

## **CONSENSUAL SEXUAL RELATIONS WITH CLIENTS? NO. NOT EVER. NOT EVEN ON VALENTINE’S DAY!<sup>i</sup>**

By Neil J Wertlieb

Neil J Wertlieb is an experienced transactional lawyer, educator and ethicist, who provides expert witness services in disputes involving business transactions and corporate governance, and in cases involving attorney malpractice and attorney ethics. He is the immediate past chair of LACBA’s Professional Responsibility and Ethics Committee, and a founding member and co-chair of the California Lawyers Association Ethics Committee. For additional information, please visit [www.WertliebLaw.com](http://www.WertliebLaw.com). The views expressed herein are his own.

A comprehensive set of new Rules of Professional Conduct was approved by the California Supreme Court and went into effect on November 1, 2018. The new rules can be found on the State Bar’s website under [Current Rules of Professional Conduct](#).

In honor of Valentine’s Day, the focus of this month’s Ethics Update is on new Rule 1.8.10, which governs sexual relations with clients.

The rule that was in effect prior to November 2018, Rule 3-120, prohibited attorneys from either demanding sexual relations with a client as a condition to professional representation, or employing coercion, intimidation or undue influence in entering into sexual relations with a client.<sup>ii</sup> In other words, under our former rules of professional conduct, an attorney was permitted to engage in sexual relations with a client, except where such relations fell into one of these categories of clearly abusive and inappropriate behavior – behavior that rightfully justifies disciplinary proceedings.

Not so under the new rules. Rule 1.8.10 reflects a major shift from the former rule, and essentially adopts a bright-line (or “hands off”) prohibition: “A lawyer shall not engage in sexual relations with a current client who is not the lawyer’s spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.”<sup>iii</sup>

This change in our rules attracted much commentary during the public review process as proposed new Rule 1.8.10 was being considered. The State Bar’s Commission for the Revision of the Rules of Professional Conduct, in deliberating over the proposed new rules, recognized that this change represented a significant departure from California’s then-current rule, and may implicate important privacy concerns. The members of the Commission, however, concluded that the former rule had not worked as intended – as evidenced by the fact that in the 25 years since that rule’s adoption, there had been virtually no successful disciplinary prosecutions under former Rule 3-120.<sup>iv</sup>

As a result, it is generally recognized that this change is an improvement in the rules, and will better serve to protect the interests of clients against abusive and inappropriate behavior by attorneys. With this change, our rule on sexual relations now conforms to the approach taken by

most other states in the country, and is consistent with the Model Rule formulated by the American Bar Association.<sup>v</sup>

Under the new rule, however, attorneys should be mindful that even sexual relations that are consensual or that are initiated by the client are also prohibited, even where it is clear that there is no *quid quo pro* or coercion, intimidation or undue influence.

It is important to note that the rule also applies even where the client is an organization and not an individual. Under both new Rule 1.8.10 and its predecessor, an attorney is barred from having sexual relations with the person who, on behalf of the organization, supervises, directs or regularly consults with the attorney.<sup>vi</sup>

Note also that the State Bar Act, in Business & Professions Code Section 6106.9, has not been updated, and still tracks the language of former Rule 3-120, providing that an attorney can be disciplined for demanding sexual relations with a client as a condition to professional representation, or employing coercion, intimidation or undue influence in entering into sexual relations with a client. However, because California attorneys are bound by both the Rules of Professional Conduct and the State Bar Act, any sexual relations with a client can result in discipline, even if those relations may have been permitted by the State Bar Act.<sup>vii</sup>

Happy Valentine's Day!

---

<sup>i</sup> A version of this article was originally published by the California Lawyers Association.

<sup>ii</sup> See former Rule 3-120, paragraph (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."

<sup>iii</sup> "Sexual relations" is defined in paragraph (B) of Rule 1.8.10 as "sexual intercourse or the touching of an intimate part of another person\* for the purpose of sexual arousal, gratification, or abuse." The Rule does not apply a current client who is the lawyer's spouse or registered domestic partner, nor where a consensual sexual relationship existed when the lawyer-client relationship commenced. See paragraph (A) of Rule 1.8.10.

<sup>iv</sup> See the Executive Summary for Rule 1.8.10, available on the California State Bar's website: [http://www.calbar.ca.gov/Portals/0/documents/rules/Rule\\_1.8.10-Exec\\_Summary-Redline.pdf](http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.8.10-Exec_Summary-Redline.pdf).

<sup>v</sup> See ABA Model Rule 1.8(J): "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

<sup>vi</sup> See Comment [2] to Rule 1.8.10: "When the client is an organization, this rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See rule 1.13.)"

<sup>vii</sup> See Comment [3] to Rule 1.8.10: "Business and Professions Code section 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This rule and the statute impose different obligations."