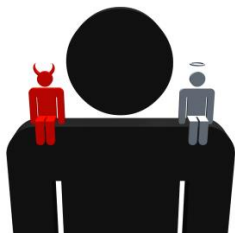


# Ethics – Sex, Lies and Secrets



**Presenter:**  
**Ronald S. Granberg**

Bar Association  
of San Francisco  
May 21, 2014



## 1. Ethics

2

### State Bar: Arm of Court

- The California State Bar acts as the **administrative arm of the California Supreme Court** in attorney admission and discipline matters. (Bus. & Prof. § 6087; *Hoffman v. State Bar* (2003) 113 Cal.App.4th 630; *Emslie v. State Bar* (1974) 11 Cal.3d 210.)
- The California Rules of Professional Conduct are promulgated by the California State Bar, subject to approval by the California Supreme Court. (Bus. & Prof. §§ 6076, 6077; *Howard v. Babcock* (1993) 6 Cal.4th 409.)

3

## Purposes of Conduct Rules

The **purposes** of the California Rules of Professional Conduct are to:

- **protect the public;**
  - **promote respect** and confidence in the legal profession; and
  - provide **ethical standards** to guide State Bar members.
- (California Professional Conduct Rule 1-100 (A).)

4

## Very Ethical Precedent

- **State Bar Act** (Bus. & Prof. Code §§6000-6238)
- **California Rules of Professional Conduct**
- **California Compendium on Professional Responsibility**  
Including ethics opinions by:
  - State Bar of Committee on Professional Responsibility and Conduct (COPRAC)
  - Bar Association of San Francisco
  - Los Angeles County Bar Association
  - Orange County Bar Association
  - San Diego County Bar Association
- **Attorney Civility and Professionalism Guidelines**

5

www.calbar.ca.gov



6

http://ethics.calbar.ca.gov



7

---

---

---

---

---

---

---

---

---

---

## State Bar Act



8

---

---

---

---

---

---

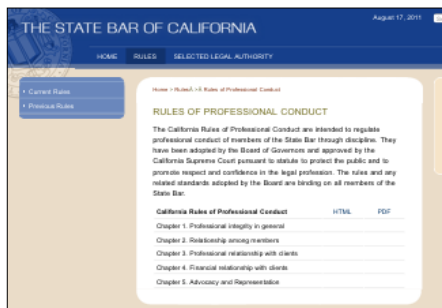
---

---

---

---

## Rules of Professional Conduct



9

---

---

---

---

---

---

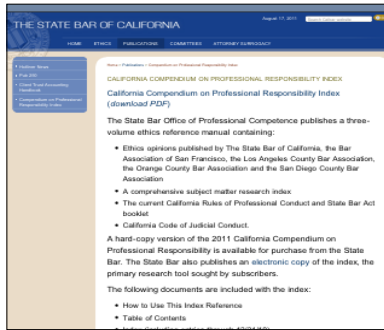
---

---

---

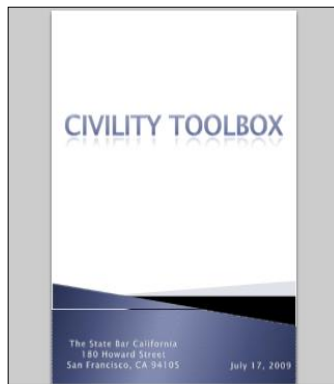
---

## Ethics Compendium Index



10

## Civility and Professional Guidelines



11

## Non-Mandatory Guidelines

- “These **voluntary Guidelines** . . . are not intended to supplant [the Rules of Professional Conduct] or any other rules or laws that govern attorney conduct.
- Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are **not to be used as an independent basis for disciplinary charges** by the State Bar or **claims of professional negligence.**”

12

## Other Non-mandatories

- **Formal opinions** of the California State Bar, or of a local bar association, are **not binding** on California courts or disciplinary bodies.

(*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656.)

- The **ABA Model Rules** are **not binding** on California courts or disciplinary bodies.

(*Colyer v. Smith* (CD CA 1999) 50 F.Supp.2d 966, 972.)

13

## July 20<sup>th</sup> comes around . . .

- **7/20/07:** State Bar adopted Attorney Civility and Professionalism Guidelines
- **7/20/11:** State Bar adopted **67 ethics rules changes** (subject, of course, to approval by the California Supreme Court) mirroring the ABA Model Rules.
- **Sex-with-client rules:**
  - **ABA:** Rule 1.8 (j)
  - **Current California:** Rule 3-120
  - **Proposed California:** Rule 1.8.10

14

## Our “hotline 2 ethics”



*State Bar  
Ethics Hotline:*  
**1-800-2ETHICS**

15



Ethical Earl



Ethics-less Elmer

16

---

---

---

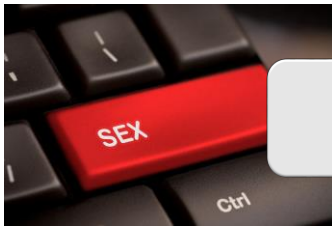
---

---

---

---

---



2. Sex

17

---

---

---

---

---

---

---

---



18

---

---

---

---

---

---

---

---

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.**"

No exception for:

- "Harmless" sex, or
- Sex with current spouse

19



20

History of Sex

**January 1, 1990**

Bus. & Prof. §6106.8

"(b) With the approval of the Supreme Court, the State Bar shall adopt a rule of professional conduct governing sexual relations between attorneys and their clients in cases involving, but not limited to . . . .

(c) The State Bar shall submit the proposed rule to the Supreme Court for approval no later than January 1, 1991."

21

## More History of Sex

### September 14, 1992

Business and Professions Code section 6106.9 became effective

### September 14, 1992

By order of the California Supreme Court, Rule 3-120 ("Sexual Relations With Client") was added to Rules of Professional Conduct

(The code section and rule are almost identical)

22

## "Early Drafts"

between

January 1, 1990 and September 14, 1992



23

## WHAT is Sex?

"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."

### Rule 3-120 (A)



24



## WHO Can't Have Sex?

Client employs one attorney  
(member of 100-lawyer firm)

ISSUE: May the other 99 firm  
members have intercourse with  
Client? How is a "forbidden  
lawyer" defined?



EARLY DRAFT:

There can't be intercourse with a  
**"FIRM MEMBER"**

25



There is no ethical violation:  
"where a lawyer in a firm has sexual relations with  
a client but does not participate in the  
representation of that client"

Rule 3-120 (D)

RESULT:

Ethical sex between Client and 99 firm members

26

## Two Safe Harbors

California sex is ethical if either:

1. You are Client's CURRENT SPOUSE or RDP, or
2. You were Client's lover BEFORE becoming  
Client's lawyer.

(Rule 3-120 (C).)

The ABA Model Rule:

- Permits #2 but not #1,
- **Thereby requiring premarital, pre-representation  
sex**

27

## Sex in the Harbor

ABA Rules provide  
**ONE SAFE HARBOR:**

1. You were Client's lover BEFORE becoming Client's lawyer

California Rules provide  
**TWO SAFE HARBORS:**

1. You were Client's lover BEFORE becoming Client's lawyer, or
2. You are Client's CURRENT SPOUSE or RDP.



28

---

---

---

---

---

---

---

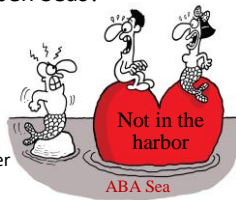
---

## Sex on the Open Seas?

Under **no circumstances** may an ABA-ruled Lawyer have ethical Client sex **outside the harbor**.

If Lawyer wasn't having pre-representation sex with Client, Lawyer can't have post-representation sex with Client – not even if the sex wouldn't impede the lawyering.

Under **certain circumstances**, a California lawyer may have ethical Client sex outside the harbor.



29

---

---

---

---

---

---

---

---

## WHEN is Sex Forbidden?

ISSUE: When sailing outside the safe harbors, under what circumstances is California Lawyer forbidden from having sex with Client?

EARLY DRAFT:

Client sexual relations are forbidden if Lawyer will

**"PERFORM INCOMPETENTLY"**



30

---

---

---

---

---

---

---

---

### Rule 3-120 (B)(3)

Client sexual relations are  
forbidden if Lawyer will  
“perform  
**LEGAL SERVICES**  
incompetently  
**IN VIOLATION OF  
RULE 3-110”**



31

---

---

---

---

---

---

---

---

### American Rule (1.8 (j))

	Competent Legal Services	Incompetent Legal Services
In the Harbor	<b>YES:</b> Sex is Ethical	<b>YES:</b> Sex is Ethical
Outside the Harbor	<b>NO:</b> Sex is Unethical	<b>NO:</b> Sex is Unethical

32

---

---

---

---

---

---

---

---

### California Rule (3-120)

	Competent Legal Services	Incompetent Legal Services
In the Harbor	<b>YES:</b> Sex is Ethical	<b>YES:</b> Sex is Ethical
Outside the Harbor	<b>YES:</b> Sex is Ethical	<b>NO:</b> Sex is Unethical

33

---

---

---

---

---

---

---

---

**Ethical Question:** Leonard didn't have intercourse with Carla before becoming her lawyer; he began having intercourse with her during the representation.

Recently the intercourse has begun to cause Leonard to perform legal services incompetently. Carla refuses to sign a substitution of attorney form.

What should Leonard do?

**Answer:**

File a Motion to Withdraw

34

The Reason for the Rule

In 1990, why did the California legislature and Supreme Court consider

Bus. & Prof. § 6106.8(b)

and

Conduct Rule 3-120

**necessary?**

35

1986 - 1994



36

Arnold Becker, Esq.



## Divorce Slut

37

---

---

---

---

---

---

---

---

Bus. & Prof. § 6106.8(b)

“ . . . the State Bar shall adopt a rule of professional conduct governing sexual relations between attorneys and their clients in cases involving, but not limited to, **probate matters, domestic relations,** including dissolution proceedings, child custody cases, and settlement proceedings.”

38

---

---

---

---

---

---

---

---

Bus. & Prof. § 6106.8(b)

“ . . . the State Bar shall adopt a rule of professional conduct governing sexual relations between attorneys and their clients in cases involving, but not limited to, probate matters, **domestic relations, including dissolution proceedings, child custody cases,** and settlement proceedings.”

39

---

---

---

---

---

---

---

---

Bus. & Prof. § 6106.8(b)

“ . . . the State Bar shall adopt a rule of professional conduct governing sexual relations between attorneys and their clients in cases involving, but not limited to, probate matters, **domestic relations, including** dissolution proceedings, child custody cases, and **settlement proceedings.**”

40

## Sex and Semantics, Part 1



41

What does “is” mean?

**Bill Clinton to reporter Jim Lehrer:** “There is no improper relationship.”

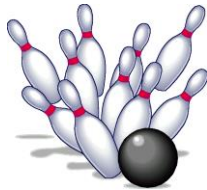
**Bill Clinton to grand jury:** “It depends on what the meaning of the word ‘is’ is.

- If ‘is’ means is and never has been – that is one thing.
- If it means there is none, that was a completely true statement.”

**time is  
now**

42

Sex and Semantics,  
Part 2



43

---

---

---

---

---

---

---

---

What does “with” mean?

Wisconsin Supreme Court decision in 2007:

*Disciplinary Proceedings  
Against Michael R. Inglimo*  
(2007) 740 N.W.2d 125

Office of Lawyer Regulation (OLR) alleged 15  
violations

Discipline Referee found 10 violations

Lawyer and OLR appealed to Wisconsin Supreme  
Court

44

---

---

---

---

---

---

---

---

Wisconsin’s (ABA) Rule:

Wisc. Rule of Professional Conduct  
20:1.8(k)(2):

“A lawyer shall not have sexual relations **with**  
a current client unless a consensual sexual  
relationship existed between them when the  
lawyer-client relationship commenced.”

(same as ABA Model Rule)

45

---

---

---

---

---

---

---

---

(Too much information)

While Lawyer represented Client:

- Lawyer had sex **with** Client's Girlfriend
- Client had sex **with** Client's Girlfriend
  - (OOPS – at the same time!)
- (Lawyer never touched Client)

Issue: did Lawyer have sex **with** Client?



46

---

---

---

---

---

---

---

OLR is “with” it

“According to the OLR, as long as the lawyer and the client are both participating in a sexual act **at the same time in the same place**, they are having sexual relations ‘with’ each other.

In response, Attorney Inglimo relies on the plain language of the rule and argues that the OLR’s interpretation would expand the rule beyond its terms.”

47

---

---

---

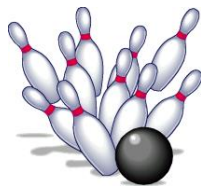
---

---

---

---

Supreme Court Ruled in Lawyer’s Favor



48

---

---

---

---

---

---

---



State Bar official comment to Rule 3-120:  
“In all client matters, a member is advised  
to keep clients' interests paramount in the  
course of the member's representation.”

**Point to remember:**

**Client Comes First**

49

### 3. Lies



50

#### Lawyer's Trilemma

1. A lawyer shall **represent her client with competence.**  
(Rule 3-110(B))
2. A lawyer shall, at every peril to herself, **preserve her client's secrets.**  
(Rule 3-100(A); Bus. & Prof. §6068(e)(1))
3. A lawyer shall **never seek to mislead a court by any false statement.**  
(Rule 5-200(B); Bus. & Prof. §6068(d))

51

Zealously, diligently or competently?

**1969 ABA** Code of Professional Responsibility, Rule 7-101:

A lawyer shall represent a client “**zealously** within the bounds of the law.”

**1983 ABA** Model Rules of Professional Conduct, Rule 1.3:

- A lawyer shall represent a client “**with reasonable diligence.**”

**California Rules** of Prof. Conduct, Rule 3-110(A),(B):

- A lawyer shall represent a client “**with competence.**”

52

## Lawyer’s Role

➤ **Cop?**

**No!**

A lawyer must “**preserve her client’s secrets.**”

➤ **Co-conspirator?**

**No!**

A lawyer may “**never seek to mislead a court by any false statement.**”

53

You represent Harold . . .

. . . and I represent Wanda.

Is it ethical for you to make this statement to me, knowing it to be false:

“Harold won’t accept Wanda’s settlement offer unless she increases it by \$100,000.”

According to ABA Formal Opinion 06-439,

**“Yes,”**

54

### How Hard Should You Push?

You are 75% certain that your client Harold is lying regarding the statements he wants you to make:

1. "Harold doesn't have a girlfriend."
2. "Harold isn't working for cash."
3. "Harold has no idea where the diamond bracelet is. Wanda must have lost it."

55

---

---

---

---

---

---

---

### Ways to INDUCE TRUTH

- Cajole
- Wheedle
- Threaten to "tell Mom"
- Threaten to withdraw
- Pretend to dial up 911
- Smash your coffee cup
- Brandish your letter opener
- **All of the above**



56

---

---

---

---

---

---

---

### Ways to INDUCE TRUTH

- **Cajole**
- **Wheedle**
- Threaten to "tell Mom"
- **Threaten to withdraw**
- Pretend to dial up 911
- Smash your coffee cup
- Brandish your letter opener
- All of the above

57

---

---

---

---

---

---

---



## 4. Secrets

58

### Confidences & Secrets

An **evidentiary confidence** is information that may not be disclosed due to the **lawyer-client privilege**.  
(*Evid. Code § 952.*)

An **ethical secret** is information that may not be disclosed due to **rules of professional conduct**.

(*Cal. Formal Opinion 1976-37.*)

59

### Confidences & Secrets

#### Business and Professions

Code section 6068:

"It is the duty of an attorney:

\* \* \*

(e) To maintain inviolate the **confidence**, and at every peril to himself or herself to preserve the **secrets**, of his or her client."

60

### An Evidentiary Confidence

Information:

- transmitted **between lawyer and client**
- during the **course of their professional relationship**
- **in confidence**
- which **not disclosed** to an unnecessary third person

*(Evidence Code section 952)*

61

### An Ethical Secret

Information gained in the professional relationship that:

- The client has **requested be held inviolate**,  
OR
- The disclosure of which would be:
  - **embarrassing**, OR
  - **likely to be detrimental** to the client.

*(Cal. Formal Opinion 1976-37)*

62

### Secret > Confidence

"A lawyer's duty to protect client information under section 6068(e) is **much broader** than the obligations imposed by the lawyer-client privilege. (Citation omitted.) This ethical precept, unlike the evidentiary privilege, exists **without regard to the nature or source** of information **or the fact that others share** the knowledge."

*(Cal. Formal Opinion 1996-146)*

63

## Confidences & Secrets



64

---

---

---

---

---

---

---

### Let's Coin a Term

Lie      Secret

Noun   "a lie"   "a secret"

Verb   "I lie"   "I blab"

"to blab" = "to tell a  
Secret without prior  
Client authorization"

65

---

---

---

---

---

---

---

### Our Disjunctive Directives

It's a secret if:

Client has **requested secrecy**

**OR**

Disclosure will be **embarrassing**

**OR**

Disclosure will likely  
be **detrimental**

66

---

---

---

---

---

---

---

When is Blabbing Ethical?

- May you ethically **presume** authorization?
- Is it ethical for you to blab when you believe your Client will **later ratify**?
- Must you **seek ratification** for all past blabs?
- Is it ethical for you to blab when you believe it is **“good for” your Client**?

67

ABA Model Rule 1.6 (a)

“A lawyer shall not reveal information relating to the representation of a client unless the **client gives informed consent**

[OR]

the **disclosure is impliedly authorized** in order to carry out the representation.”

68

Comment to Rule 1.6 (a)

“ . . . a lawyer is **impliedly authorized** to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that **facilitates a satisfactory conclusion to a matter.**”

69

Two Possible Sniff Tests:

**EAVESDROP TEST:**

A blab is unethical if you **wouldn't want Client to overhear you** making it

**TESTIMONY TEST:**

A blab is unethical if you **wouldn't want it admitted into evidence:**

- Before **judge** in the pending case
- Before the **disciplinary** board
- Before the **malpractice** jury

70

Is it ethical to tell OC:

1. "Wanda demonstrated **poor parenting** when she forgot to pick Katie up from soccer."
2. "Wanda is **too unfocused** to discuss settlement this week."
3. "I'm having control problems with Wanda – she's becoming a **giant pain in the neck**."
4. "Off the record, I'm going to **file a motion to withdraw** next week. Don't tell Harold."

71

(Let's Play Telephone)

You admit to OC that Wanda's forgetting Katie was "**unwise**."

OC tells Harold – that you had told OC that Wanda's forgetting Katie "**irresponsible**."

Harold tells Wanda – that OC had told him – that you had told OC – that Wanda's forgetting Katie was "**abusive**."

Wanda tells you – that Harold had told her – that OC had told Harold – that you had told OC – that Wanda's forgetting Katie was "**child abuse**."

72



OC – Trustworthy Blabee?

**Blabbermouth Blabee** quotes you all over town.

**Malicious Blabee** misquotes you all over town.

**Silent Blabee** doesn't tell anyone what you said.

**Semi-silent Blabee** only tells Harold what you said.

**Super Blabee** uses the lawyer Super Powers only to advance the "Forces of Good."  
(Blabs righteously.)

73

---

---

---

---

---

---

---



### Our Legal Culture

You & OC = Zeus & Athena?

**Have we lawyers been:**

- Keeping our clients' secrets
- OR -
- Keeping secrets from our clients?

**Have we lawyers created:**

- A beneficial "culture of camaraderie and candor"?
- OR -
- An unethical "culture of conspiracy and control"?



74

---

---

---

---

---

---

---



Ronald S. Granberg

75

---

---

---

---

---

---

---

“ethical  
lawyer”



---

---

---

---

---

---

---