relationship. Conversely, if the proposed Rule is adopted, and a lawyer and client become romantically involved but comply with the Rule by remaining chaste until they marry or become domestic partners, the literal wording of the rule will prohibit them from consummating their otherwise legitimate relationship.

Last but perhaps most importantly, the proposed Rule following Model Rule 1.8(j) implicates both the federal and California constitutional rights of sexual privacy. It has long been settled that there is a federal and state constitutional right to sexual privacy. In fact, this penumbra right is one of individual autonomy thereby requiring the existence of a compelling state interest before it can be abridged. (*Griswold v. Connecticut* (1965) 381 U.S. 479) One prong of the “compelling state interest test” is whether the law is narrowly tailored to meet the needs of the public. The U.S. Supreme Court has recently affirmed this tenet of constitutional law, in striking down Texas’ sodomy law. (*Lawrence v. Texas* (2003) 539 U.S. 558) Our state supreme court follows this same analytical path when scrutinizing laws affecting sexual privacy under the California constitution. (*In re Marriage Cases* (2008) 43 Cal.4th 757; see also Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, *Geo. J. Legal Ethics* (Winter 1997).)

*A Note on the Rule Number.* As noted, the Rule appears in the Model Rules numbered as 1.8(j). The Commission has not proposed that California follow the Model Rules construct of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within current client, former client, or government lawyer conflict situations addressed in Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier to locate and use, the Commission has recommended that each rule in the 1.8 series be given a separate number. Thus, the Commission’s proposed sex with a client rule appears as a stand-alone rule, numbered 1.8.10, to correspond to Model Rule 1.8(j).

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.8.10 Sexual Relations With Client</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(ja) A lawyer shall not <del>have</del><u>engage in</u> sexual relations with a client unless a consensual sexual relationship existed between them when the <del>client</del><u>lawyer-client</u> relationship commenced.</p>	<p>Paragraph (a) is nearly identical to MR 1.8(j). The only changes are 1) to substitute “lawyer-client” for the Model Rules’ “client-lawyer” rubric to conform the phrase to the style used in California statutes, e.g., “Lawyer-Client Privilege,” Evid. Code §§ 950-962, and in typical judicial opinions; and 2) to change “have” to “engage in” so that, when considered in conjunction with Comment [1], the Rule will apply to sexual relations that are initiated by the lawyer or the client and that are an exploitation by the lawyer in the course of a professional representation. The change from “have” to “engage in”, together with the sentence at the end of Comment [1], was added in response to the Board Committee on Regulation and Admissions’ consideration of 1.8.10 on November 12, 2009.</p>

\* Proposed Rule 1.8.10, Draft 8 (11/30/09).

<p align="center"><u>ABA Model Rule</u> Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.10 Sexual Relations With Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(b) <a href="#">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.</a></p>	<p>The Model Rule does not define "sexual relations." Paragraph (b) adds a definition of "sexual relations" imported verbatim from California rule 3-120(A) and Bus. &amp; Prof. Code § 6106.9(d).</p> <p>Following the Board Committee on Regulation and Admissions' review of proposed rule 1.8.10 in November 2009, the existing definition of "sexual relations" in rule 3-120(A) was reconsidered by the Commission, along with a broader definition and no definition at all. A broader definition that applies equally (whether the lawyer initiates the sexual relations or is the recipient of advances from the client) runs the risk of subjecting a lawyer to discipline for being the recipient of client conduct that is for the client's sexual arousal, gratification, or abuse. No definition would be consistent with Model rule 1.8(j), but would cause uncertainty as to what definition to apply to rule 1.8.10 cases. The Commission stayed with recommending Bus. &amp; Prof. Code § 6106.9(d) the existing definition in rule 3-120(A), which is consistent with the statutory definition in Bus. &amp; Prof. Code § 6106.9(d).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.8.10 Sexual Relations With Client Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Client-Lawyer Sexual Relationships</b></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. 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. Because of the significant danger of harm to client 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.</p>	<p><del>Client-Lawyer Sexual Relationships</del></p> <p><del>[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. 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. Because of the significant danger of harm to client 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.</del></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.8.10 Sexual Relations With Client Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[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., <i>Greenbaum v. State Bar</i> (1976) 15 Cal.3d 893, 903 [126 Cal.Rptr. 785]; <i>Alkow v. State Bar</i> (1971) 3 Cal.3d 924, 935 [92 Cal.Rptr. 278]; <i>Cutler v. State Bar</i> (1969) 71 Cal.2d 241, 251 [78 Cal.Rptr 172]; <i>Clancy v. State Bar</i> (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., <i>Giovanazzi v. State Bar</i> (1980) 28 Cal.3d 465, 472 [169 Cal Rptr. 581]; <i>Benson v. State Bar</i> (1975) 13 Cal.3d 581, 586 [119 Cal.Rptr. 297]; <i>Lee v. State Bar</i> (1970) 2 Cal.3d 927, 939 [88 Cal.Rptr. 361]; <i>Clancy v. State Bar</i> (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., <i>Magee v. State Bar</i> (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839]; <i>Lantz v. State Bar</i> (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</a></p>	<p>Comment [1] replaces Model Rule 1.8, cmt. [17]. While repeating some of the core ethical principles that inform the proposed Rule, Comment [1] cites to California case law supporting the referenced principles.</p> <p>In response to the Board Committee on Regulation and Admissions' consideration of 1.8.10 on November 12, 2009, a sentence is added at the end of Comment [1] stating that the prohibition in this Rule applies whether it is the client or the lawyer who initiates the sexual relations.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8(j) Conflict Of Interest: Current Clients: Specific Rules Comments</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.8.10 Sexual Relations With Client Comments</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.</a></p>	
<p>[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. 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 Rule 1.7(a)(2).</p>	<p><del>[182] Sexual relationships that</del> <a href="#">This Rule is not applicable to ongoing consensual sexual relations which predate the client-lawyer relationship</a> <del>are not prohibited. Issues</del> <a href="#">because issues</a> relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the <del>client-lawyer-client</del> 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 <del>materially limited</del> <a href="#">adversely affected</a> by the relationship. See <del>Rule</del> <a href="#">Rules 1.7(a) (2) (conflicts of interest), 1.1 (competence) and 2.1 (independent judgment).</a></p>	<p>Comment [2] is based on Model Rule 1.8, cmt. [18]. The active voice replaces the passive in the first sentence to conform to California rule drafting convention. The term "adversely affected" has been substituted for the Model Rule's "materially limited" because the Commission has not adopted that term in its proposed Rule 1.7.</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 the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.</p>	<p><del>[193]</del> When the client is an organization, <del>paragraph (j) of this Rule prohibits</del> <a href="#">is applicable to</a> a lawyer for the organization (whether inside counsel or outside counsel) <del>from having a who has</del> <a href="#">sexual relationship</a> <del>relations</del> with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. <a href="#">(See Rule 1.13.)</a></p>	<p>Comment [3] is based on Model Rule 1.8, cmt. [19]. No change in meaning is intended by the changes.</p> <p>The cross-reference to Rule 1.13, concerning the organization as client, refers the lawyer to that Rule for further guidance on the intricacies of representing an organization.</p> <p>The minority argues that the proposed Comment contradicts the rationale underlying the Rule. See Introduction, ¶. 12.</p>

## Rule 1.8.10 Sexual Relations With Client

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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, “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 lawyer 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 lawyer has sexual relations if such sexual relations cause the lawyer to perform legal services incompetently in violation of Rule 1.1, or if the sexual relations would, or would be likely to, damage or prejudice the client's matter.~~
- ~~(c) Paragraphs (b)(1) and (b)(2) shall not apply to sexual relations between lawyers and their spouses or persons in an equivalent domestic relationship, or to ongoing consensual sexual relations 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.~~

### COMMENTComment

- [1] This Rule ~~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 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 adversely affected by the relationship. See Rules [1.7(d) (conflicts of interest)], 1.1 (competence) and 2.1 (independent judgment).
- [23] 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].)
- ~~[3] Although paragraph (c) excludes representation of certain clients from the scope of this Rule, the exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including Rule 1.4 and Rule [re: conflicts of interest].~~

**Rule ~~3-120~~ 8.10 Sexual Relations With Client**  
(Comparison of the Current 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.

~~(A)~~(b) 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 prohibitprohibits 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 tolawyer 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. (Added by order of Supreme Court, operative September 14, 1992.)~~

[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 adversely affected by the relationship. See Rules [1.7(d) (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].)

**Rule 1.8.10 Sexual Relations With Client**  
**(Commission’s Proposed Rule – 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] 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 adversely affected by the relationship. See Rules [1.7(d) (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].

## Rule 1.8.10: Sexual Relations With Client

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew Perlman. The text relevant to proposed Rule 1.8.10 is highlighted)

**Alabama.** In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

**Arizona:** Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

**California:** California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm

will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

**Connecticut** adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

**District of Columbia:** D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

**Florida** adds Rule 4-8.4(i), which provides that a lawyer shall not 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.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

**Georgia:** Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

**Illinois:** Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains

ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar’s investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

**Louisiana:** Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer’s behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

**Massachusetts:** Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer's advantage or the advantage of a third person” without consent.

**Michigan:** Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client's consent be “in a writing signed by the client.” Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

**Minnesota:** Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)'s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

**Mississippi:** Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

**New Hampshire:** The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer's professional liability insurance ceases to be in effect.”

**New Jersey:** Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or

diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

**New York:** Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer’s inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer’s own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party 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.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York’s counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

**North Dakota:** Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

**Ohio:** Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer’s partner, associate, paralegal, law clerk or other employee of the lawyer’s firm, a lawyer acting ‘of counsel’ in the lawyer’s firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client’s rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

**Oregon:** Rule 1.8(b) permits a lawyer to use confidential information to a client's disadvantage only if the client's consent is "confirmed in writing" (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if "the client remains ultimately liable for such expenses to the extent of the client's ability to pay." Finally, Oregon's rule governing sexual relations with clients contains a detailed description of "sexual relations," providing that it includes "sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party."

**Pennsylvania:** Rule 1.8(g) does not require that client consent be "confirmed in writing."

**Texas:** Rule 1.08(c) provides that prior to the conclusion of "all aspects of the matter giving rise to the lawyer's employment," a lawyer shall not make or negotiate an agreement "with a client, prospective client, or former client" giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

**Virginia:** Rule 1.8(b) forbids the use of information "for the advantage of the lawyer or of a third person or to the disadvantage of the client." Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is "an employee" of the client "as long as the client is independently represented in making the agreement" prospectively limiting the lawyer's liability for malpractice.

**Washington:** Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation "provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter." Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

**Wisconsin:** Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

**Rule 1.8.10 Sexual Relations With Client.  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 1**  
**Disagree = 4**  
**Modify = 1**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Crockett, Michael	D	N	1.8.10	The current rule should be continued without any changes.	Commission revised the rule to be a broad prohibition.
2	Gupta, Steve	M	N	1.8.10	The rule should provide for a per se violation and hold lawyers to the same standard as physicians.	Commission revised the rule to be a broad prohibition.
3	Konig, Alan	D	N	1.8.10	The rule is too narrow, the prohibition should not be limited to those situations where competent representation is at risk.	Commission revised the rule to be a broad prohibition.
4	Langford, Carol M.	D	N	1.8.10	The rule should be more of a bright line standard and generally prohibit sex with clients.	Commission revised the rule to be a broad prohibition.
5	Los Angeles County Bar Association	A	Y	1.8.10	Supports as drafted.	Contrary to the public comment proposal supported by the commentator, the Commission revised the rule to be a broad prohibition.
6	San Francisco, Bar Association of	D	Y	1.8.10	This should be a bright line prohibition, a client's case may not be prejudiced and an attorney may have acted competently, but the client may still feel violated  Violations are difficult to prove where consent to sexual relations is invariably asserted by the attorney.	Commission revised the rule to be a broad prohibition.

<sup>1</sup> A = AGREE with proposed Rule    D = DISAGREE with proposed Rule    M = AGREE ONLY IF MODIFIED    NI = NOT INDICATED



**RRC – Rule 1.8.10 [3-120]  
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**May 5, 2010 McCurdy E-mail to Drafters (Ruvolo, Foy & Julien), cc RRC:**

Rule 1.8.10 Codrafters (RUVOLO, Foy, Julien):

The public comments received to date on this rule are attached in a combined PDF. I've also provided a Word copy of the draft public commenter chart with the comment synopses filled in. To keep pace with the comments being received, please consider beginning to add the RRC responses, and if desired, modifications to the synopses.

Of course, more comments continue to be received each day, and we will convey updated information periodically in order to keep abreast of the public comment review in anticipation of the work being carried out at your June 4 & 5, and June 25 & 26 meetings.

**Attached:**

RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-120 [1-8-10] - Public Comment Complete - REV (05-05-10).pdf

**May 11, 2010 Ruvolo E-mail to McCurdy, cc KEM:**

Here is my comment chart for this rule. Please note that I think we need to conform the language in Comment [2] to the latest version of rule 1.7 we sent to the BOG (e.g., “adversely affected” needs to be changed to “materially limited”). Kevin, is this right? If so, that is the only rule change needed.

**Attached:**

RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT2 (05-11-10)NR.doc

**May 12, 2010 McCurdy E-mail to Drafters, cc Staff:**

Nace asked that I forward his message below to each of you, his codrafters on this rule.

Please review the attached commenter chart and provide your comments and/or input.

**Attached:**

RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT2 (05-11-10)NR.doc

**May 31, 2010 Sondheim e-mail to RRC:**

Commenter 1 (p. 579) indicates that she believes the rule as drafted creates some uncertainty as to what is permissible after the representation is terminated. The RRC Response is accurate, but it is not likely that, except for ethics gurus, the bar will grasp our subtle distinction. Why not clarify this directly with a comment that makes it clear that sexual relations are not prohibited after the representation is terminated?

**May 31, 2010 Kehr E-mail to RRC:**

Here are my comments on these materials:

1. The response to the Eggleston comment is not accurate. Rule 1.8.1 can apply to transactions with former clients, but the Rule only refers to clients, and I don't see that we have referred to former clients in the Comment to Rule 1.8.1 (I wonder why not). Perhaps we could remove the second sentence and instead say: "The only exception to this is with proposed Rule 1.8.1, which can apply to a lawyer's transactions with former clients under well-established principles. See, for example, *Hunnecutt v. State Bar* (1988) 44 Cal.3d 362, 371-72.

2. The current response to Rose and others might seem curt. I hope that the drafters will supplement (or better, replace) it with a brief explanation of why the Commission believes that this proposed rule is needed.

**June 1, 2010 Julien E-mail to Drafters, cc Staff:**

The suggestion to conform our language to 1.7 sounds as reasonable as this rule does to me.:-)

**June 2, 2010 Sapiro E-mail to RRC List:**

1. I respectfully disagree with the proposed change to Comment [2].
2. To me, there is a difference between this rule and Rule 1.7. The issue here is not whether the scope of the lawyer's representation will be limited by the lawyer and client engaging in sexual relations. The issue here is whether the representation of the client will adversely be affected. The scope of the representation may not change at all. I would not make the change recommended by COPRAC.
3. I have not had time to search the rules we have recommended. However, it is my recollection that, several times, I made motions to make explicit whether a given rule applies to current clients or to former clients. It is my recollection that several times my motions to that effect were defeated. I therefore think that our proposed response to the Eggleston comment may not entirely be accurate.