

# ATTORNEY-CLIENT SEXUAL RELATIONSHIPS IN THE #METOO ERA: UNDERSTANDING CURRENT STATE APPROACHES AND WORKING TOWARDS A BETTER RULE

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Casey W. Baker, J.D.\*

On June 20, 2017, the Supreme Judicial Court of Maine suspended the law license of former probate judge Robert M.A. Nadeau for two years.<sup>1</sup> The disciplinary action was the fourth time Nadeau faced formal ethics proceedings.<sup>2</sup> He would face additional disciplinary sanction in a fifth ethics complaint in 2018.<sup>3</sup>

According to court records, Nadeau's disciplinary saga began a decade and a half earlier with an affair with a divorce client in 2003.<sup>4</sup> When Nadeau tried to reconcile with his wife, the former client filed an ethics complaint, and the Maine Board of Overseers of the Bar sought suspension or disbarment of Nadeau's law license.<sup>5</sup> The former client offered her testimony against Nadeau at a disciplinary hearing in May 2005.<sup>6</sup>

Within days of the hearing, however, Nadeau sought to reconnect romantically with the former client and lover, and by June 2005, he was living with her.<sup>7</sup> The two became engaged, and the client-turned-fiancée withdrew her disciplinary complaint.<sup>8</sup> At the time, Maine did not expressly prohibit sexual relations between attorneys and clients, so with the former

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\* Assistant Professor of Legal Environment, Smith Schools of Business, Lewis College of Business, Marshall University.

1. *In re Nadeau*, 2017 ME 121, ¶ 63, 168 A.3d 746, 762.

2. *Id.* ¶ 62, 168 A.3d at 761.

3. *In re Nadeau*, 2018 ME 18, ¶ 19, 178 A.3d 495, 500.

4. Bd. of Overseers v. Nadeau, No. Bar-05-03, 2006 Me. LEXIS 167, at \*1-3 (Mar. 2, 2006).

5. *Nadeau v. Nadeau*, 2008 ME 147, ¶¶ 4-5, 957 A.2d 108, 111-12.

6. *Id.* ¶ 5, 957 A.2d at 112.

7. *Id.* ¶¶ 5-6, 957 A.2d at 112.

8. *Id.*

client's change of heart, the Supreme Judicial Court of Maine dismissed the ethics complaint against Nadeau.<sup>9</sup>

Eventually the engagement ended—and litigation between Nadeau and the former client began.<sup>10</sup> The litigation in turn led to another disciplinary proceeding against Nadeau, relating to alleged abuse of his judicial office in the course of prosecuting the civil action.<sup>11</sup> In addition, two attorneys departed Nadeau's firm following the revelation of the affair, and Nadeau became embroiled in litigation with them.<sup>12</sup> These events led to additional disciplinary action against Nadeau based on his conduct towards his former colleagues, both in his capacity as an attorney<sup>13</sup> and a judge.<sup>14</sup> Thus, while Nadeau was ultimately disciplined for improper conduct related to the affair with his client, he was never disciplined for the sexual relations that triggered the ordeal.

Nadeau's case illustrates the need for a clear express prohibition on attorney-client sexual relations, such as that found in the American Bar Association's ("ABA") Model Rules of Professional Conduct ("MRPC") at Model Rule 1.8(j) (hereinafter "Model Rule 1.8(j)"), which states that "[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>15</sup>

While the ABA recommended that each state adopt Model Rule 1.8(j) in 2001,<sup>16</sup> prior to October 2018, Maine had not done so.<sup>17</sup> The record does

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9. *Bd. of Overseers v. Nadeau*, No. Bar-05-03, 2006 Me. LEXIS 167, at \*2-3 (Mar. 2, 2006).

10. *Nadeau v. Frydrych*, 2014 ME 154, ¶ 3, 108 A.3d 1254, 1255.

11. *In re Nadeau*, 2017 ME 191, ¶¶ 16-17, 170 A.3d 255, 258-59; *In re Nadeau*, 2016 ME 116, ¶ 50, 144 A.3d 1161, 1175.

12. *Nadeau v. Nadeau*, 2008 ME 147, ¶ 3, 957 A.2d 108, 111; *see also McGarry v. Nadeau*, No. CV-03-267, 2005 Me. Super. LEXIS 81, at \*10 (July 29, 2005).

13. *See Bd. of Overseers v. Nadeau*, No. Bar-05-03, 2006 Me. LEXIS 167, at \*3-5 (Mar. 2, 2006) (publicly reprimanding Nadeau for (i) direct contact with his former colleagues during the litigation, in violation of Maine Bar R. 3.6(f), which prohibits such direct contact with represented persons, and (ii) "discourteous and degrading" conduct towards the judge who refused to seal records related to Nadeau's affair, in violation of Maine Bar R. 3.7(e)(2)(vi)).

14. *In re Nadeau*, 2017 ME 191, ¶ 18, 170 A.3d 255, 259 (refusing to reconsider Nadeau's two-year suspension for acts in 2012 and 2013 directed at the former partners and attorneys associated with them, which the Court described as "vindictive and impulsive actions").

15. MODEL RULES OF PROF'L CONDUCT r. 1.8(j) (AM. BAR ASS'N 2018).

16. *See Comm'n on Evaluation of the Rules of Prof'l Conduct, Report No. 401*, ABA (Aug. 6-7, 2001), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/ethics2000\\_report\\_hod\\_082001.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics2000_report_hod_082001.pdf); *see also* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 459 (2002).

17. Rule Amendment Order of Amendments to the Me. Rules of Prof'l Conduct, 2018 Me. Rules 18 (Me. Oct. 26, 2018), [https://www.courts.maine.gov/rules\\_adminorders/rules/amendments/2018\\_mr\\_18\\_prof\\_conduct.pdf](https://www.courts.maine.gov/rules_adminorders/rules/amendments/2018_mr_18_prof_conduct.pdf).

not indicate that Nadeau's case was the specific inspiration for change, but Maine did eventually recognize that reliance on the general conflict of interest prohibitions was insufficient to govern attorney conduct with regard to client sexual relations:

The Committee recommends adopting ABA Model Rule 1.8(j)'s prohibition on sexual relations with clients. When Maine adopted the Rules of Professional Conduct, the Task Force (over a minority dissent) recommended not adopting Rule 1.8(j). The Task Force noted in Comment [12] to Rule 1.7 (the general current conflict rule), that it was not "implicit[ly] approv[ing]" of sexual relationships with clients, and expressly noted that attorneys had been disciplined under the former Code of Professional Responsibility for entering into sexual relationships with clients and "may be disciplined for similar conduct under these rules" even without the adoption of Rule 1.8(j). Feedback from the bar in the years since has helped convince the Committee that adopting Rule 1.8(j) will be helpful to the bar and the public in understanding the nature of an attorney's obligations in this regard.<sup>18</sup>

Maine should be commended for recognizing the shortcomings of its approach to regulating attorney-client sexual relations—a lesson that other states should also heed. As of December 1, 2019, eleven states, plus the District of Columbia, have not expressly prohibited sexual relations between attorneys and clients, and five states have adopted prohibitions that are materially weaker than Model Rule 1.8(j).<sup>19</sup> Furthermore, Model Rule 1.8(j) itself is unclear as to other important aspects of attorney sexual misconduct, such as the scope of the ethical duty when the client is an organizational entity rather than an individual—only nine states have by express rule addressed the attorney's ethical obligation in such a context.<sup>20</sup>

#### I. THE PROBLEM OF ATTORNEY-CLIENT SEXUAL RELATIONSHIPS IN THE #METOO ERA

The need to re-examine the rules relating to sexual relationships between attorneys and clients is especially pertinent today, given some of the high-profile sexual harassment and assault cases that have come to the public's attention as a part of the #MeToo social media campaign and other efforts.<sup>21</sup>

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18. *Id.*

19. *See infra* notes 82-92 and accompanying text.

20. *See infra* notes 145-57 and accompanying text.

21. *See* Ashley Badesch, *Lady Justice: The Ethical Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 GEO. J. LEGAL ETHICS 497, 498 (2018); *see also* Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85, 85-86 (2018).

At the root of the cases highlighted by #MeToo is an imbalance of power.<sup>22</sup> The legal profession has an important role in these movements, acting as a check on the power imbalances.<sup>23</sup> And yet, the legal profession has its own #MeToo problem. In recent years, allegations of sexual impropriety have surfaced against several state and federal judges, including cases in Nebraska, New York, Montana, Pennsylvania, Kansas, and California.<sup>24</sup> United States Supreme Court Chief Justice John G. Roberts, Jr., in 2017, acknowledged the problem within the judiciary, stating that “[e]vents in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune.”<sup>25</sup>

The problem is not limited to the judiciary. A 2018 survey commissioned by the Women’s Bar Association of Massachusetts found that more than twenty-eight (28%) percent of law firm employees—the majority of whom were associate attorneys—had at some point felt the need to engage in sexual behavior or develop a personal relationship with a co-worker to advance professionally.<sup>26</sup> The author of the survey concluded that the same power imbalances associated with #MeToo exist within the legal industry:

The survey yielded several striking findings. First—and no surprise when the survey is viewed in comparison to other organizations, corporations, and industries—is that the majority of the negative behaviors described arose from those in authority who misused their power. Nearly all of the anecdotes reported described events that happened to younger people,

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22. See Arnow-Richman, *supra* note 21, at 89-90. Regarding the imbalance of power, one author notes:

Employers who respond to the #MeToo movement by looking solely at unwanted sexualized behavior are likely to miss the forest while uprooting particular trees. By contrast, examining the allocation of power in contemporary workplaces helps identify where and in what form sexual harassment is likely to occur. Not only are top-level employees uniquely situated to sexually harass their subordinates, their disproportionate influence and control makes any form of harassment, or any implicit threat of adverse consequences, more menacing.

*Id.* (internal citations omitted).

23. See Badesch, *supra* note 21, at 498-99; see also Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims’ Attorneys*, 65 DRAKE L. REV. 293, 327 (2017).

24. Jaime A. Santos, *When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary*, 54 CT. REV. 156, 156 (2019) (internal citations omitted).

25. JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (Dec. 31, 2017), <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf>; Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88-89 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Gertner-1.pdf> (last visited Nov. 4, 2019).

26. LAUREN STILLER RIKLEEN, ESQ., WOMEN’S BAR ASS’N OF MASS., SURVEY OF WORKPLACE CONDUCT AND BEHAVIORS IN LAW FIRMS 5, 22 (2018), <https://wbawbf.org/sites/WBAR-PR1/files/WBA%20Survey%20of%20Workplace%20Conduct%20and%20Behaviors%20in%20Law%20Firms%20FINAL.pdf>.

where the perpetrator was more senior and, frequently, among the more powerful persons in the firm.<sup>27</sup>

Model Rule 1.8(j) does not specifically address workplace sexual harassment and assault between attorneys<sup>28</sup>—by its text, it is limited to the attorney-client relationship. However, the power imbalance between an attorney and his or her client is commonly just as great as that between a senior attorney and junior employees. As the ABA recognizes:

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.<sup>29</sup>

Furthermore, there are ethical risks beyond abuse of the power imbalance. A sexual relationship can impair the attorney's professional judgment and risk a breach of confidentiality and attorney-client privilege.<sup>30</sup> It is also questionable whether a client involved in a sexual relationship with his or her attorney can give informed consent to the representation and matters related thereto.<sup>31</sup>

Accordingly, it would be prudent for the legal profession to re-examine its own regulation of attorney-client sexual relations. When the Model Rules of Professional Conduct (the "MRPC") were extensively revised by the ABA in 2002, the reviewers sought to "promote national uniformity and consistency," to address the "substantive shortcomings in some rules and a lack of clarity in others," and to "reconcile text and commentary."<sup>32</sup> Essentially, the world in 2002 was a much different place than when the MRPC was adopted in 1983<sup>33</sup>—and the profession's ethics rules needed to change with it. In much the same way, #MeToo and other public awareness campaigns have changed the way society—and the legal profession—view sexual conduct between those in positions of power and those lacking it.

27. *Id.* at 38.

28. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018). The Model Rules provide:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

*Id.*

29. MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 17 (AM. BAR ASS'N 2018).

30. *Id.*

31. *Id.*

32. Love, *supra* note 16, at 441-42.

33. MODEL RULES OF PROF'L CONDUCT, at xii (AM. BAR ASS'N 2018).

While some recent scholarship looks at #MeToo, sexual harassment, and sexual assault within the legal profession—especially with regard to the provisions of Model Rule 8.4(g) regarding sexual discrimination and harassment<sup>34</sup>—there is little recent scholarship examining jurisdictional variations on Model Rule 1.8(j). Furthermore, there is little scholarship addressing attorney sexual conduct with a client representative when the client is an organization.

This article attempts to provide such information and analysis with the hope that a better ethical rule can emerge. Part II examines the reasons for an express prohibition on attorney-client sexual relations and the development of Model Rule 1.8(j). Part III examines some of the different state approaches to regulating attorney-client sexual relations, with analysis of some of the arguments raised against the adoption of an express prohibition. Part IV looks at the variation among states with regard to attorney sexual relations where the client is a corporate or other organizational entity. Part V proposes a new model rule that takes into consideration the issues raised herein, in an effort to better protect both the integrity of the attorney-client relationship and the profession as a whole.

## II. THE NEED FOR AN EXPRESS PROHIBITION ON ATTORNEY-CLIENT SEXUAL RELATIONS

The attorney-client relationship is a fiduciary relationship.<sup>35</sup> As a fiduciary, the attorney owes the client the duty of care, consistent with a certain minimum level of skill or expertise as well as diligence, and the duty of loyalty and fidelity, including the duties of confidentiality, candor, and disclosure.<sup>36</sup> It is fundamental to the attorney-client relationship that the attorney faithfully, honestly, and consistently represent the interests and protect the rights of the client—and the attorney must fulfill these duties to the client with the highest degree of fidelity and in utmost good faith.<sup>37</sup> Trust, confidence, open and honest communication, and unbiased judgment are key components of the relationship.<sup>38</sup>

The ABA, in drafting the MRPC, recognized the importance of the attorney's fiduciary relationship to his or her client. The Preamble to the MRPC reflects these expectations:

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34. *E.g.*, Badesch, *supra* note 21, at 498.

35. 7 AM. JUR. 2D *Attorneys at Law* § 138 (2019).

36. *Id.* § 139.

37. *Id.*

38. *Id.*

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

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In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.<sup>39</sup>

But the MRPC Preamble also makes clear that the attorney's duties extend to society.<sup>40</sup> The attorney must not only represent the client's interests but must do so in a manner that reflects positively on the profession, given that lawyers are often the intermediary between the average citizen and the administration of justice.<sup>41</sup> Sexual relationships between attorneys and clients jeopardize this public duty as well.<sup>42</sup>

These dual considerations must be kept in mind when reviewing the rules regarding attorney-client sexual relations, embodied by Model Rule 1.8(j). Additionally, while other scholars have addressed the genesis of Model Rule 1.8(j),<sup>43</sup> a brief review is helpful to understanding some of the concerns relating to adoption as well as state variation in approach to attorney-client sexual relations.

39. MODEL RULES OF PROF'L CONDUCT pmb. ¶¶ 2, 4 (AM. BAR ASS'N 2018).

40. *See id.* ¶ 1 ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

41. *See id.* ¶ 6 ("In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

42. *See, e.g.,* Lawyer Disciplinary Bd. v. Campbell, 807 S.E.2d 817, 825-26 (W. Va. 2017) (admonishing public defender for violating the "duty owed to the public and the legal system," even though the Court found that the sexual relationship she engaged in was not a violation of Rule 1.8(j) because it pre-existed the attorney-client relationship).

43. *See* Nicole J.A. Reid, *The Legal Profession's "Dirty Little Secret": Attorney-Client Sexual Relations and Public vs. Private Disciplinary Sanctions*, 24 GEO. J. LEGAL ETHICS 801, 805-06 (2011); *see also* Craig D. Feiser, *Strange Bedfellows: The Effectiveness of Per Se Bans on Attorney-Client Sexual Relations*, 33 J. LEGAL PROF. 53, 56-57 (2008); *see, e.g.,* Malinda L. Seymore, *Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 YALE J.L. & FEMINISM 175, 191-94 (2003).

Model Rule 1.8(j) initially was proposed in conjunction with the ABA's Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000 Commission").<sup>44</sup> Created in 1997, the Ethics 2000 Commission sought to review and propose updates to the MRPC given changes in the law and the legal profession since adoption fourteen years prior.<sup>45</sup> In particular, the Ethics 2000 Commission found that the MRPC insufficiently addressed certain ethical problems, lacked sufficient clarity in others, and were not adopted uniformly or consistently among jurisdictions.<sup>46</sup> With regard to sexual relations between attorneys and clients, the Ethics 2000 Commission recognized an excessive number of complaints involving attorney sexual misconduct<sup>47</sup>—some commenters referred to the problem as the profession's "dirty little secret."<sup>48</sup>

At its April 1998 meeting, the Ethics 2000 Commission first considered a broad prohibition on attorney-client sexual relations:

(k) 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. For purposes of this paragraph:

(1) 'Sexual relations' means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

(2) If the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization is deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7 rather than by this rule with respect to sexual relations with other employees of the entity they represent.

(3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.<sup>49</sup>

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44. Comm'n on Evaluation of Rules of Prof'l Conduct, *Meeting Minutes, Friday, April 17, and Saturday, April 18, 1998, Wilmington, Delaware*, pt. V, r. 1.8, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/041798mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/041798mtg/) [hereinafter Ethics 2000 Commission April 1998 Minutes] (last visited Nov. 8, 2019).

45. Love, *supra* note 16, at 441.

46. *Id.* at 441-42.

47. Ethics 2000 Comm'n, *Model Rule 1.8, Reporter's Explanation of Changes*, ABA (Oct. 5, 2011), [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule18rem/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem/).

48. Reid, *supra* note 43, at 805 (citing James A. Kawachika & Evan R. Shirley, *Sex with a Client? If You're Considering It . . . Think Again*, 13 HAW. B. J. 18 (2009)).

49. Seymore, *supra* note 43, at 192; Ethics 2000 Commission April 1998 Minutes, *supra* note 44, pt. V, proposed r. 1.8(k).

Thus, as initially proposed, Model Rule 1.8(j) not only prohibited sexual relations between attorneys and clients (except for those sexual relationships existing prior to the attorney-client relationship), it also clearly defined “sexual relations” and expressly extended the prohibition to organizational representation situations (with the exception of in-house counsel).

The proposal, from its outset, was controversial. Some commission members and observers argued that the rule was unnecessary or too broad, while others argued that it was too narrow.<sup>50</sup> Nevertheless, at that April 1998 meeting, the Ethics 2000 Commission voted to have some rule addressing sexual relations,<sup>51</sup> but the necessity and scope of the rule would continue to be debated.<sup>52</sup>

In July 1998, there was an effort to strike the express prohibition entirely; the rule narrowly survived by just a single vote.<sup>53</sup> Consideration of the rule continued into May 2000, with some observers and commission members continuing to argue that Model Rule 1.7(a)(2)’s prohibition on general conflicts of interest was sufficient to address the problem.<sup>54</sup>

Even at the final vote for adoption, debate continued. A motion to replace Model Rule 1.8(j) with cautionary guidance rather than an express prohibition failed.<sup>55</sup> A second motion would have completely eliminated Model Rule 1.8(j), and it also failed.<sup>56</sup> Ultimately, the Ethics 2000 Commission recommended, and the ABA adopted, Model Rule 1.8(j) over said objections.<sup>57</sup>

50. Ethics 2000 Commission April 1998 Minutes, *supra* note 44, pt. V, proposed r. 1.8(k).

51. *Id.*

52. Comm’n on Evaluation of Rules of Prof’l Conduct, *Meeting Minutes, Friday, May 30, and Saturday, May 31, 1998, Montreal, Quebec, Canada*, pt. V, r. 1.8(k), ABA, [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/052998mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/052998mtg/) (last visited Nov. 8, 2019).

53. Comm’n on Evaluation of Rules of Prof’l Conduct, *Meeting Minutes, Friday, July 31, and Saturday, August 1, 1998, Toronto, Canada*, pt. IV, model r. 1.8, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/073198mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/073198mtg/) (moved and seconded to strike the proposed prohibition on the basis that other ethical rules were sufficient; motion defeated 4-3) (last visited Nov. 8, 2019).

54. Comm’n on Evaluation of Rules of Prof’l Conduct, *Meeting Minutes, Friday, May 5, to Sunday, May 7, 2000, Memphis, Tennessee*, pt. IV, r. 1.8, ABA (Oct. 5, 2011), [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/050500mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/050500mtg/) (“Another member moved to delete paragraph (k) entirely. He argued that 1.7(a)(2) provides sufficient protection. Others felt that a per se rule is important to flag this issue for lawyers. . . . The motion failed with a vote of 4 to 6.”).

55. Ethics 2000 Comm’n, *Summary of House of Delegates Action on Ethics 2000 Commission Report*, ABA (Mar. 18, 2013), [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_summary\\_2002/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_summary_2002/).

56. *Id.*

57. Comm’n on Evaluation of the Rules of Prof’l Conduct, *supra* note 16.

The Ethics 2000 Commission's official explanation of Model Rule 1.8(j) unequivocally recognized that sexual misconduct by attorneys is a problem that deserves express prohibition:

The Commission recommends following the lead of a number of jurisdictions that have adopted Rules explicitly regulating client-lawyer sexual conduct. Although recognizing that most egregious behavior of lawyers can be addressed through other Rules, the Commission believes that such Rules may not be sufficient. Given the number of complaints of lawyer sexual misconduct that have been filed, the Commission believes that having a specific Rule has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients but also of alerting clients that the lawyer may have violated ethical obligations in engaging in such conduct.<sup>58</sup>

But the final version of the rule is substantially weaker than the initial proposal, with the provision addressing organizational representation relegated to an interpretive comment.<sup>59</sup> The final version of Model Rule 1.8(j) also fails to address ethical issues that may arise in sexual relationships that exist prior to the attorney-client relationship, which are provisionally exempt.<sup>60</sup>

Accordingly, while the adoption of Model Rule 1.8(j) was certainly a positive development for the profession, the rule can be improved. In the nearly two decades since Model Rule 1.8(j) was adopted, efforts such as the #MeToo movement have brought even greater attention to abuse of power and influence in the pursuit of sexual conquest. The legal profession would be justified in re-examining the clarity and impact of its existing prohibitions on attorney-client sexual relations to better reflect modern concerns.

Furthermore, there remains variance among jurisdictions as to how to address attorney-client sexual relationships, an issue that the Ethics 2000

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58. Ethics 2000 Comm'n, *supra* note 47.

59. Comm'n on Evaluation of Rules of Prof'l Conduct, *Meeting Minutes, Friday, March 16, to Saturday, March 17, 2001, Charleston, South Carolina*, pt. IX, r. 1.8, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_03\\_16m\\_tg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_03_16m_tg/) [hereinafter Ethics 2000 Commission March 2001 Minutes] (last visited Feb. 20, 2020). As discussed in Part IV, *infra*, the placement of the corporate client provision in an interpretive comment creates a conflict with other express rules—namely, Model Rule 1.13.

60. Seymore, *supra* note 43, at 219, 220. As one author notes:

Like most of the state rules, the Model Rule excludes from coverage relationships that predate the legal representation. These exemptions for pre-existing relationships seem to assume that the only real harm in attorney-client sex is an attorney abusing his or her position to initiate a sexual relationship with a client. The exemptions do not address potential conflicts of interest or impairment of judgment that might arise in pre-existing relationships . . . . This comment is not sufficient to highlight to attorneys or their clients that pre-existing relationships have the potential for impairing representation. The matter should be addressed in the rule itself.

*Id.*

Commission expressly sought to remedy. Part III examines that variance, offering analysis as to the relative strengths and weaknesses of the different jurisdictional approaches as well as discussing objections to adoption of express prohibitions. Part IV looks at the variance among states with regard to attorney sexual relations where the client is a corporate or other organizational entity, and issue that Model Rule 1.8(j) does not expressly address. Part V proposes a new model rule that incorporates some of the features from different state approaches.

### III. STATE APPROACHES TO ATTORNEY-CLIENT SEXUAL RELATIONSHIPS: MODEL RULE 1.8(J) AS THE BASELINE

With regard to sexual relationships between attorneys and individual clients, twenty-two states have adopted Model Rule 1.8(j) verbatim.<sup>61</sup> Another seven states have adopted rules substantially similar to Model Rule 1.8(j), with some slight language differences. For example, California explicitly exempts sexual relationships between attorneys and spouses or registered domestic partners.<sup>62</sup> Although Model Rule 1.8(j) is silent on this point, this is largely a distinction without difference.

California's rule also defines "sexual relations" and provides that the California State Bar must first consider whether the client will be burdened unduly by the investigation before pursuing disciplinary action against the attorney.<sup>63</sup> Minnesota's rule does the same.<sup>64</sup> Oregon,<sup>65</sup> West Virginia,<sup>66</sup> and Wisconsin<sup>67</sup> also adopt the model rule's language while adding a definition of "sexual relations," but none of the three states require an assessment of the impact on the client before initiating a disciplinary action.

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61. ARIZ. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); ARK. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); CONN. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); DEL. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); IND. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); KY. RULES OF PROF'L CONDUCT r. 3.130(1.8)(j) (2019); N.H. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); N.M. RULES OF PROF'L CONDUCT r. 16-108(J) (2019); PA. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); VT. RULES OF PROF'L CONDUCT r. 1.8(j) (2019); COLO. RULES OF PROF'L CONDUCT r. 1.8(j) (2018); S.D. RULES OF PROF'L CONDUCT r. 1.8(j) (2018); KAN. RULES OF PROF'L CONDUCT r. 1.8(k) (2016); NEB. RULES OF PROF'L CONDUCT r. 3-501.8(j) (2016); HAW. RULES OF PROF'L CONDUCT r. 1.8(j) (2014); IDAHO RULES OF PROF'L CONDUCT r. 1.8(j) (2014); ME. RULES OF PROF'L CONDUCT r. 1.8(j) (2014); WYO. RULES OF PROF'L CONDUCT r. 1.8(j) (2014); ILL. RULES OF PROF'L CONDUCT r. 1.8(j) (2010); N.D. RULES OF PROF'L CONDUCT r. 1.8(j) (2009); MO. RULES OF PROF'L CONDUCT r. 4-1.8(j) (2007); MONT. RULES OF PROF'L CONDUCT r. 1.8(j) (2004).

62. CAL. RULES OF PROF'L CONDUCT r. 1.8.10(a) (2018).

63. *Id.* r. 1.8.10(b), 1.8.10(c).

64. MINN. RULES OF PROF'L CONDUCT r. 1.8(j)(1), 1.8(j)(4) (2019).

65. OR. RULES OF PROF'L CONDUCT r. 1.8(j) (2018).

66. W. VA. RULES OF PROF'L CONDUCT r. 1.8(j) (2015).

67. WIS. RULES OF PROF'L CONDUCT r. 1.8(j) (2019).

Washington<sup>68</sup> and Nevada<sup>69</sup> have both adopted Model Rule 1.8(j), but each add language addressing the rule's applicability when the sexual relationship is with a representative or constituent of a client. Minnesota,<sup>70</sup> Oregon,<sup>71</sup> and Wisconsin<sup>72</sup> also expressly address the issue of sexual relationships with client representatives or constituents. The issue of sexual relationships between attorneys and client representatives or constituents is discussed in depth, *infra*, in Part IV.

Five states have rules that are substantially stronger than Model Rule 1.8(j). Of all states, Iowa's rule may be the strongest:

A lawyer shall not have sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the client-lawyer relationship. Even in these provisionally exempt relationships, the lawyer should strictly scrutinize the lawyer's behavior for any conflicts of interest to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.<sup>73</sup>

Iowa's rule reflects the core of Model Rule 1.8(j) while also emphasizing that even provisionally exempt sexual relationships are a risk, and Iowa establishes that such relationships should be strictly scrutinized for any reasonable possibility of harm to the client or the representation. No other state takes this approach.

Like Iowa, Alaska's<sup>74</sup> and Oklahoma's<sup>75</sup> respective rules expressly reference other ethical obligations imperiled by provisionally exempt sexual relationships. Both states effectively incorporate the provisions of Model Rule 1.7(a)(2), which prohibits representation where "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer."<sup>76</sup> Model Rule 1.8(j) does not expressly incorporate Rule 1.7(a)(2) within the rule text, but instead attempts to make the same point with an interpretive comment:

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68. WASH. RULES OF PROF'L CONDUCT r. 1.8(j) (2015).

69. See NEV. RULES OF PROF'L CONDUCT r. 1.8(j) (2018).

70. MINN. RULES OF PROF'L CONDUCT r. 1.8(j)(2) (2019).

71. OR. RULES OF PROF'L CONDUCT r. 1.8(j) (2018).

72. WIS. RULES OF PROF'L CONDUCT r. 1.8(j)(2) (2019).

73. IOWA RULES OF PROF'L CONDUCT r. 32:1.8(j) (2015).

74. ALASKA RULES OF PROF'L CONDUCT r. 1.8(j) cmt. (2019). Alaska's rule also addresses sexual relationships with constituents of organizational clients, discussed *infra*, in Part IV.

75. OKLA. RULES OF PROF'L CONDUCT r. 1.8(j) cmt. 17 (2008).

76. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2018).

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).<sup>77</sup>

While it could be argued that Rule 1.7(a)(2) applies regardless of Rule 1.8(j)—and therefore this is a distinction without difference—the express reference reinforces the notion that even provisionally exempt sexual relationships must be scrutinized for ethical concerns.<sup>78</sup>

Ohio utilizes Model Rule 1.8(j) in substance but also adds a prohibition against solicitation of sexual activity with a client.<sup>79</sup> North Carolina takes a similar tack but uses the terms “require or demand” instead of “solicit.”<sup>80</sup> Model Rule 1.8(j) is silent as to attorney solicitations for sex from clients.<sup>81</sup> Given the risk of undue influence presented in the attorney-client relationship, prohibitions on requests for sexual relations also seem worthy of consideration.

Of the remaining jurisdictions, five have prohibitions that are weaker than Model Rule 1.8(j). New York's rule does not technically prohibit any sexual relationships, except where the attorney represents the client in a domestic relations matter.<sup>82</sup> Instead, New York provides that an attorney shall not “employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation.”<sup>83</sup> New York does, however, prohibit attorneys from requiring or demanding sexual relations “with any person”—that is, the rule is not restricted to demands made on clients—as a condition of entering into or continuing any representation.<sup>84</sup>

At first glance, this seems like a broad rule, and potentially stronger than Model Rule 1.8(j). But New York's rule does not prohibit attorney sexual activity with clients—it prohibits the use of coercion, intimidation, or undue

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77. MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 18 (AM. BAR ASS'N 2018). Note that Alaska and Oklahoma have both adopted the same interpretive comment in addition to codifying the reference to Rule 1.7(a)(2).

78. See Ethics 2000 Commission April 1998 Minutes, *supra* note 44, pt. V, proposed r. 1.8(k).

79. OHIO RULES OF PROF'L CONDUCT r. 1.8(j) (2019).

80. N.C. RULES OF PROF'L CONDUCT r. 1.19(c) (2003).

81. MODEL RULES OF PROF'L CONDUCT r. 1.8(j) (AM. BAR ASS'N 2018).

82. N.Y. RULES OF PROF'L CONDUCT r. 1.8(j)(1)(iii).

83. *Id.* r. 1.8(j)(1)(ii).

84. *Id.* r. 1.8(j)(1)(i).

influence in connection with sexual activity.<sup>85</sup> The use of coercion, intimidation, or undue influence to take advantage of a client relationship would be prohibited in a number of contexts, not just sexual relations.<sup>86</sup> Therefore, it is unclear whether New York's rule actually prohibits sexual relations between attorneys and clients outside of the domestic relations context.

Four other states have rules restricting attorney-client sexual relationships, but none of the four provide substantially robust client protections thereunder. Alabama<sup>87</sup> and Florida<sup>88</sup> prohibit attorneys from engaging in sexual conduct with clients only to the extent such conduct “exploits or adversely affects” a client's interests or the representation. Likewise, Utah prohibits sexual relations “that exploit the lawyer-client relationship.”<sup>89</sup> South Carolina forbids sexual relations when the client is in a vulnerable condition, subject to the control or undue influence of the attorney, or when the sexual relations could adversely affect the client's interests or the representation.<sup>90</sup>

While such prohibitions are better than nothing, it is unclear whether they, like New York's rule, actually address the concerns posed by attorney-client sexual relations. Under no circumstances should an attorney take advantage of his or her undue influence, act in a manner that harms client interests, or otherwise adversely affect the representation—regardless of whether the method of doing so is sexual, financial, or otherwise! Alabama, Florida, and Utah do provide that sexual relationships that do not exist prior to the attorney-client relationship are presumed to be exploitive, but the presumption is rebuttable.<sup>91</sup> Beyond this presumption, these states' rules do

85. *Id.* r. 1.8(j)(1)(ii).

86. *Id.* r. 1.8 cmt. 17A (“Even if a lawyer does not know that the firm represents a person, the lawyer's use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law.”).

The ABA also recognizes the undue influence a lawyer may have on a client:

A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2018).

87. ALA. RULES OF PROF'L CONDUCT r. 1.8(l) (2008).

88. FLA. RULES OF PROF'L CONDUCT r. 4-8.4(i) (2019).

89. UTAH RULES OF PROF'L CONDUCT r. 1.8(j) (2017).

90. S.C. RULES OF PROF'L CONDUCT r. 1.8(m) (2019).

91. FLA. RULES OF PROF'L CONDUCT r. 4-8.4(i) cmt. (2019); UTAH RULES OF PROF'L CONDUCT r. 1.8(j)(2) (2017); ALA. RULES OF PROF'L CONDUCT r. 1.8(m) (2008).

little to emphasize and regulate the particular problems associated with attorney-client sexual relationships.

The remaining twelve jurisdictions—the states of Georgia, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, Rhode Island, Tennessee, Texas, and Virginia, plus the District of Columbia—have adopted no express rule prohibiting sexual relations between attorneys and clients.<sup>92</sup> Instead, these jurisdictions rely entirely on the other generally applicable rules of professional conduct to regulate attorney-client sexual relationships.

Why would approximately one-fourth of attorney disciplinary bodies not adopt an express prohibition on attorney-client sexual relationships? The primary objection to an express ban is that such a prohibition is unnecessary, and other ethical rules can better address the sexual relationships of concern.<sup>93</sup> Some argue that a blanket prohibition may even do more harm than good.<sup>94</sup>

Much of the early Ethics 2000 Commission discussion focused on whether Model Rule 1.7's general prohibition on conflicts of interest sufficiently addressed the specific problem of attorney sexual misconduct:

An observer said that [an express prohibition on sexual relations with clients] is not needed. He said that disciplinary agencies are currently able to prosecute the cases brought to them by using Rule 1.7 and that the existence of such a rule would not help clients to file a grievance. He thought the problems created by having such a Rule would outweigh the benefits. A member pointed out the difficulty in proving undue influence.

Other members thought it was important to state, either in the black letter or the Comment, that such relationships are prohibited. A member suggested placing the prohibition in Rule 8.4.

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92. GA. RULES OF PROF'L CONDUCT r. 1.8. (2019); LA. RULES OF PROF'L CONDUCT r. 1.8 (2018); MD. RULES OF PROF'L CONDUCT r. 19-301.8 (2019); MASS. RULES OF PROF'L CONDUCT r. 1.8 (2015); MICH. RULES OF PROF'L CONDUCT r. 1.8 (2019); MISS. RULES OF PROF'L CONDUCT r. 1.8 (2019); N.J. RULES OF PROF'L CONDUCT r. 1.8 (2018); R.I. RULES OF PROF'L CONDUCT r. 1.8 (2017); TENN. RULES OF PROF'L CONDUCT r. 1.7 cmt. 12, 1.8 (2011); TEX. RULES OF PROF'L CONDUCT r. 1.8 (2019); VA. RULES OF PROF'L CONDUCT r. 1.8 (2019); D.C. RULES OF PROF'L CONDUCT r. 1.8 (2019).

93. See Seymore, *supra* note 43, at 177 (citing Florence Vincent, *Regulating Intimacy of Lawyers: Why Is It Needed and How Should It Be Approached*, 33 U. TOL. L. REV. 645 (2002)); Nancy Goldberg Wilks, *Sex in the ABA: Impotent Standing Committee or the Proverbial Fox?*, 6 MD. J. CONTEMP. LEGAL ISSUES 205, 207, 217-18 (1995); Anthony E. Davis & Judith Grimaldi, *Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 57, 57 (1993)).

94. See Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 210-11 (1997); see, e.g., Ethics 2000 Commission April 1998 Minutes, *supra* note 44, pt. V, proposed r. 1.8(k).

Some members suggested that this Rule be made part of the Comment to Rule 1.7.<sup>95</sup>

Sometimes the specific objection is that Model Rule 1.8(j) is too broad, in that it prohibits sexual relationships that do not impact the attorney's performance; other times, the argument is that Model Rule 1.8(j) is too narrow, seemingly blessing problematic sexual relationships so long as they exist at the time the attorney-client relationship begins.<sup>96</sup>

In either event, the argument boils down to the same basic concept: black letter prohibitions like Model Rule 1.8(j) are not *perfect*. As Professor Feiser has stated, “[a]ny time a disciplinary floor is described, inherently adversarial attorneys will find plenty of ways to explain away their conduct as being within the letter of the rule, even if not within its spirit. And only violations of the letter of the rules typically result in discipline.”<sup>97</sup>

But the profession should not allow the *perfect* to be the enemy of the *good*. Even if Model Rule 1.8(j) is not the ideal “disciplinary floor,” with some innocuous attorney conduct prohibited and some bad behavior permitted, the proper response is to build a better floor—not completely remove it. To that end, Model Rule 1.8(j) serves as a baseline that states can build upon and improve based on experience.<sup>98</sup>

Moreover, attorneys are not strangers to black letter prohibitions, and Model Rule 1.8 restricts a variety of specific conduct that jeopardizes the attorney-client relationship.<sup>99</sup> For example, every jurisdiction has adopted some form of Model Rule 1.8(a), which prohibits attorneys from entering into business transactions with clients.<sup>100</sup> Every jurisdiction has adopted some version of Model Rule 1.8(f), which restricts attorneys from accepting compensation from a non-client.<sup>101</sup> Beyond Model Rule 1.8, Model Rule 7.3 tightly regulates attorney advertising and solicitation activities based on the *potential* for abuse, regardless of whether the activity actually is abusive.<sup>102</sup>

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95. Ethics 2000 Commission April 1998 Minutes, *supra* note 44, pt. V, proposed r. 1.8(k).

96. *See* Feiser, *supra* note 43, at 79-80.

97. *Id.* at 82.

98. Justice Brandeis's oft-cited description of states as laboratories of policy is apt. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

99. MODEL RULES OF PROF'L CONDUCT r. 1.8(j) (AM. BAR ASS'N 2018); *see also* Nancy J. Moore, *Sex with a Client: Always a Violation? Adopt the ABA's Specific Prohibition*, 19 GPSOLO 37, 40 (2002).

100. ABA CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (Sept. 29, 2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpe\\_1\\_8.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpe_1_8.pdf).

101. *Id.*

102. MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. 2 (AM. BAR ASS'N 2018) (“A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services.”).

That these rules may prohibit some attorney conduct that is perfectly legitimate, or allow some conduct that is illegitimate, does not generate the controversy that Model Rule 1.8(j) does.<sup>103</sup>

Why, then, is sex different? Virtually all jurisdictions expressly recognize the inherent risks to representation posed by attorney-client sexual relations.<sup>104</sup> This is true even among jurisdictions not adopting any express prohibition. The District of Columbia describes the inherent risks at length, stating that an attorney-client sexual relationship “can involve unfair exploitation of the lawyer’s fiduciary role” and “presents a significant risk that the lawyer’s emotional involvement will impair the lawyer’s independent professional judgment.”<sup>105</sup> Louisiana refused to adopt Model Rule 1.8(j) in part because its case law addresses attorney-client sexual relations.<sup>106</sup> Michigan’s official commentary references possible criminal sanctions against an attorney for sexual relationships with a client.<sup>107</sup> Georgia and Maryland officials apparently felt it necessary to adopt commentary specifying that sexual favors are not valid fee arrangements.<sup>108</sup>

Yet, these states’ rules do not expressly prohibit attorney sexual misconduct. The legal profession must meet its public responsibility to support, defend, and advocate for victims of sexual harassment, assault, and oppression, and as Professor Seymore notes, that is difficult when the profession fails to expressly state that such conduct is unacceptable:

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103. See, e.g., *Attorney Grievance Comm’n v. Kent*, 653 A.2d 909, 919 (Md. 1995) (“In order to maintain public confidence in the legal system, lawyers must avoid not only actual acts of misconduct but even the type of behavior that can suggest misconduct.”).

104. For example, in Maryland:

A sexual relationship with a client, whether or not in violation of criminal law, will create an impermissible conflict between the interests of the client and those of the attorney if (1) the representation of the client would be materially limited by the sexual relationship and (2) it is unreasonable for the attorney to believe the attorney can provide competent and diligent representation. Under those circumstances, informed consent by the client is ineffective.

MD. RULES OF PROF’L CONDUCT r. 19-301.7 cmt. 12 (2019).

Furthermore, in Massachusetts:

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship raises concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns are particularly acute when a lawyer has a sexual relationship with a client.

MASS. RULES OF PROF’L CONDUCT r. 1.7 cmt. 12 (2015).

105. D.C. RULES OF PROF’L CONDUCT r. 1.7 cmt. 38 (2019). The D.C. rules caution that sexual relationships with clients are “imprudent” even if not in actual violation of the rules. *Id.* cmt. 37.

106. Dane S. Ciolino, *Lawyer Ethics Reform in Perspective: A Look at the Louisiana Rules of Professional Conduct Before and After Ethics 2000*, 65 LA. L. REV. 535, 568 (2005).

107. MICH. RULES OF PROF’L CONDUCT r. 1.8 cmt. (2019).

108. GA. RULES OF PROF’L CONDUCT r. 1.5 cmt. 1A (2019); MD. RULES OF PROF’L CONDUCT r. 19-308.4 cmt. 3 (2019).

[A]n important first step is for every state to adopt an explicit prohibition against attorneys representing clients with whom they have a sexual relationship. The passage of such a rule sends an important message about valuing women's voices, about listening when women talk of oppression. Adopting such rules makes explicit what attorneys know—or should know—that sex with clients is unethical, exploitative, and harmful.”<sup>109</sup>

Second, some opponents of an express prohibition argue that there is not enough evidence to conclude that attorney-client sexual relationships are a substantial problem warranting the rule.<sup>110</sup> It is true that survey data is outdated—perhaps the most comprehensive and cited nationwide survey on the topic was published in 1993.<sup>111</sup> Furthermore, due to state-by-state reporting discrepancies—along with general issues relating to the reporting of sexual misconduct—it is difficult to gather consistent data that accurately gauges the problem.<sup>112</sup> In the 1993 survey, seven percent of attorneys self-reported having had a sexual relationship with a client.<sup>113</sup> A different nationwide poll of state bars reported that only one percent of state bar complaints involved attorney-client sexual relationships,<sup>114</sup> but a Texas study determined that lawyer-client sexual relationships are among the top ten sources of disciplinary complaints.<sup>115</sup>

Nevertheless, concerns about data consistency appear to be a red herring. As discussed above, even in the absence of clear, consistent, and recent data, states that have not adopted an express prohibition on attorney-client sexual relationships still recognize the inherent risk therein.<sup>116</sup> Given the broad consensus among states that sexual relations jeopardize the trust and confidence required between attorneys and clients, critics cannot legitimately

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109. See Seymore, *supra* note 43, at 219; see also *id.* at 223 (“Enacting a rule prohibiting lawyers from representing clients with whom they have a sexual relationship would be a significant step toward increasing confidence in the legal system.”).

110. See Frederick C. Moss & Patricia Chamblin, *Lover vs. Lawyer: The Sex with Clients Debate in Texas*, 55 THE ADVOCATE (TEX.) 48, 50 (2011); News Release, American Bankers Association, California Considers General Ethical Ban on Lawyer Sex with Clients (Nov. 29, 2016) (on LexisNexis).

111. Dan S. Murrell et al., *Loose Canons—A National Survey of Attorney-Client Sexual Involvement: Are There Ethical Concerns?*, 23 MEMPHIS ST. U. L. REV. 483, 487 (1993).

112. Seymore, *supra* note 43, at 181-83.

113. Murrell et al., *supra* note 111, at 491.

114. Seymore, *supra* note 43, at 181 (citing Linda Jorgenson & Pamela Sutherland, *Lawyer-Client Sexual Contact: State Bars Polled*, NAT'L L.J., June 15, 1992, at 27).

115. Moss & Chamblin, *supra* note 110, at 50 (citing CHARLES F. HERRING, JR. ET AL., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 559 (10th ed. 2011)).

116. See *supra* note 92.

claim the need for more data to ascertain whether an express prohibition is appropriate.<sup>117</sup>

The third argument against Model Rule 1.8(j) is based in privacy—that sexual misconduct charges could unduly damage an attorney’s public reputation even though the representation was not impacted.<sup>118</sup> These commenters argue, essentially, that sexual relationships are within a constitutionally protected “zone of privacy” that should be free from unreasonable governmental intervention.<sup>119</sup>

Yet, there is little concern over statutory prohibitions on sexual exploitation in other professions, such as medical professionals, mental health professionals, and clergy, especially where the professional occupies a position of trust.<sup>120</sup> Separate from statutory prohibition, professional accrediting bodies frequently regulate members’ sexual relationships with clients.<sup>121</sup> So why should attorneys—who occupy positions of power and trust with respect to their clients—be any different?

Furthermore, as Professor Seymore argues, privacy concerns are lessened because the attorney-client relationship is *not* private:

The government regulates whether an attorney-client relationship exists, defining the relationship for purposes of rules of evidence regarding the attorney-client privilege as well as rules of professional responsibility. The government restricts whom attorneys can and cannot represent. The government further regulates the rights and duties of attorneys and clients, regulates what the terms of the contract between attorney and client must be, and regulates how the relationship may be terminated. Regulating

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117. This is not to suggest that such data would not be helpful in combating the legal profession’s #MeToo problem, better training attorneys and law students with regard to recognizing, preventing, and reporting ethical violations among their peers, and cultivating a more professional, respectful, and inclusive legal industry. See RIKLEEN, *supra* note 26, at 33-38.

118. Feiser, *supra* note 43, at 62.

119. See Seymore, *supra* note 43, at 208 (citing Mischler, *supra* note 94, at 231-35).

120. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 92 (1998) (identifying doctors, psychotherapists, and clergy members as professionals whose sexual relationships are frequently subject to statutory regulation); see also Ralph H. Brock, *Sex, Clients, & Legal Ethics*, 64 TEX. B. J. 234, 236 (2001) (identifying psychotherapists, acupuncturists, podiatrists, dentists and dental hygienists, persons licensed to practice medicine, optometrists, and physical therapists as prohibited from engaging in sexual activities with clients) (citing *People v. Good*, 893 P.2d 101, 103 (Colo. 1995)).

121. Moss & Chamblin, *supra* note 110, at 50 (identifying the American Medical Association, the American Psychiatry Association, the American Psychological Association, the National Association of Social Workers, the American Counseling Association, and the National Certification Board for Therapeutic Massage and Bodywork as professional governing bodies with ethical prohibitions on sexual relationships with clients) (internal citations omitted).

attorney-client sex is well within the sphere of government action given this framework.<sup>122</sup>

Professor Seymore asserts that the regulation of attorney-client sexual relationships is not about dictating when or with whom an attorney can have a sexual relationship—it is about dictating the circumstances under which an attorney can represent a client.<sup>123</sup>

While the author is sympathetic to the privacy arguments, he agrees with Professor Seymore's conclusions. The practice of law—and therefore the attorney-client relationship—is within the public sphere, and public concerns justify prohibiting attorney-client sexual relationships. But focusing the regulation on the attorney-client relationship—and the inherent risks thereto presented by the specific problem of sexual conduct—is key. *Contra* Professor Seymore's analysis, the author finds that the text of Model Rule 1.8(j) does in fact target sexual conduct, not merely regulate the terms of representation.<sup>124</sup> The problem is that Model Rule 1.8(j) does not permit the attorney to withdraw from representation if the attorney and client wish to pursue a sexual relationship—the attorney simply is told, “thou shalt not engage in sexual relations with a client.”<sup>125</sup>

Nevertheless, privacy concerns do not justify the refusal to adopt *any* prohibition or restriction on sexual relations. Such privacy concerns can be addressed through careful drafting. For example, in contrast to Model Rule 1.8(j) is Iowa's rule, which specifies that the correct course of action is withdrawal from representation: “[i]f there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.”<sup>126</sup> Such direction negates the concern that government may be dictating the private lives of attorneys.

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122. Seymore, *supra* note 43, at 210-11 (internal citations omitted).

123. *Id.* at 212.

124. MODEL RULES OF PROF'L CONDUCT r. 1.8(j) (AM. BAR ASS'N 2018).

125. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 1.16(a) (AM. BAR ASS'N 2018) (requiring withdrawal from representation where, *inter alia*, the representation will result in a violation of the rules of professional conduct, or where the lawyer's physical or mental condition materially impairs his or her ability to represent the client).

126. IOWA RULES OF PROF'L CONDUCT r. 32:1.8(j) (2015).

IV. ATTORNEY-CLIENT SEXUAL RELATIONS WHEN THE CLIENT IS AN ORGANIZATION: MODEL RULE 1.8(J)'S SHORTCOMINGS AND STATE APPROACHES TO THE ISSUE

When the client is an organizational entity rather than an individual, concerns about power imbalances may not be as significant.<sup>127</sup> And yet, that does not mean that power imbalances are insignificant. Organizational representatives and constituents certainly place their trust and confidence in the entity's counsel, and attorney fiduciary duties are not avoided simply by the fact that a client takes a corporate form. Furthermore, even if there were not concerns about power imbalances when the client is an organization, concerns regarding impairment of professional judgment, creation of conflicts of interests, and issues of client confidentiality persist.<sup>128</sup>

But the MRPC, at Model Rule 1.13, is clear that when the client is an organization, the organization's officers, directors, representatives, and other constituents are *not* the client:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

....

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.<sup>129</sup>

Thus, a rule forbidding an attorney from engaging in sexual relations with a client does not necessarily forbid the attorney from engaging in sexual relations with persons connected to the client organization.

As discussed in Part II above, when it was first proposed, Model Rule 1.8(j) expressly stipulated that when the client was an organization, any person within the organization with oversight and authority regarding the attorney's representation was deemed the client for the purposes of the sexual

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127. See Seymore, *supra* note 43, at 220.

128. *Id.* at 221.

129. MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2018).

relations prohibition.<sup>130</sup> However, during drafting, this provision was removed.<sup>131</sup>

Thus, Model Rule 1.8(j) does not, in the text of the rule itself, address attorney sexual relations with a representative of an organizational client.<sup>132</sup> Instead, the rule utilizes an interpretive comment (“Comment 19”) to address that situation:

[19] When the client is an organization, paragraph (j) 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, directs or regularly consults with that lawyer concerning the organization’s legal matters.<sup>133</sup>

Twenty-two states have followed the ABA’s lead on the organizational client context by attempting to prohibit the concerning sexual conduct via interpretive guidance.<sup>134</sup> In addition, New York also addresses the matter via interpretive comment instead of express rule, but New York’s comment does not state that sexual relations are prohibited.<sup>135</sup> Rather, New York’s comment states that the rule “applies” when the client is an organization.<sup>136</sup> As discussed at Part III, *supra*, the text of New York’s rule does not strictly prohibit any attorney-client sexual relations unless the representation relates to domestic relations matters. It would be the exceedingly odd case in which a corporation or other organizational entity engages an attorney for representation in a domestic relations matter of the type concerning New York’s officials.<sup>137</sup>

130. Seymore, *supra* note 43, at 192; Ethics 2000 Commission April 1998 Minutes, *supra* note 44, pt. V, proposed r. 1.8(k).

131. See Ethics 2000 Commission March 2001 Minutes, *supra* note 59, pt. IX, r. 1.8.

132. MODEL RULES OF PROF’L CONDUCT r. 1.8(j) (AM. BAR ASS’N 2018).

133. *Id.* cmt. 19.

134. ARIZ. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2019); ARK. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2019); DEL. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2019); IND. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2019); N.H. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2019); N.M. RULES OF PROF’L CONDUCT r. 16-108(J) cmt. 19 (2019); PA. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2019); CAL. RULES OF PROF’L CONDUCT r. 1.8.10 cmt. 2 (2018); COLO. RULES OF PROF’L CONDUCT r. 1.8 cmt. 20 (2018); OHIO RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2017); UTAH RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2017); KAN. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2016); NEB. RULES OF PROF’L CONDUCT r. 3-501.8 cmt. 19 (2016); W.VA. RULES OF PROF’L CONDUCT r. 1.8 cmt. 24 (2015); HAW. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2014); IDAHO RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2014); WYO. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2014); KY. RULES OF PROF’L CONDUCT r. 3.130(1.8) cmt. 19 (2012); ILL. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2010); N.D. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2009); OKLA. RULES OF PROF’L CONDUCT r. 1.8 cmt. 19 (2008); MO. RULES OF PROF’L CONDUCT r. 4-1.8 cmt. 19 (2007).

135. N.Y. RULES OF PROF’L CONDUCT r. 1.8(j) & cmt. 19 (2018).

136. *Id.* cmt. 19.

137. See *id.* r. 1.8(j) & cmt. 17.

The principal problem with relying on the interpretive comment to create an enforceable prohibition is that interpretive comments are *not* enforceable. The MRPC expressly recognizes this limitation:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.” Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.<sup>138</sup>

Of the states that have followed the MRPC approach and addressed the issue via comment, all have likewise adopted prefatory statements negating the enforceability of interpretive comments.<sup>139</sup>

Nevertheless, most commenters considering the matter assume that Comment 19 (or the particular state equivalent) is just as enforceable as the text of rule itself.<sup>140</sup> The author is less convinced than these previous

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Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent.

*Id.* at cmt. 17.

138. MODEL RULES OF PROF’L CONDUCT scope ¶14 (AM. BAR ASS’N 2018) (emphasis added).

139. See ARIZ. RULES OF PROF’L CONDUCT scope ¶ 14 (2019); ARK. RULES OF PROF’L CONDUCT scope ¶ 14 (2019); HAW. RULES OF PROF’L CONDUCT scope ¶ 1 (2019); IND. RULES OF PROF’L CONDUCT scope ¶ 14 (2019); KY. RULES OF PROF’L CONDUCT scope ¶ XV (2019); N.M. RULES OF PROF’L CONDUCT scope para. 1 (2019); PA. RULES OF PROF’L CONDUCT scope ¶ 14 (2019); WYO. RULES OF PROF’L CONDUCT scope ¶ 14 (2019); CAL. RULES OF PROF’L CONDUCT r. 1.0(c) (2018); N.Y. RULES OF PROF’L CONDUCT scope ¶ 6 (2018); OHIO RULES OF PROF’L CONDUCT scope ¶ 14 (2017); COLO. RULES OF PROF’L CONDUCT scope ¶ 14 (2016); W. VA. RULES OF PROF’L CONDUCT scope ¶ 14 (2015); IDAHO RULES OF PROF’L CONDUCT scope ¶ 14 (2014); KAN. RULES OF PROF’L CONDUCT scope ¶ 14 (2014); DEL. RULES OF PROF’L CONDUCT scope ¶ 14 (2010); ILL. RULES OF PROF’L CONDUCT scope ¶ 14 (2010); NEB. RULES OF PROF’L CONDUCT scope ¶ 14 (2008); N.H. RULES OF PROF’L CONDUCT statement of purpose para. 4 (2007); N.D. RULES OF PROF’L CONDUCT scope ¶ 1 (2006); OKLA. RULES OF PROF’L CONDUCT pmb1. (2006); MONT. RULES OF PROF’L CONDUCT scope ¶ 15 (2004); UTAH RULES OF PROF’L CONDUCT pmb1. ¶ 14 (2003).

140. See *In re Bergman*, 382 P.3d 455, 457-58, 466-67 (Kan. 2016) (uncontested disciplinary action consistent with enforcement of Comment 19); see, e.g., Moss & Chamblin, *supra* note 110, at 52 n.60; Steven H. Resnicoff, *Illinois’ New Legal Ethics Rules: A Disappointing Travail, a Lesson for All, and Their Impact on the Practice of Business and Commercial Law*, 9 DEPAUL BUS.

commenters. It could be argued that Model Rule 1.8(j) addresses a specific attorney-client relationship issue,<sup>141</sup> and therefore the specific organizational “client” issues addressed by the rule should trump the more general organizational “client” issues addressed by Model Rule 1.13 under applicable canons of construction.<sup>142</sup> But as the United States Supreme Court has recognized, “the ancient interpretive principle that the specific governs the general (*generalia specialibus non derogant*) applies only to conflict between laws of equivalent dignity.”<sup>143</sup>

In the case of Model Rule 1.8(j)’s Comment 19 and Model Rule 1.13, the conflict is not between the rules “of equivalent dignity.” The conflict is between an actual express rule and an unenforceable interpretive comment. Model Rule 1.8(j) can be read entirely consistent with Model Rule 1.13—the “client” is the organization per Model Rule 1.13, and therefore Model Rule 1.8(j), by its terms, does not apply in the organizational context.<sup>144</sup>

To clarify the situation and put the drafters’ intent into effect, an express rule addressing attorney-client sexual relations in the organizational client context is needed. But only nine states have adopted express rules addressing the situation. Of those, one—Nevada—provides that the prohibition does not apply when the client is an organization.<sup>145</sup> Thus, only eight states by express rule prohibit attorney sexual relations with organizational client representatives.

& COMM. L.J. 29, 42 (2010); Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 915 n.13 (2005); Moore, *supra* note 99, at 37 n.2; Christian F. Southwick, *Ardor and Advocacy: Attorney-Client Sexual Relations and the Regulatory Impulse in Texas and Across the Nation*, 44 S. TEX. L. REV. 307, 381 n.470 (2002).

141. Indeed, Model Rule 1.8 is titled “Current Clients: Specific Rules.” MODEL RULES OF PROF’L CONDUCT r. 1.8(j) (AM. BAR ASS’N 2018).

142. See Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251, 277 n.108 (2018); Eric C. Chaffee, *The Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law*, 28 GEO. J. LEGAL ETHICS 323, 365-66 (2015) (“[T]he specific is designed to directly address an issue, is usually more carefully studied and thought out than the general . . .”); Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 107 n.59 (2011).

143. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (per curiam).

144. See OR. RULES OF PROF’L CONDUCT r. 1.8(j) (2018) (“This rule is identical to ABA Model Rule 1.8 with the following exceptions . . . [Model Rule] 1.8(j) does not address sexual relations with representatives of corporate clients and does not contain definitions of terms.”).

145. NEV. RULES OF PROF’L CONDUCT r. 1.8(j) (2018) (“A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. This paragraph does not apply when the client is an organization.”). The Nevada Rules of Professional Conduct do not include any interpretive guidance or comments explaining the decision to exclude organizational clients from the prohibition. See *id.* r. 1.8.

Alaska's rule perhaps most clearly reconciles the approach of Model Rule 1.8 with Model Rule 1.13, effectively codifying Comment 19 and also expressly incorporating its Rule 1.13:

For purposes of this rule, when the client is an organization, "client" means a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters. See Rule 1.13(h) for the definition of "constituent."<sup>146</sup>

Thus, Alaska's Rule 1.8, by its own terms, is an exception to Rule 1.13. Alaska's approach therefore offers protection to clients and client representatives while at the same time avoiding statutory construction issues under Rule 1.13.

Washington takes a similar tack by expressly extending its prohibition to any "representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation."<sup>147</sup> Washington does not expressly reference Rule 1.13 within Rule 1.8, but Washington's Comment 19 does reference Rule 1.13.<sup>148</sup>

Iowa also forbids an attorney from engaging in sexual relations with a "representative of a client."<sup>149</sup> It does not—within the rule or by comment—expressly reference Rule 1.13.<sup>150</sup> Oregon does the same.<sup>151</sup> Both states have adopted versions of Comment 19, which, when combined with the textual distinction between "client" and "representative of a client," is probably sufficient to address the organizational client.<sup>152</sup>

Florida and Alabama also by rule expressly prohibit attorney sexual conduct with a "representative of a client," but as discussed in Part III *supra*, Florida and Alabama only prohibit sexual conduct that "exploits or adversely affects the interests of the client or the lawyer-client relationship."<sup>153</sup> Nevertheless, both at least avoid the tension between Model Rule 1.8 and Model Rule 1.13.

146. ALASKA RULES OF PROF'L CONDUCT r. 1.8(j) (2017).

147. WASH. RULES OF PROF'L CONDUCT r. 1.8(j)(2) (2019).

148. *Id.* cmt. 19, 22 ("Paragraph (j)(2) of Washington's Rule, which prohibits sexual relationships with a representative of an organizational client, differs from the Model Rule. Comment [19] to Model Rule 1.8 was revised to be consistent with the Washington Rule.").

149. IOWA RULES OF PROF'L CONDUCT r. 1.8(j) (2015).

150. *Id.* r. 1.8(j) & cmt. 17-19.

151. OR. RULES OF PROF'L CONDUCT r. 1.8(j) (2018).

152. *Id.* cmt. Comparison to ABA Model Rule; IOWA RULES OF PROF'L CONDUCT r. 32:1.8(j) cmt. 19 (2015).

153. ALA. RULES OF PROF'L CONDUCT r. 1.8(l) (2019); FLA. RULES OF PROF'L CONDUCT r. 4-8.4(i) (2019).

Minnesota<sup>154</sup> and Wisconsin<sup>155</sup> effectively codify Comment 19 and also adopt it as a separate comment. Minnesota and Wisconsin differ though in their approaches to in-house counsel. Minnesota expressly exempts in-house counsel from coverage under Rule 1.8(j), deferring instead to Rule 1.7.<sup>156</sup> Wisconsin expressly includes both inside and outside counsel within the scope of Rule 1.8(j).<sup>157</sup>

The remaining nineteen jurisdictions do not address attorney sexual conduct in the organizational representation context at all, via rule or comment. This includes the twelve jurisdictions that have not adopted any express prohibition on attorney-client sexual relations,<sup>158</sup> plus six states with an express rule on attorney-client sexual relations generally but no comment addressing the application to an organizational client.<sup>159</sup> Obviously, the lack of any specific rule on point does nothing to address the ethics issues raised throughout this work.

#### V. IMPROVING MODEL RULE 1.8(J)

As discussed above, when the ABA Ethics 2000 Commission developed the MRPC and Model Rule 1.8(j), it did so with the goals of promoting national uniformity and consistency in attorney ethics rules, addressing inadequacies and lack of clarity in some rules, and reconciling text and with commentary.<sup>160</sup> This work has identified several areas in which the profession has failed to fulfill those goals as they relate to attorney-client sexual relations.

To address some of the inadequacies of Model Rule 1.8(j) itself as well as state adoption thereof, the author would propose universal adoption of the following rule addressing attorney-client sexual relationships:

- (1) A lawyer shall not solicit or have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced;

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154. See MINN. RULES OF PROF'L CONDUCT r. 1.8(j) cmt. 19 (2019).

155. See WIS. RULES OF PROF'L CONDUCT r. 1.8(j) cmt. 19 (2019).

156. MINN. RULES OF PROF'L CONDUCT r. 1.8(j)(2) (2019).

157. WIS. RULES OF PROF'L CONDUCT r. 1.8(j)(2) (2019).

158. *Supra* note 92 and accompanying text.

159. CONN. RULES OF PROF'L CONDUCT r. 1.8(j) & cmt. (2019); S.C. RULES OF PROF'L CONDUCT r. 1.8(m) & cmt. 21 (2019); ME. RULES OF PROF'L CONDUCT r. 1.8(j) & cmt. 17-19, advisory committee's note to 2018 amendment (2018); S.D. RULES OF PROF'L CONDUCT r. 1.8(j) (2018). MONT. RULES OF PROF'L CONDUCT r. 1.8(j) (2017); N.C. RULES OF PROF'L CONDUCT r. 1.19(c) & cmt. 1-7 (2003).

160. Love, *supra* note 16, at 441-42.

(2) For purposes of this rule, when the client is an organization, “client” means a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization’s legal matters. See Rule 1.13 for the definition of “constituent”;

(3) Even in a sexual relationship provisionally exempt under paragraphs (1) and (2) above, the lawyer’s behavior should be strictly scrutinized for any conflicts of interest to determine if any harm may result to the client or to the representation.

(4) If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the initiation or continuation of a sexual relationship, the lawyer shall decline or immediately withdraw from the legal representation pursuant to Rule 1.16.

The proposed rule more thoroughly addresses the concerns raised by this article than either Model Rule 1.8(j) or any state-adopted version thereof. First, the proposed rule embraces Model Rule 1.8(j)’s clear black letter prohibition on attorney-client sexual relations, and also extends the prohibition to solicitation of sexual relations. Currently, only two states prohibit attorneys from soliciting or demanding sexual relations with clients within their respective versions of Model Rule 1.8(j).<sup>161</sup>

Second, the proposed rule resolves any statutory contradictions in applying the black letter prohibition to the organizational client context by express reference to Rule 1.13. Only one state expressly reconciles the conflict with Rule 1.13 within Rule 1.8,<sup>162</sup> although other states have otherwise codified the rule’s application to organizational clients.

Third, the proposed rule leaves little doubt that even provisionally exempt sexual relationships are nevertheless concerning, cautioning the attorney as to potential conflicts of interests. Furthermore, the proposed rule gives clear guidance to the attorney as to how to proceed when legal representation is jeopardized by a sexual relationship—withdrawal is mandatory. Only one state expressly offers such guidance to attorneys.<sup>163</sup>

The author acknowledges that the proposed rule is not perfect—it is virtually impossible to draft a black letter rule on any subject that perfectly captures all possible problematic scenarios while avoiding all potential injustices.<sup>164</sup> Nevertheless, the proposed rule does better reflect the goals the

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161. OHIO RULES OF PROF’L CONDUCT r. 1.8(j) (2017); N.C. RULES OF PROF’L CONDUCT r. 1.19(c) (2003).

162. ALASKA RULES OF PROF’L CONDUCT r. 1.8(j) (2017).

163. IOWA RULES OF PROF’L CONDUCT r. 32:1.8(j) (2015).

164. In fact, the author has previously criticized reliance on black letter conflicts of interest rules in a much different context. See Casey W. Baker, *Incubating Golden Eggs: Why Attorney Ethics Rules May Stifle Small Business Development*, 2 ENTREPRENEURIAL BUS. L.J. 507 (2007) (arguing that, in the business incubator context, consent to non-adversarial dual representation and

Ethics 2000 Commission had in mind in crafting a prohibition on attorney-client sexual relations, and the author would encourage the ABA and the individual states to reassess their rules to meet the challenges facing the profession today.

## VI. CONCLUSION

The legal profession has a #MeToo problem—but the public attention also represents an opportunity to build a better profession. The power imbalances that are at the heart of the problem of sexual harassment, assault, and abuse are a risk not only to employees within the profession, but also to clients. States that have thus far refused to adopt any express prohibition on attorney-client sexual relations should now do so.

Furthermore, just as the Ethics 2000 Commission re-examined ethics obligations in response to a changing world and built upon the foundation laid by the MRPC's 1983 formulation, the profession today should re-examine its current approach to attorney-client sexual relations and build upon the foundation laid by the Model Rule 1.8(j). States that have experimented with different variations on prohibitions have identified a number of ways that the model rule can be improved. The author's proposed rule incorporates several of those variations into a clearer rule offering substantive guidance to the practitioner. While the proposed rule certainly will not satisfy all objections to an express prohibition, it is the author's hope that it at least advances the discussion towards the development of a better ethical baseline.