

June 5, 2010 Melchior E-mail to RRC List:

This is a quick further dissent from yesterday's action which applies the prohibition against sexual relations with a client only as long as the sex partner is a client: in other words, if lawyer and client desire an intimate relationship, they can end the attorney/client relation and go forward with their tryst.

That decision, and the discussion which preceded it, show that the Commission's decision to reverse itself and ban the relationship whenever it exists between lawyer and client instead of where it is based on an abuse of the professional's power over the client (as we provide elsewhere: for example, in the prohibition of business relations with clients unless certain conditions are met), shows a misunderstanding of the reasons for this prohibition, as I will explain. For that reason I formally dissent from that decision, in addition to my joinder in the general dissent from that proposed rule.

There is no reason to believe that a lawyer is, generally speaking, less able to represent a paramour than would be the case in representing another person with whom the lawyer has a very close relationship, as for instance a close relative. The latter is not forbidden, and properly so, although thoughtful lawyers would be cautious about accepting such representations, depending on the nature of the matter. I believe that the reason for the profession's interest in regulating intimate conduct is not that the quality of the professional service would be affected -- if that were the case, we would also want to regulate engagements between family members and other intimates. Rather, the reason is that a lawyer can and often but by no means always holds a superior or power position over the client; and abuse of that position for personal gratification is an intolerable abuse of the trust relationship. (That is why the dissenters would want to continue the present rule, which forbids such relations only where there is such an overlay. See Rule 3-120 (B) (1) through (3).)

If there is such an abuse of power, the harm generally lies not in the way in which the professional engagement is performed, but in the abuse of trust. That violation, or condition, is not allayed by termination of the attorney-client relation. In the mental health field, where these concerns were identified much earlier, it is clearly understood that terminating the physician-patient relationship in order to have an affair with the patient is not acceptable, precisely because both the relation of trust and the abuse of power will continue. The Commission has compounded its error by adopting the position that ending the attorney-client relation ends the abuse of power in a sexual relation with a client.

June 7, 2010 Karpman E-mail to RRC List:

I was in Seattle at the ABA Ethics Symposium, and regret missing the meeting, but is Kurt suggesting that- the attorney client relationship could terminate and therefore the forbidden tryst would be kosher?

Generally "hot potato" dropping is prohibited in other areas, so are you we permitting it to validate sex with a client?

June 7, 2010 Melchior E-mail to RRC List:

That's my understanding of a Comment we adopted on Friday.

June 7, 2010 Lamport E-mail to RRC List:

This has been discussed within the Commission on a number of occasions. Those who support the rule (I am not among them) have taken the position that a lawyer who has (or at least wants to have) sex with a client would have to withdraw before doing so. The theory is that nothing prohibits a lawyer from having sex with a former client (and rightly so). So the only way a lawyer and client can have such a relationship is to convert the client to a former client.

June 9, 2010 McCurdy E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

Nace,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an “Agree if Modified” position):

- 1.4 (Agenda Item III.E)
- 1.8.3 (Agenda Item III.M)
- 1.8.10 (Agenda Item III.U)
- 1.12 (Agenda Item III.Z)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - RUVOLO - DFT1 (06-09-10).pdf
- RRC - 3-500 [1-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [1-12] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 4-400 [1-8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 3-310 [1-12] - Rule - PCD [6] (02-17-10) - CLEAN-LAND.pdf
- RRC - 3-310 [1-12] - Rule - PCD [6] (02-17-10) - CLEAN-LAND.doc
- RRC - 3-500 [1-4] - Rule - PCD [8] (09-14-10) - CLEAN-LAND.pdf
- RRC - 3-500 [1-4] - Rule - PCD [8] (09-14-10) - CLEAN-LAND.doc
- RRC - 4-400 [1-8-3] - Rule - PCD [5.1] (10-18-09) - CLEAN-LAND.pdf
- RRC - 4-400 [1-8-3] - Rule - PCD [5.1] (10-18-09) - CLEAN-LAND.doc
- RRC - 3-120 [1-8-10] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf
- RRC - 3-120 [1-8-10] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc

June 11, 2010 Difuntorum E-mail to Ruvolo, cc Chair, Vice Chair & Staff:

As you know, Rule 1.8.10 was discussed at the June 4th meeting. Please use the attached updated version of the commenter chart for any further edits, rather than the version distributed with your general assignments. I've made some edits to implement the action the was taken on Rule 1.8.10 (see highlighted text).

For now, nothing more is needed on the Rule 1.8.10 commenter chart until other public comment, if any, is received.

Attached:

RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc

June 14, 2010 Ruvolo E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:

Thanks Randy. This looks great.

June 16, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from HALT (an actual non-lawyer public interest group). There are 5 rules addressed in the letter but HALT supports 3 rules (1.8.10, 1.4.1, and 1.2), so only the 2 rules listed below require attention. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.5 = VAPNEK (Ruvolo)

1.4 = RUVOLO (Julien)

Attached:

RRC - 3-410 [1-4-1] - 06-14-10 HALT Comment.pdf

RRC - 3-500 [1-4] - 06-14-10 HALT Comment.pdf

RRC - 3-210 [1-2] - 06-14-10 HALT Comment.pdf

RRC - 3-120 [1-8-10] - 06-14-10 HALT Comment.pdf

RRC - 4=200 [1-5] - 06-14-10 HALT Comment.pdf

June 16, 2010 McCurdy E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

Nace,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

1.4 (Agenda Item III.E) - 2 Comments: **COPRAC (attached)**; and OCTC (sent with Randy's 6/15/10 e-mail)

1.8.3 (Agenda Item III.M) – OCTC (sent with Randy's 6/15/10 e-mail)

1.8.10 (Agenda Item III.U) - OCTC (sent with Randy's 6/15/10 e-mail)

1.12 (Agenda Item III.Z) - OCTC (sent with Randy's 6/15/10 e-mail)

2.4 (Agenda Item III.II) - OCTC (sent with Randy's 6/15/10 e-mail)

3.9 (Agenda Item III.SS) – 2 Comments: OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

8.2 (Agenda Item III.UUU) - OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 3-500 [1-4] - 06-11-10 COPRAC Comment.pdf

June 17, 2010 Difuntorum E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

Nace:

OCTC commented as set forth below on Rule 1.8.10. Do you recommend any revisions in response?

Rule 1.8.10. Sexual Relation with Client.

1. Comment 1 is too long and seems more appropriate for a treatise, law review, or ethics opinion. The Commission, however, might want to advise the attorneys in a Comment of Business & Professions Code section 6106.9, which also covers sexual relations between attorneys and clients.

June 17, 2010 Ruvolo E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:

No, but I thought we did cross reference the B&P code.

June 17, 2010 Difuntorum E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

There's no cross reference because the Board's desired policy (ABA absolute ban approach) is inconsistent with the policy in the B&P code provision. Board implementation of this rule would involve close coordination with the Legislature, the Governor and the Supreme Court. Perhaps that can serve as the RRC to the OCTC comment?

June 17, 2010 Ruvolo E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:

Sounds good to me.

June 21, 2010 McCurdy E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

Nace,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

p.s. We realize you are not able to be present at the meeting, but we're hoping you can give us your final additions and/or edits to these charts for consideration at this meeting.

Attached:

RRC - 1-710 [2-4-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-700 [8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [3-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [1-12] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-400 [1-8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-500 [1-4] - Public Comment Chart - By Commenter - XDFT1 (06-21-10)ML.doc
RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc
RRC - 1-720 [2-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

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

TOTAL = 7 Agree = 2
Disagree = 3
Modify = 2
NI =

No.	Commenter	Position ¹	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.	The Commission agreed that it would be helpful to clarify whether the rule applies to a lawyer's relations with former clients. The Commission is recommending a new comment stating: "This Rule does not apply after the lawyer-client relationship has terminated."
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.

¹ 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 = 7 Agree = 2
Disagree = 3
Modify = 2
NI =

No.	Commenter	Position ¹	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.

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

TOTAL = 7 Agree = 2
Disagree = 3
Modify = 2
NI =

No.	Commenter	Position ¹	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.
6	HALT, Inc. – An Organization of Americans for Legal Reform	A	Yes		There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the RRC and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current CRPC 3-120.	

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

TOTAL = 7 Agree = 2
 Disagree = 3
 Modify = 2
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	Office of Chief Trial Counsel	M	Yes	Comment [1]	Comment [1] is too long and seems more appropriate for a treatise, law review or ethics opinion. The Commission, however, might want to advise attorneys in a Comment of B&P Code section 6106.9, which also covers sexual relations between attorneys and clients.	

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].