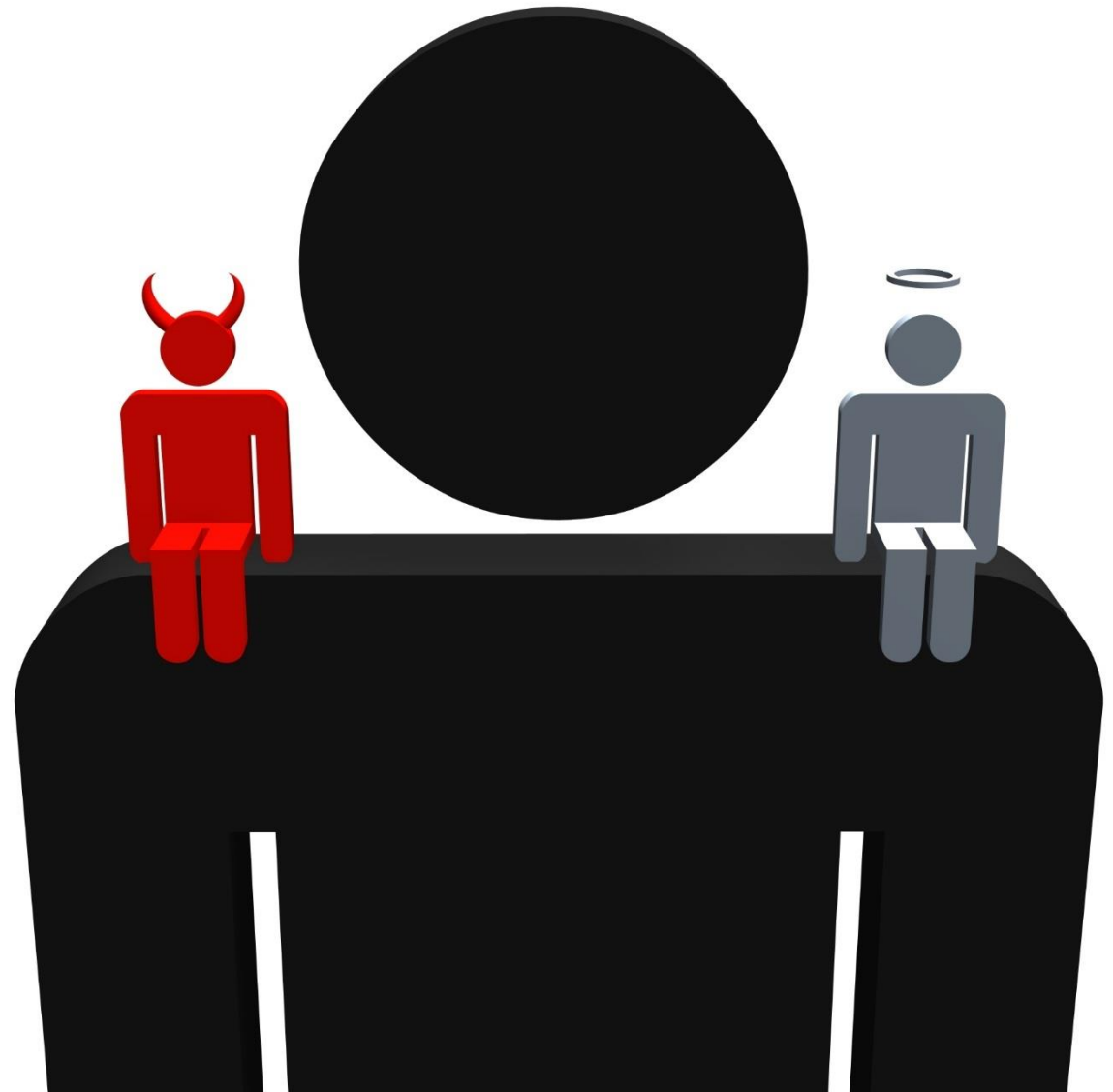


Ethics – Sex, Lies and Secrets



**Presenter:
Ronald S. Granberg**

**Bar Association
of San Francisco**
May 21, 2014



1. Ethics

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.)

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).)

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**

www.calbar.ca.gov

The State Bar of California

August 19, 2011 [GO](#)

THE STATE BAR OF CALIFORNIA

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- [State Bar Court](#)

DEADLINES

- Aug. 17** — Early bird State Bar Annual Meeting pre-registration deadline
- Aug. 19** — SoCal legal services agency board

Annual Meeting

Long Beach is the setting for the Sept. 15-18 State Bar 84th Annual Meeting, which will include noted speakers, an art show, golf and 158 MCLE classes.

[1](#) [2](#) [3](#) [11](#)

What can the State Bar of California do for you? [Find out more](#)

Five attorneys elected to State Bar Board of Governors

State Bar asks Supreme Court to review ruling on bar exam data

Supreme Court gets proposed Rules of Professional Conduct

Random group will be audited for MCLE compliance

Pismo Beach attorney charged with embezzlement

Legal specialist exam set for October

MY STATE BAR PROFILE

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<http://www.calbar.ca.gov/> [8/19/2011 10:44:38 AM]

http://ethics.calbar.ca.gov

Ethics

August 19, 2011

THE STATE BAR OF CALIFORNIA

HOME ETHICS PUBLICATIONS COMMITTEES ATTORNEY SUCROGACY

Hotline

Opinions

2009-176 to Present

1998-152 to 2008-175

1992-126 to 1997-151

1988-96 to 1991-125

1984-76 to 1987-95

1979-48 to 1983-75

1971-24 to 1977-47

1965-1 to 1970-23

Professional Competence

Home > Ethics

ETHICS INFORMATION

The Ethics Information area serves as a hub for ethics-related resources, education programs and research tools.

It also serves as a convenient bookmark for direct links to legal ethics authorities posted on the State Bar's website, searchable full text resources, proposed ethics opinions and proposed new or amended Rules of Professional Conduct. As the Ethics Information area develops, original content, external links and other resources will be added.

Listed below are links to areas of the State Bar's website pertaining to ethics research and information:

- California Attorney Guidelines of Civility and Professionalism (Civility Toolbox)
- California Rules of Professional Conduct
- The State Bar Act - Business & Professions Code §§ 6000 et seq. (See Div. 3, Chapt. 4 Attorneys)
- California Compendium on Professional Responsibility Index
- Legislative News & Information
- Law Corporations
- Legal Specialization
- Limited Liability Partnerships
- Minimum Continuing Legal Education (MCLE)
- Out-of-State Attorney Arbitration Counsel Program (OSAAC)
- Practical Training of Law Students
- Constitution of California (relevant provisions)
- California Rules of Court
- Rules of Practice of the State Bar Court
- Rules of Procedure of the State Bar Court

Announcements

- Attorney Surrogacy
- Proposed Rules of Professional Conduct
- FAQ re SB 94: Loan Modification Services
- FAQ: New Rule 3-410 (Disclosure of Professional Liability Insurance)

FREE MCLE ETHICS CREDIT

Client Trust Accounts and Bank Stability Concerns

- Attorney Information
- FAQs
- Handbook on Client Trust Accounting for California Attorneys
- IOLTA Information


Ethics Hotline Customer Satisfaction Survey

Satisfaction Survey


Proposed Rules of Professional Conduct

http://ethics.calbar.ca.gov/[8/19/2011 10:45:33 AM]

State Bar Act



THE STATE BAR OF CALIFORNIA

August 17, 2011 

[HOME](#) [RULES](#) [SELECTED LEGAL AUTHORITY](#)

- Constitution Examples
- The State Bar Act
- California Rules of Court
- Related Statutes

Home » Related Legal Authority » [The State Bar Act](#)

THE STATE BAR ACT

The State Bar Act refers to the *California Business & Professions Code Div. 3 - Professions and Vocations Generally, Ch. 4 - Attorneys (Bus. & Prof. Code §§ 6000 et seq.)*

[State Bar Act \(download PDF\)](#)

Article Number	Name
ARTICLE 1	GENERAL PROVISIONS (§§ 6000-6009.5) (view section files)
ARTICLE 2	ADMINISTRATION (§§ 6010-6033) (view section files)
ARTICLE 2.5	CONFLICTS OF INTEREST (§§ 6035-6038) (view section files)
ARTICLE 3	COMMITTEES OF THE STATE BAR (§§ 6040-6054) (view section files)
ARTICLE 4	ADMISSION TO THE PRACTICE OF LAW (§§ 6060-6069) (view section files)
ARTICLE 4.5	MANDATORY CONTINUING LEGAL EDUCATION (§§ 6070-6071) (view section files)
ARTICLE 4.7	CONTRACTS FOR LEGAL SERVICES (§§ 6072) (view section files)
ARTICLE 4.8	PRO BONO SERVICES (§§ 6073) (view section files)
ARTICLE 5	DISCIPLINARY AUTHORITY OF THE BOARD OF

Rules of Professional Conduct

The screenshot shows the website of the State Bar of California. The header is dark blue with the text "THE STATE BAR OF CALIFORNIA" in white. To the right of the header, the date "August 17, 2011" is displayed. Below the header is a navigation bar with three tabs: "HOME", "RULES", and "SELECTED LEGAL AUTHORITY". The "RULES" tab is currently selected. On the left side of the page, there is a sidebar with two links: "Current Rules" and "Previous Rules". The main content area has a light beige background. At the top of this area, there is a breadcrumb trail: "Home > Rules > All Rules of Professional Conduct". Below this, the title "RULES OF PROFESSIONAL CONDUCT" is displayed in a large, bold, dark blue font. A paragraph of text follows, explaining the purpose of the rules: "The California Rules of Professional Conduct are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors and approved by the California Supreme Court pursuant to statute to protect the public and to promote respect and confidence in the legal profession. The rules and any related standards adopted by the Board are binding on all members of the State Bar." Below this paragraph is a table with two columns: "California Rules of Professional Conduct" and "HTML" and "PDF". The table lists the following chapters: Chapter 1. Professional integrity in general, Chapter 2. Relationship among members, Chapter 3. Professional relationship with clients, Chapter 4. Financial relationship with clients, and Chapter 5. Advocacy and Representation.

THE STATE BAR OF CALIFORNIA

August 17, 2011

HOME RULES SELECTED LEGAL AUTHORITY

Current Rules
Previous Rules

Home > Rules > All Rules of Professional Conduct

RULES OF PROFESSIONAL CONDUCT

The California Rules of Professional Conduct are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors and approved by the California Supreme Court pursuant to statute to protect the public and to promote respect and confidence in the legal profession. The rules and any related standards adopted by the Board are binding on all members of the State Bar.

California Rules of Professional Conduct	HTML	PDF
Chapter 1. Professional integrity in general		
Chapter 2. Relationship among members		
Chapter 3. Professional relationship with clients		
Chapter 4. Financial relationship with clients		
Chapter 5. Advocacy and Representation		

Ethics Compendium Index



The screenshot shows the website of The State Bar of California. The header includes the organization's name, the date August 17, 2011, and a search bar. The navigation menu has links for HOME, ETHICS, PUBLICATIONS, COMMITTEES, and ATTORNEY SERVICES. A sidebar on the left lists links: Home, Pub 250, Client Trust Accounting Handbook, and Compendium on Professional Responsibility Index. The main content area is titled "Recent Publications > Compendium on Professional Responsibility Index" and features the heading "CALIFORNIA COMPENDIUM ON PROFESSIONAL RESPONSIBILITY INDEX". Below this is a link to "California Compendium on Professional Responsibility Index (download PDF)". The text states that the State Bar Office of Professional Competence publishes a three-volume ethics reference manual containing:

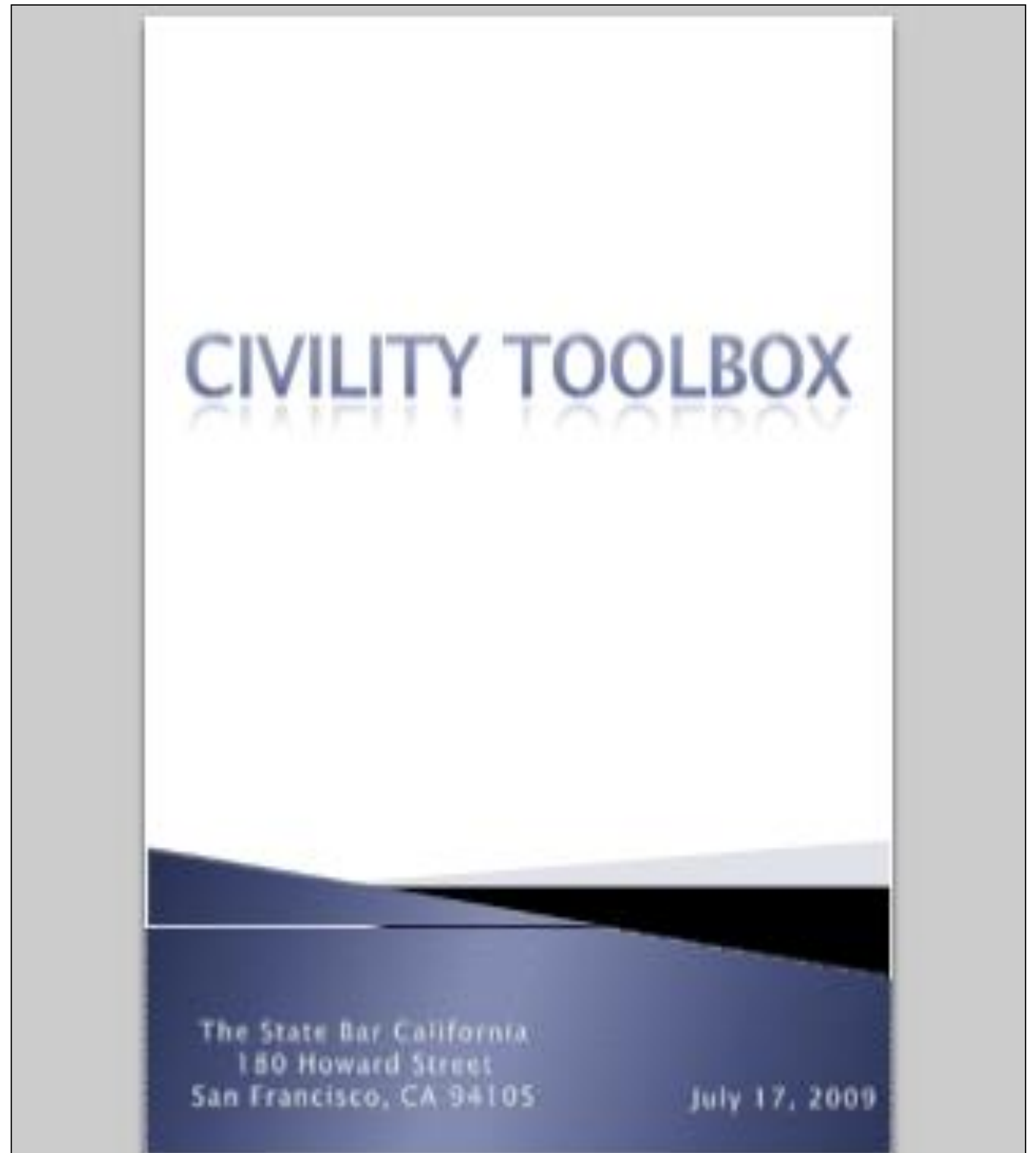
- Ethics opinions published by The State Bar of California, the Bar Association of San Francisco, the Los Angeles County Bar Association, the Orange County Bar Association and the San Diego County Bar Association
- A comprehensive subject matter research index
- The current California Rules of Professional Conduct and State Bar Act booklet
- California Code of Judicial Conduct.

A hard-copy version of the 2011 California Compendium on Professional Responsibility is available for purchase from the State Bar. The State Bar also publishes an [electronic copy](#) of the index, the primary research tool sought by subscribers.

The following documents are included with the index:

- How to Use This Index Reference
- Table of Contents
- Index: Conclusions, orders, decisions, 12/31/2010

Civility and Professional Guidelines



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.**”

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.)

July 20th 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

Our “hotline 2 ethics”



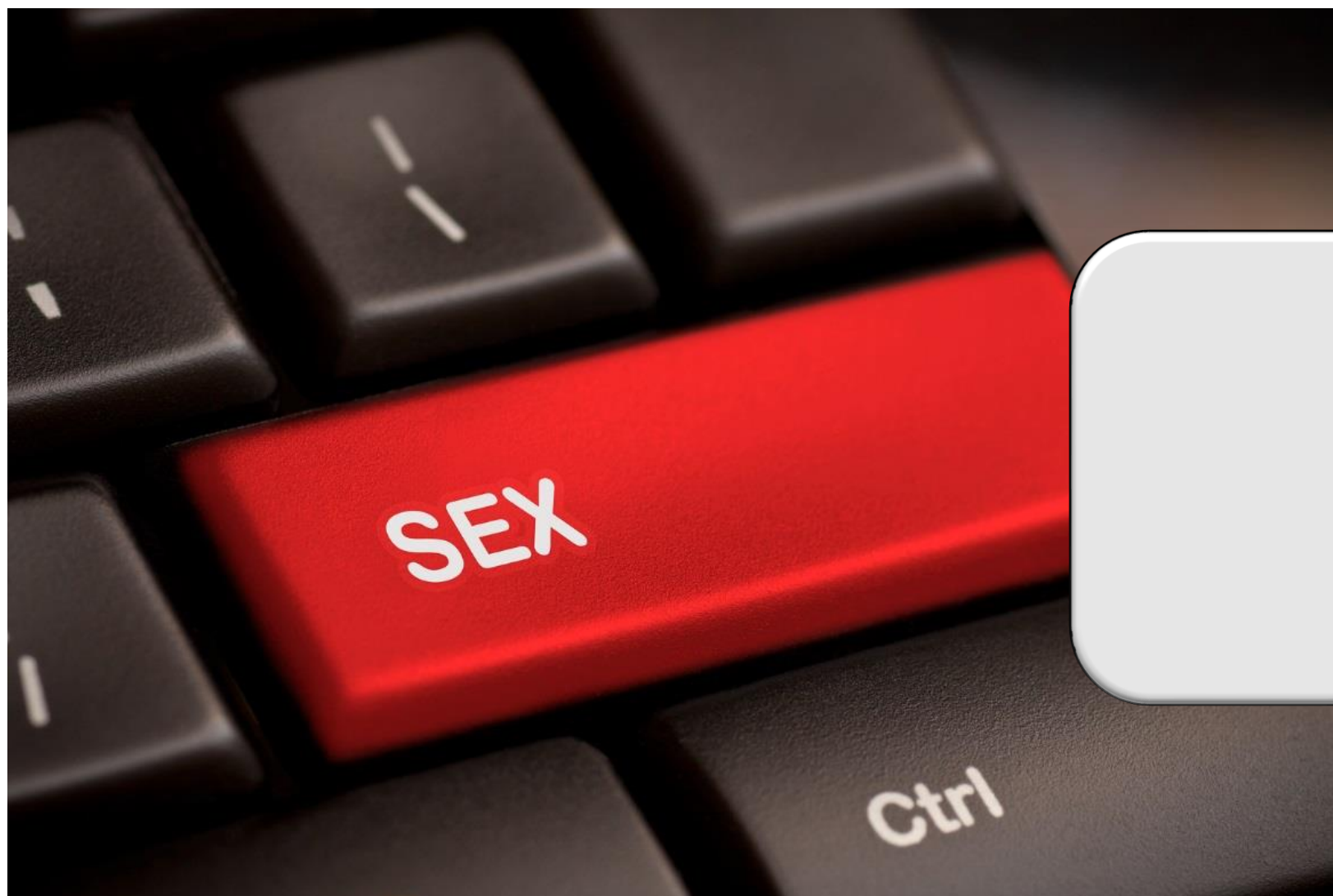
*State Bar
Ethics Hotline:*
1-800-2ETHICS



Ethical Earl



Ethics-less Elmer



2. Sex



Client Sex in America

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



Client
Sex
in
California

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.”

More History of Sex

September 14, 1992

Business and Professions Code section 6106.9 became effective

September 14, 1992

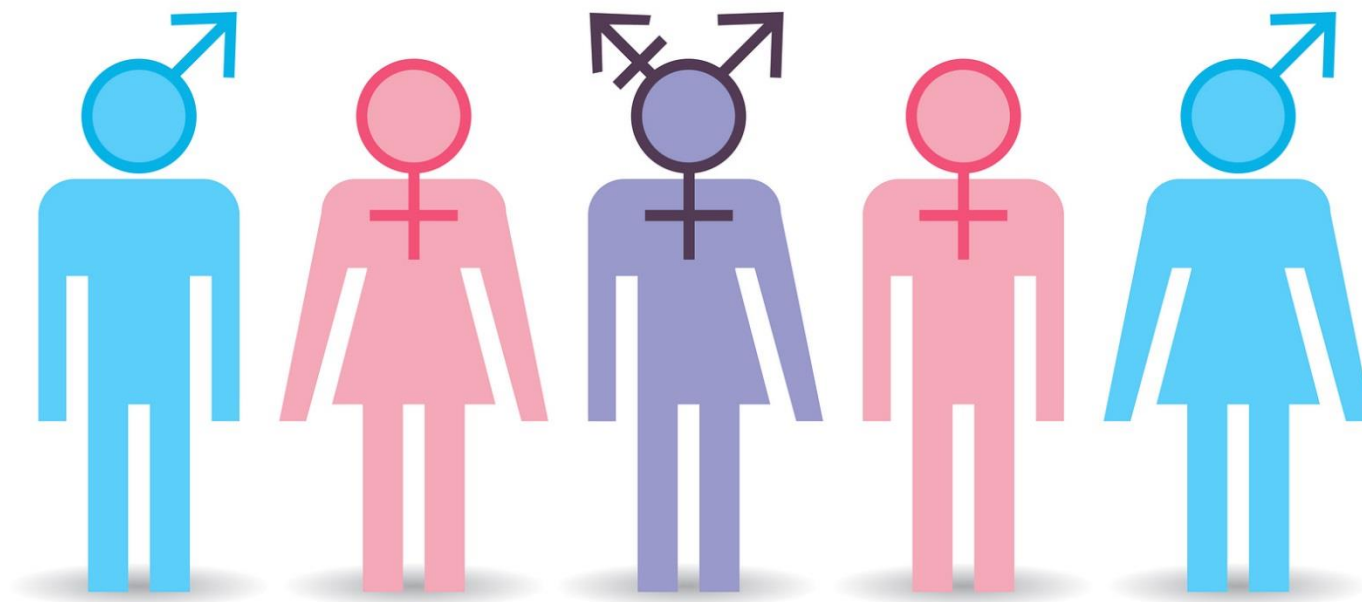
By order of the California Supreme Court, Rule 3-120 (“Sexual Relations With Client”) was added to Rules of Professional Conduct

(The code section and rule
are almost identical)

“Early Drafts”

between

January 1, 1990 and September 14, 1992



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)



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”





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

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**

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**.

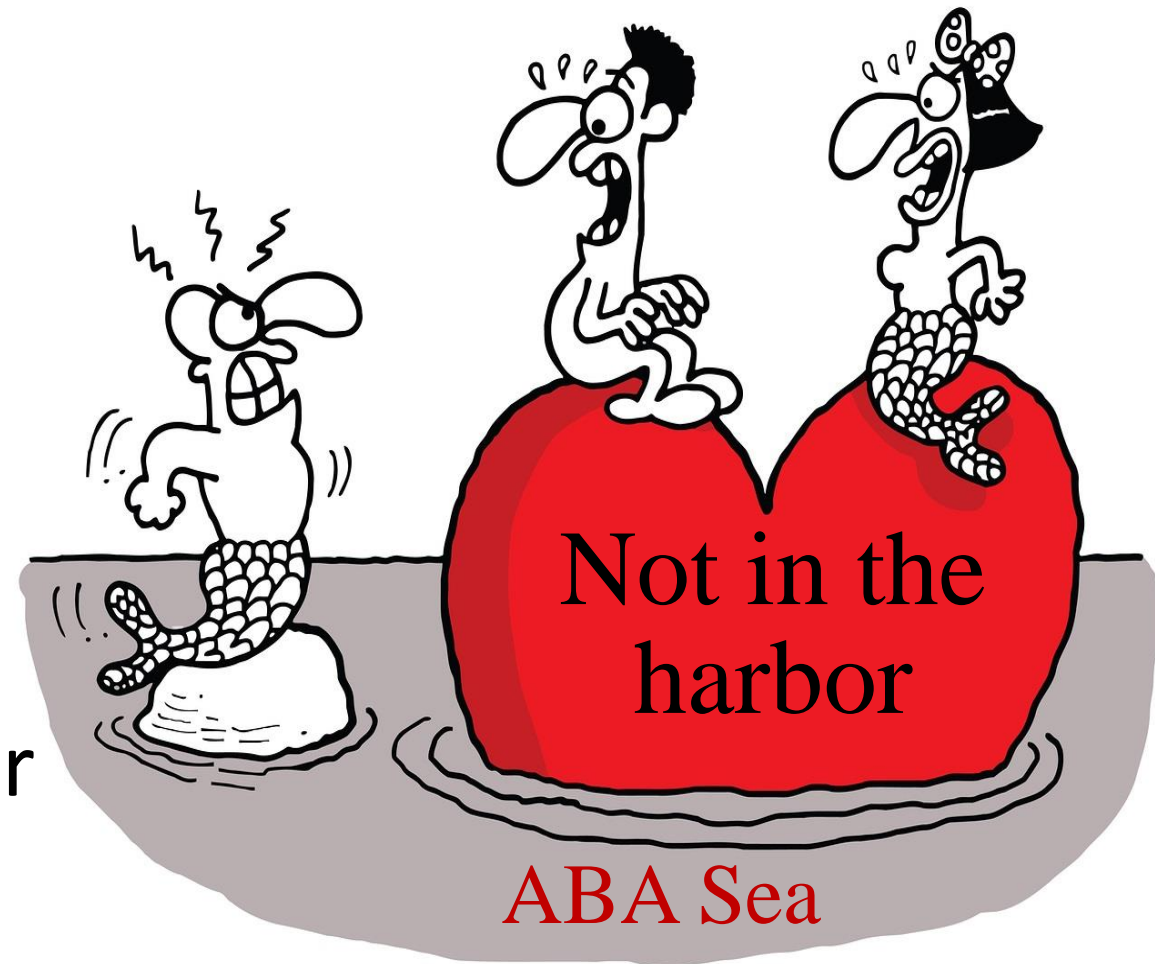


Sex on the Open Seas?

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.



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”



Rule 3-120 (B)(3)

Client sexual relations are
forbidden if Lawyer will

“perform

LEGAL SERVICES

incompetently

IN VIOLATION OF

RULE 3-110”



American Rule (1.8 (j))

	Competent Legal Services	Incompetent Legal Services
In the Harbor	YES: Sex is Ethical	YES: Sex is Ethical
Outside the Harbor	NO: Sex is Unethical	NO: Sex is Unethical

California Rule (3-120)

	Competent Legal Services	Incompetent Legal Services
In the Harbor	YES: Sex is Ethical	YES: Sex is Ethical
Outside the Harbor	YES: Sex is Ethical	NO: Sex is Unethical

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

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?

1986 - 1994



Arnold Becker, Esq.



Divorce Slut

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.”

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.**”

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.**”

Sex and Semantics, Part 1



What does “is” mean?

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

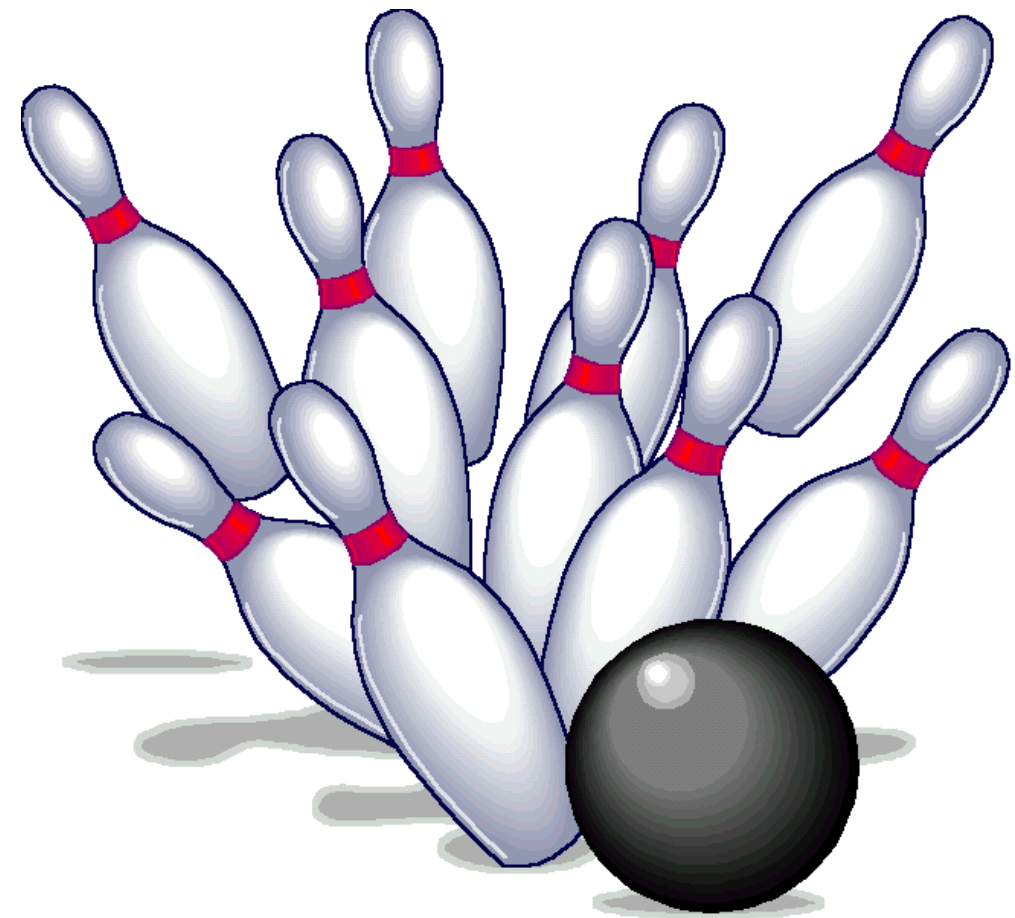
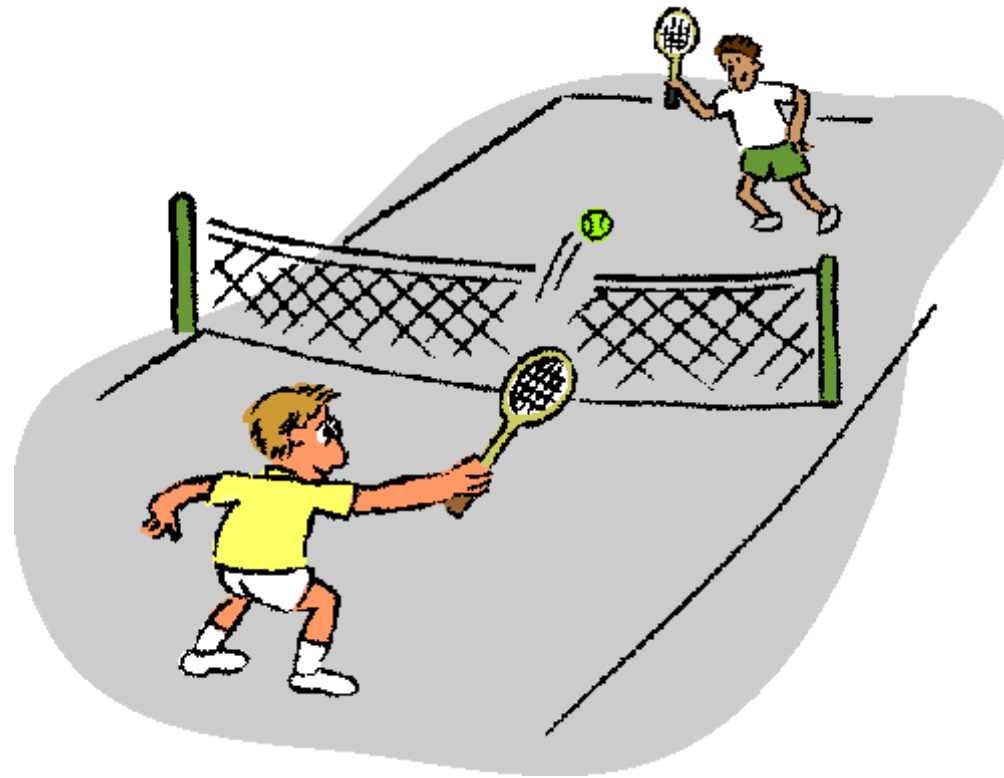
Bill Clinton to grand jury: “It depends on what the meaning of the word ‘is’ is.

- 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**

Sex and Semantics, Part 2



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

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)

(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?

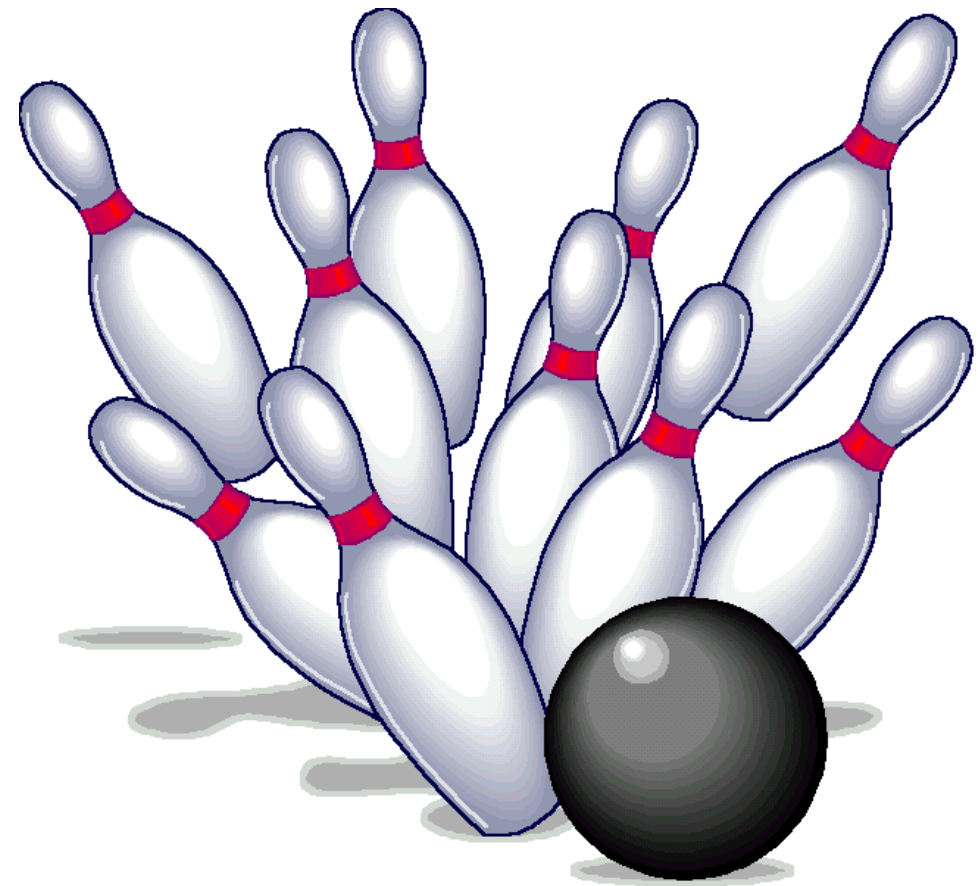
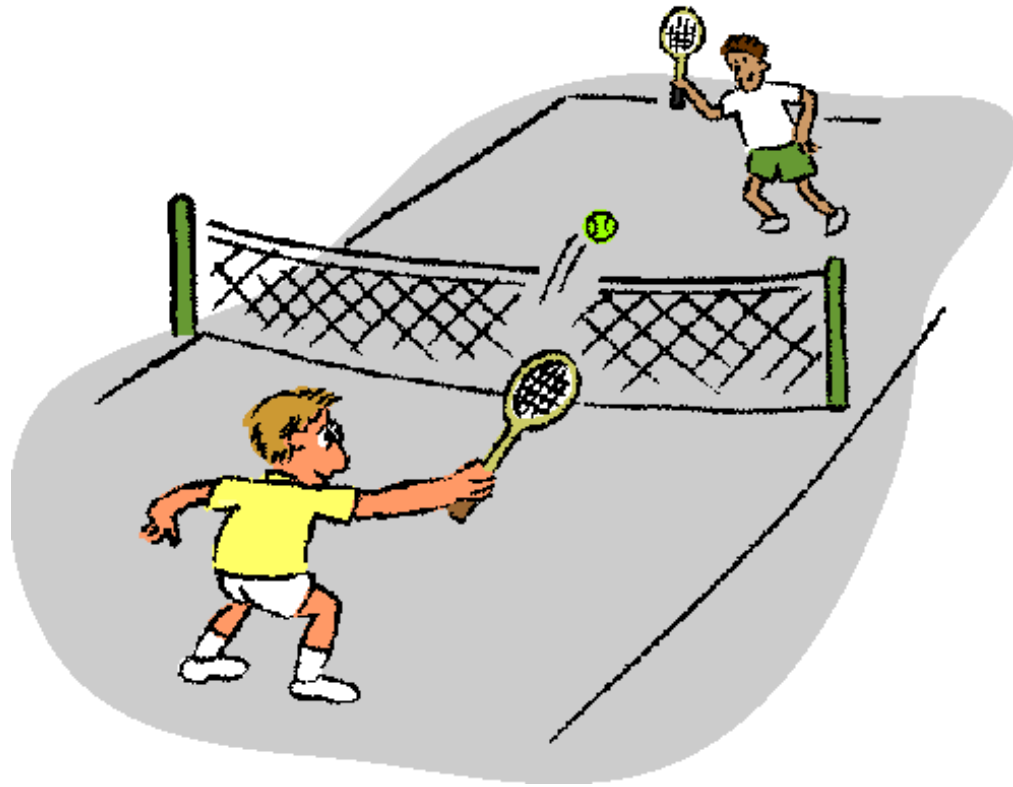


OLR is “with” it

“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.”

Supreme Court Ruled in Lawyer's Favor



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

3. Lies



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))

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.**”

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.**”

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,”

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.”

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**



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~~



4. Secrets

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.)

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.”

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)

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)

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)

Confidences & **Secrets**



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”

Our Disjunctive Directives

It's a secret if:

Client has **requested secrecy**

OR

Disclosure will be **embarrassing**

OR

Disclosure will likely
be **detrimental**

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 to for you to blab when you believe it is “**good for**” **your Client**?

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.”

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.**”

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

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.”

(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.**"

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.)



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:

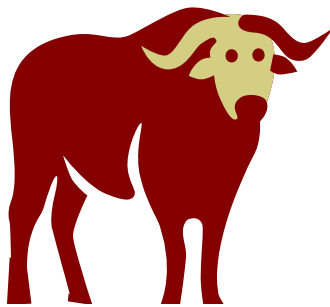
- A beneficial “**culture of camaraderie and candor**”?
 - OR -
- An unethical “**culture of conspiracy and control**”?





Ronald S. Granberg

“ethical
lawyer”

=  e ?

