

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
RULES OF PROFESSIONAL CONDUCT 1.8 AND 1.10**

**PETITION OF THE VIRGINIA STATE BAR
VSB 21-6**

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed changes to Rules of Professional Conduct 1.8 and 1.10, as set forth below. The proposed changes to Rule 1.8(k) and associated re-enumeration of Rule 1.10(d) were approved by a vote of 55 to 2 of the Council of the Virginia State Bar on April 21, 2021 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics (“Committee”) has proposed amendments to Rules 1.8 and 1.10. The proposed changes include a prohibition on sexual relationships with clients under Rule 1.8(k) and an associated renumbering of Rule 1.10’s cross-reference to Rule 1.8.

Rule 1.8(k)

This proposed rule amendment would add a paragraph to Rule 1.8, Conflict of Interest: Prohibited Transactions, to explicitly forbid a lawyer from having sexual relations with a client during the representation. This proposal would bring the rules in line with the ABA model rules and over 40 jurisdictions that address this issue as part of Rule 1.8 rather than only through an advisory ethics opinion.

The issue of sexual relationships with clients is currently addressed in LEO 1853 (Appendix, Page 67), which does not expressly forbid the conduct but rather identifies several different conflicts of interest or other concerns that might be present in specific situations where a lawyer has a sexual relationship with a client. Because the risk of violating other rules of professional conduct is so significant, LEO 1853 ultimately concludes that a lawyer *should not* have sex with a client but is not prohibited from entering a sexual relationship with a client. While much of the reasoning in LEO 1853 supports a bright line prohibition, LEO 1853 stops short:

Rules 1.3(c), 1.8(b), and 1.7(a)(2) reflect the fundamental fiduciary obligation of a lawyer not to exploit a client's trust for the lawyer's benefit, which implies that the lawyer *should not* abuse the client's trust by taking sexual or emotional advantage of a client.

While the Committee agrees with LEO 1853's reasoning, it believes that

the best position is that a lawyer must not abuse the client's trust by having sexual relations with a client during the professional engagement, unless the sexual relationship predated the professional engagement and the lawyer's representation of that client is not "materially limited" by the lawyer's personal relationship with that client. See Rule 1.7(a)(2). This result is exactly what the proposed rule would achieve.

Although courts and disciplinary cases have condemned lawyer-client sex, lawyers have continued to engage in sexual relations after commencement of the professional relationship, asserting that if the sexual relationship is between two consenting adults, the matter is none of the regulatory bar's business,¹ that the client's case was not prejudiced, or that no harm to the client had occurred. But the concept that these relationships are truly consensual is untenable. Where is the client's ability to say "no" when her attorney tells her he will abandon her lawsuit to keep her home unless she agrees to have sex? Reported cases are filled with clients who have said that they submitted to their attorney's sexual advances out of fear that refusing to submit would affect the quality of their representation at

¹ The proposed Rule 1.8(k) is not an attempt by the VSB to regulate personal decisions by the lawyer and client to have a sexual relationship. The proposed rule regulates the professional conduct of a lawyer during the legal representation of the client which falls squarely within the bar's regulatory objectives. If the lawyer and client wish to pursue a sexual relationship, then the lawyer must withdraw from the professional relationship.

a time of vulnerability and dependence on the attorney.²

LEO 1853 essentially puts the burden on the client, and in turn the Bar discipline system, to prove that the representation of the client was adversely affected by the existence of the sexual relationship that the Respondent lawyer will claim was “consensual.” While the burden is always (appropriately) on the Bar to prove disciplinary offenses by clear and convincing evidence, the offense here should properly be considered the existence of the sexual relationship itself, not any follow-on effects it had on the lawyer’s representation of the client. Those effects are separate offenses and should be treated as such, rather than as necessary to prove the misconduct of the sexual relationship itself.

Beyond that, adopting proposed Rule 1.8(k) sends a clear message that this conduct is not acceptable under any circumstances. On a practical level, many lawyers might expect to see this topic addressed in Rule 1.8, since that is how a majority of jurisdictions approach the issue, and do not necessarily know or appreciate that they also need to consider LEOs on this topic. And on a symbolic level, it reaffirms the Bar’s commitment to

² See, e.g., *In re Vogel*, 482 S.W.3d 520 (Tenn. 2016); *Iowa Supreme Court Atty. Disciplinary Bd. v. Moothart*, 860 N.W.2d 598 (Iowa 2015); *Disciplinary Counsel v. Detweiler*, 135 Ohio St.3d 447, 989 N.E.2d 41 (2013); *Disciplinary Counsel v. Moore*, 101 Ohio St.3d 261, 804 N.E.2d 423 (2004); *Akron Bar Ass’n v. Williams*, 104 Ohio St.3d 317, 819 N.E.2d 677 (2004); *Matter of Berg*, 264 Kan. 254, 955 P.2d 1240 (1998); *In re Rinella*, 175 Ill.2d 504, 677 N.E.2d 909 (1997).

protecting clients from predatory behavior.

Rule 1.10

If Rule 1.8(k) is adopted, then current Rule 1.8(k) will become Rule 1.8(l). This in turn will require an amendment to Rule 1.10(d) to say that “[t]he imputed prohibition of improper transactions is governed by Rule 1.8(l),” instead of Rule 1.8(k).

II. Publication and Comments

A. Rule 1.8(k)

The Standing Committee on Legal Ethics approved proposed Rule 1.8(k) at its meeting on December 12, 2019 (Appendix, Page 4). The Virginia State Bar issued a publication release dated December 13, 2019, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 6). Notice of proposed Rule 1.8(k) was also published in the Bar’s January 2020 newsletter (Appendix, Page 10), on the Bar’s website on the “Actions on Legal Ethics Opinions” page (Appendix, Page 15), on the bar’s “News and Information” page on January 7, 2020 (Appendix, Page 29), and in the *Virginia Lawyer Register*, February 2020 issue, Volume 68 (Appendix, Page 35).

Eleven comments were received, from Kevin Martingayle, Sandra

Bowen, Andrew Straw, deez132@yahoo.com (no other identification provided), Amy McDougal, James Wrenn, Leo Rogers (on behalf of the Local Government Attorneys), Leslie Haley, Hilton Oliver, Peter Owen, and John Crouch (Appendix, Page 36). The only change the Committee made in response to the comments was to remove the phrase “or regularly consults with” from proposed Comment [19], based on the suggestion in Leslie Haley’s comment. This change narrows the scope of the rule as applied to counsel for an entity, which the Committee agreed was an appropriate limitation for the reasons stated in Ms. Haley’s comment. This change also addresses some of the scenarios raised by Mr. Owen’s comment.

Several comments asked whether there is a need for a rule to address this issue and whether something has changed since LEO 1853 was adopted. The reasons for the Committee’s determination that a rule is necessary and appropriate are addressed above in the first section of this petition.

Several comments also raised, in different ways, questions about whether “sexual relationship” should be defined in the rule or comments. The Committee considered this both before and after receiving comments on the proposal and concluded that a specific definition is not necessary at

this time. There is no shortage of resources that attempt to define a sexual relationship, and the Committee, bar counsel, and disciplinary tribunals will be able to use standard methods of rule interpretation to apply the rule as specific factual scenarios arise. Should problems arise with this approach as the rule is applied, the Committee can revisit the comments equipped with better knowledge about what needs to be clarified.

B. Rules 1.8(b) and 1.10

The Standing Committee on Legal Ethics approved the amendment to Rule 1.10 at its meeting on February 27, 2020 (Appendix, Page 5). The Virginia State Bar issued a publication release dated February 27, 2020, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 8). Notice of the proposed rule amendment was also published in the Bar's March 2020 newsletter (Appendix, Page 14), on the Bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 25), and on the Bar's "News and Information" page on February 28, 2020 (Appendix, Page 33).

No comments were received on the substance of the Rule 1.10 amendment.

III. Proposed Rule Changes

RULE 1.8 Conflict of Interest: Prohibited Transactions

(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

([k] While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

COMMENT

Client-Lawyer Sexual Relationships

[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.

Like a conflict arising under paragraph (i) of this Rule, this conflict is personal to the lawyer and is not imputed to other lawyers in the firm with which the lawyer is associated.

[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).

[19] When the client is an organization, paragraph (k) 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 or directs that lawyer concerning the organization's legal matters.

RULE 1.10 Imputed Disqualification: General Rule

(d) The imputed prohibition of improper transactions is governed by Rule 1.8(kl).

IV. Conclusion

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of

professional conduct are promulgated and implemented. The proposed rule changes were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the Bar requests that the Court approve the proposed changes to Rules 1.8 and 1.10 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

A handwritten signature in black ink, appearing to read "Jay B. Myerson". The signature is written in a cursive style with a prominent initial "J" and a long horizontal stroke at the end.

Jay B. Myerson, President

A handwritten signature in black ink, appearing to read "Karen A. Gould". The signature is written in a cursive style with a large, looping initial "K" and a distinct "G" at the end.

Karen A. Gould, Executive Director

Dated this 24th day of November 2021.