Louisiana Law Review

Volume 81
Number 3 *Spring 2021*

Article 7

4-29-2021

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INTRODUCTION

Sexual misconduct by lawyers has been a problem for their victims[1] and for the legal profession. However, until 2002, there was no provision in the American Bar Association's Model Rules of Professional Conduct that dealt specifically with sexual behavior by lawyers.[2] In that year, the

1. I mean to give "victims" a broad scope in this sentence—one that is not limited to those who are injured by a lawyer's sexually related criminal misconduct. So, for example, a victim would include a client whose interests are impaired as a result of a consensual sexual relationship with the lawyer.

2. In that year, on recommendation of the Ethics 2000 Commission, the American Bar Association adopted Model Rule 1.8(j), which deals with sexual relations between lawyers and clients. *See* MODEL RULES OF PRO. CONDUCT r. 1.8(j) (AM. BAR ASS'N 1983). Some states had previously adopted rules on lawyer sexual misconduct. *See, e.g.*, Christian F. Southwick, *Ardor and*

American Bar Association added Model Rule 1.8(j), which states: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[3]

Many jurisdictions have adopted the ABA's rule, or its equivalent.[4] As of this writing, however, Louisiana has not adopted the ABA rule. In fact, no provision of the Louisiana Rules of Professional Conduct explicitly deals with sexual conduct by lawyers. But this does not mean that the sexual conduct of Louisiana lawyers is unregulated. As it turns out, a number of Louisiana lawyers have incurred professional discipline for their sexually related behavior. Some have experienced other adverse consequences.

Louisiana cases featuring sexual misconduct by lawyers have some recurring themes, and variations on those themes. This Article identifies them. It considers the extent to which the Louisiana disciplinary decisions might have been different if Model Rule 1.8(j) had been in effect at the relevant time.[5] It also discusses what Louisiana could do going forward.

Part I of this Article discusses some background matters relating to the promulgation of Model Rule 1.8(j) and the Louisiana response to that promulgation. Part II discusses the cases in which the Louisiana Supreme Court has disciplined Louisiana lawyers for sexually related misconduct. Part III considers whether Louisiana should revisit adoption of Model Rule 1.8(j) or take another approach to the issue of lawyer sexual misconduct. The conclusion suggests some possible courses of action.

Advocacy: Attorney-Client Sexual Relations and the Regulatory Impulse in Texas and across the Nation, 44 S. TEX. L. REV. 307, 321–22 (2002).

3. MODEL RULES OF PRO. CONDUCT r. 1.8(j) (AM. BAR ASS'N 1983).

4. *See* Casey W. Baker, *Attorney-Client Sexual Relationships in the #MeToo Era: Understanding Current State Approaches and Working towards a Better Rule*, 49 SW. L. REV. 243, 253–57 (2020) (discussing approaches taken in different jurisdictions); Hannah Thompson Stilley, Comment, *Attorney-Client Sexual Relationships: A Call for All States to Adopt Model Rule 1.8(j)*, 32 J. AM. ACAD. MATRIM. LAW. 499, 512–25 (2020) (including a table showing different approaches taken in different jurisdictions); *see also Jurisdictional Rules Comparison Charts*, ABA CTR. FOR PRO. RESP., https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/S2XE-VVPR] (last visited Aug. 13, 2020).

5. Louisiana courts decided some of the Louisiana cases before the 2002 promulgation of Model Rule 1.8(j). Even so, it will be instructive to consider what difference, if any, Model Rule 1.8(j) might have made if it had been promulgated earlier and if Louisiana had adopted it. MODEL RULES OF PRO. CONDUCT r. 1.8(j) (AM. BAR ASS'N 1983).

I. THE PROMULGATION OF MODEL RULE 1.8(J) AND THE LOUISIANA RESPONSE

A. The Promulgation of Model Rule 1.8(j)

In 2002, after considerable debate, the American Bar Association's House of Delegates adopted Model Rule 1.8(j).[6] It provides 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."[7] Adoption had been recommended by the Ethics 2000 Commission.[8] A "Reporter's Explanation of Changes" characterized the change as a "new per se Rule prohibiting most client-lawyer sexual relationships."[9] The Reporter's Explanation also identified some reasons for the commission's recommendation:

> 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.[10]

The commission thought that the new rule would have an informational role. The new rule would alert lawyers to the dangers of sexual relationships with clients. Lawyers, thus alerted, presumably would be better able to avoid those dangers. The new rule would also alert clients to the existence of an ethical obligation that that their lawyers were expected to observe. Clients, thus alerted, presumably would be better

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6. *See* 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING §13.37 (4th ed. 2020); Baker, *supra* note 4, at 251 (noting that the proposed new rule was controversial from its outset and mentioning efforts to defeat it).

7. MODEL RULES OF PRO. CONDUCT r. 1.8(j) (AM. BAR ASS'N 1983).

8. *See* 1 HAZARD ET AL., *supra* note 6; Baker, *supra* note 4.

9. *See Model Rule 1.8: Reporter's Explanation of Changes*, ABA ETHICS 2000 COMM'N (Apr. 10, 2020), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem/ [https://perma.cc/348T-AHR2] [hereinafter *Reporter's Explanation*].

10. *Id.*

informed about relevant professional obligations of their lawyers and be in a better position to deal with violations, or impending violations, of those obligations.

The Reporter's Explanation also explained why the commission had recommended a "total" ban:

> The Commission further recommends a total, rather than a partial, ban on client-lawyer relationships, except for those pre-dating the formation of the client-lawyer relationship. Partial bans, i.e., those that prohibit relationships only when they involve coercion or cause the lawyer to act incompetently, do not effectively address the problem of conflicts of interest, particularly the difficulty of obtaining an adequately informed consent from the client. Moreover, they do little to prevent problems from arising in the first place.[11]

If certain conditions can be satisfied, some conflicts of interest can be remedied by client consent.[12] But this new rule, which became a subpart of Rule 1.8—itself a conflict of interest rule—was not designed that way. The ban, where it applies, is "total."[13] In the commission's view, the total ban would be more likely to prevent problems associated with lawyer-client sexual relationships than would a narrower prohibition that focused only on particular evils to be avoided.

When the House of Delegates adopted 1.8(j), it also adopted some new comments to Model Rule 1.8. One of the comments provides additional information about the rationale for the rule and its non-consentable status:

> 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

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11. *Id.*

12. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7(b) (AM. BAR ASS'N 1983).

13. *Id.* r. 1.8(j). "Notably, and unlike many rules governing the client-lawyer relationship, Rule 1.8(j) cannot be obviated by the client's informed consent. To the extent that the problem is one of conflict of interest, in other words, the conflict is 'non-consentable.'" 1 HAZARD ET AL., *supra* note 6, § 13.37.

> 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.[14]

The comment mentions two justifications for the rule that, as we will see, have also been discussed in Louisiana cases involving sexual misconduct by lawyers: exploitation of the client, contrary to fiduciary obligations, and impairment of independent professional judgment. But it also mentions concerns about protection of confidences—something that has not, at least so far, received attention in Louisiana sexual misconduct cases.

Model Rule 1.8(j) prohibits sexual relations between attorneys and clients that arise after the formation of the attorney-client relationship. It does not prohibit lawyers from representing persons with whom they already have a sexual relationship. The problem, from the ABA's perspective, is not so much the sexual relations themselves, but the timing of them. A comment to Model Rule 1.8 offers this explanation:

> 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).[15]

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14. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 17 (AM. BAR ASS'N 1983).

15. *Id.* r. 1.8 cmt. 18. The reference to Model Rule 1.7(a)(2) is to a provision that defines a "concurrent conflict of interest" as one in which "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." *Id.* r. 1.7(a)(2).

The comment indicates that even though there is not a total ban on the representation of a client with whom the lawyer has a pre-existing sexual relationship, there could still be a conflict of interest in the representation. A conflict of interest could arise if, under the circumstances, the pre-existing sexual relationship would materially limit the lawyer's ability to represent the client. In other words, even though Model Rule 1.8(j) would not prohibit a lawyer from taking on the representation of a person with whom the lawyer was having a sexual relationship, another rule might do so.

One additional comment to the Model Rules of Professional Conduct endeavors to apply the rule of 1.8(j) to the situation in which the client is an organization, such as a corporation. The comment provides:

> 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.[16]

The prohibition is narrowly drawn. It does not bar lawyers from having sexual relationships with all constituents of the organization but only with those who are charged with dealing with the lawyers on behalf of the organization. Sexual relationships with those constituents could impair the interests of the client-organization.

In light of the foregoing, and especially considering the rule's focus on the timing of sexual relations, no one should mistake Model Rule 1.8(j) for a rule that attempts to prevent "immoral" conduct as such.[17] Instead, it aims to prevent breaches of fiduciary duty and impairment of the representation that can arise when a lawyer engages in sexual relations with an existing client.

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16. *Id.* r. 1.8 cmt. 19.

17. *Id.* On a somewhat related point, a comment to Model Rule 8.4—the "misconduct" rule—observes that one could construe the concept of "'moral turpitude' . . . to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law." *Id.* r. 8.4 cmt. 2. The comment goes on to state: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice." *Id.*

Some states had adopted rules on attorney-client sexual relationships before the promulgation of Model Rule 1.8(j).[18] After the American Bar Association promulgated Model Rule 1.8(j), additional states adopted rules limiting lawyer-client sexual relations.[19] A number of commentators have called for the adoption of such rules.[20] However, some commentators have raised objections to Model Rule 1.8(j) or to the idea of imposing a per se ban on sexual relations between lawyers and clients.[21]

B. The Louisiana Response

In 1999, the Louisiana State Bar Association established an Ethics 2000 Committee to monitor the work of the ABA Ethics 2000 Commission, to conduct a review of the Louisiana Rules of Professional Conduct, and to recommend changes to those rules.[22] In its initial

18. *See, e.g.*, Southwick, *supra* note 2, at 321; Florence Vincent, *Regulating Intimacy of Lawyers: Why Is It Needed and How Should It Be Approached?*, 33 U. TOL. L. REV. 645, 672–73 (2002); Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131, 137–48 (1998).

19. *See* Baker, *supra* note 4, at 253–57 (discussing approaches taken in different jurisdictions).

20. *See, e.g.*, Frederick C. Moss & Patricia Chamblin, *Lover vs. Lawyer: The Sex with Clients Debate in Texas*, 55 THE ADVOC. 48 (2011); Stilley, *supra* note 4; Carole J. Buckner & Robert K. Sall, *Point/Counterpoint-Sex with Clients: Prohibition or Permission?*, 50 ORANGE CNTY LAW. MAG. 38 (2008), https://sallspencer.com/wp-content/uploads/2016/01/February%202008%20-%20Sex%20with%20Clients.pdf [https://perma.cc/2G4X-NJZ5]; *see also* Baker, *supra* note 4, at 252 (saying that, although adoption of Model Rule 1.8(j) was a positive development, the rule can be improved); Awad, *supra* note 18, at 191 ("States should adopt express rules that prohibit attorney-client sexual relations during representation."); Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 FORDHAM L. REV. 5, 47 (1993) (proposing that a rule should be adopted prohibiting attorney-client sexual relations during the period of representation, where the client is a natural person).

21. *See, e.g.*, Baker, *supra* note 4; Craig D. Feiser, *Strange Bedfellows: The Effectiveness of Per Se Bans on Attorney-Client Sexual Relations*, 33 J. LEGAL PROF. 53 (2008); Buckner & Sall, *supra* note 20; Rachel Abigail Herrin, *Let's Get It on: Why Model Rule 1.8(j) Is Overinclusive (a Three-Pronged Argument)*, 31 J. LEGAL PROF. 307 (2007); Phillip R. Bower & Tanya E. Stern, *Conflict of Interest?: The Absolute Ban on Lawyer-Client Sexual Relationships Is Not Absolutely Necessary*, 16 GEO. J. LEGAL ETHICS 535 (2003); *see also* Southwick, *supra* note 2 (questioning the case for sex-specific rules).

22. *See* 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, 544–45 (2005).

deliberations, "the committee decided that it would not deviate from the language of the ABA Model Rules unless there was a compelling reason for doing so."[23] Nonetheless, after many meetings, the committee ultimately decided, on a five-to-five vote, not to recommend adoption of ABA Model Rule 1.8(j).[24] To the extent that the five members of the committee who voted against adoption adhered to the committee rule about deviating from the language of the Model Rules, they presumably were of the view that there was a compelling reason not to adopt Model Rule 1.8(j).

In December of 2002, the committee submitted a report to the Louisiana State Bar Association's House of Delegates on recommended changes to the Louisiana Rules of Professional Conduct.[25] Following debate, and after making a few modifications, none of which related to Model Rule 1.8(j), the House of Delegates unanimously approved the report on January 25, 2003.[26] The president of the bar association thereafter submitted the approving resolution to the Louisiana Supreme Court.[27]

In a letter dated 29 October 2003, addressed to committee chair Harry S. Hardin, III, Chief Justice Pascal F. Calogero of the Louisiana Supreme Court asked for some additional information about the proposed rule changes. The chief justice inquired about several matters, but he had this to say about the recommendation on Rule 1.8(j):

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23. *Id.* at 546.

24. *See id.* at 547, 568. The committee actually voted twice. According to the minutes of the committee's meeting on November 4, 2002: "A motion was made to add the sex with clients rule from the ABA. There was discussion and the vote was as follows: 4 In favor of 4 Against and 1 abstention. This matter will be held in abeyance until the next meeting of the Committee." LA. STATE BAR ASS'N ETHICS 2000 COMM., MINUTES OF MEETING 2 (Nov. 4, 2002). The next meeting took place on November 5, 2002. According to the minutes of that meeting: "ABA Rule 1.8(j) was revisited dealing with sex with clients. There was a motion to add ABA 1.8(j). The vote was 5 to 5 to add the ABA model rule. The motion failed for lack of a majority. 1.8(j) will not be added to the E2K recommendations." LA. STATE BAR ASS'N ETHICS 2000 COMM., MINUTES OF MEETING 3 (Nov. 5, 2002).

25. *See* Ciolino, *supra* note 22, at 547.

26. *See* Letter (with accompanying agenda) from Larry Feldman, Jr., President, La. State Bar Ass'n, to Pascal F. Calogero, Jr., C.J., La. Sup. Ct. (on file with the Louisiana State Bar Association). The accompanying agenda indicates that there were eleven "resolutions" that proposed changes to the recommendations of the Ethics 2000 Committee, none of which focused on Model Rule 1.8(j).

27. *See* Ciolino, *supra* note 22, at 547.

> The Ethics 2000 Committee did not adopt ABA Model Rule 1.8(j), because this type of relationship is purportedly addressed by other rules, such as 1.7 (conflict) and 2.1 (independent advice). Nonetheless, the ABA has suggested the adoption of a "bright line" rule to clarify conduct which is clearly unethical. In theory at least, there is a benefit to providing continuing and clear notice to lawyers of the type of conduct that is prohibited.
>
> As you are aware, unethical sexual conduct has been addressed by the Court before. *See, e.g.*, *In Re Schambach*, 98-2432 (La. 1/29/99), 726 So.2d 892; *In Re Ashy*, 98-0662 (La. 12/1/98), 721 So.2d 859. We would ask you to reconsider this omission, particularly in view of the benefits to be provided by the notice and clarity which may be offered by the subject ABA Model Rule. If the Committee's decision on reconsideration remains unchanged, we would ask for a brief explanation of why not having a rule like ABA Model ROPC 1.8(j) is the better way of proceeding.[28]

Based on the quoted language from the letter, it appears that the court was concerned about the committee's decision not to approve inclusion of Rule 1.8(j). It was an "omission" that "[w]e would ask you to reconsider." Moreover, if, upon reconsideration, the committee's view would remain unchanged, the court wanted "a brief explanation" why.

The committee submitted a memorandum in response to the court's letter. The memorandum addressed several matters. With respect to Model Rule 1.8(j), the committee noted that, after a 5-to-5 vote, the committee had not recommended adoption of the rule. It then observed: "No member of the LSBA House of Delegates moved the adoption of ABA Model Rule 1.8(j). Thereafter the LSBA House of Delegates, without further debate concurred with the Committee's proposal."[29] Although the committee said that it "understands the Court's concern," it was "hesitant at this stage to formally recommend a change to the proposal actually passed by the House of Delegates."[30]

Nonetheless, the committee offered the following reasons why its members had voted for and against adoption of Model Rule 1.8(j):

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28. Letter from Pascal F. Calogero, C.J., La. Sup. Ct., to Harry. S. Hardin, III, Chair, La. State Bar Ass'n Ethics 2000 Comm. (Oct. 29, 2003) (on file with the Louisiana State Bar Association).

29. *Id.* at 8–9.

30. *Id.* at 9.

> For the Court's information, however, those members of the Committee who voted against adopting Rule 1.8(j) did so for the following reasons: (1) they felt that the Court's existing case law adequately addresses the complex and variable issues associated with "unethical" sexual conduct; (2) they felt that a bright-line rule could serve as a safe-harbor sheltering lawyers engaged in sexual conduct that is inappropriate, but that comports with the letter of Rule 1.8(j); and, (3) they felt that there may be situations in which sexual conduct should not be treated as per se sanctionable.
>
> On the other hand, those who voted *for* adopting Model Rule 1.8(j) did so for the following reasons: (1) they felt that a refusal to adopt Rule 1.8(j) could be misconstrued by the bar and the public as indicating that Louisiana has opted for a more permissive attitude with respect to sexual relations with clients, when that is clearly not the case; (2) they felts that the proposed rule is not inconsistent with existing jurisprudence in Louisiana; and (3) they felt that even if a sexual relationship predates the representation—and thus is not covered by the proposed rule—the lawyer is nonetheless constrained by *other* rules, including Rule 1.7(b), which the Court already has interpreted to prohibit sexual misconduct adversely affecting the client, as was the case in *Ashy* and *Schambach*, contrary to the "safe harbor" contention.[31]

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31. *Id.* (footnote omitted). The omitted footnote relates to situations in which, at least in the view of some committee members, lawyer sexual conduct should not be treated as per se sanctionable:

> For example, consider Firm X, which represents both Client ABC, Inc. and Law Firm Y.
>
> Attorney Q in law firm X, after the representation of Client ABC commences, becomes sexually involved with a senior vice president of Client ABC. The senior vice president is a member of the management committee of Client ABC but does not direct litigation or recommend counsel. Attorney Q does not do any legal work for Client ABC; Attorney Q's legal work for Firm X is in other fields.
>
> Attorney Z in law firm X, after the representation of Law Firm Y, becomes sexually involved with a partner of Law Firm Y. The partner in Law Firm Y is not on the management committee of Law Firm Y, but has imputed knowledge of all Law Firm Y's confidences under Rule 1.10.
>
> In both cases, members of the Committee believed that a bright line rule against sexual relationships may be overreaching.

In the end, the Louisiana Supreme Court decided against adoption of Model Rule 1.8(j).[32] But it approved other revisions to the Louisiana Rules of Professional Conduct, effective March 1, 2004.[33] Since 2004, there have been a number of changes to the Louisiana Rules of Professional Conduct.[34] However, as of this writing, the Louisiana Supreme Court has not adopted Model Rule 1.8(j).[35]

II. LOUISIANA LAWYER SEXUAL MISCONDUCT CASES

We will now turn to Louisiana cases involving sexual misconduct by lawyers. Lawyers can experience various adverse consequences for sexually related misbehavior, including criminal prosecution or tort liability.[36] However, the focus of this Article will be on professional

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Id. at 9. This argument against adoption of Model Rule 1.8(j) seems questionable. In both of the cases, the client is an organization, and the sexual relationship is not with the client; it is with a constituent of the client. The text of Model Rule 1.8(j) prohibits sexual relations with clients, not constituents of clients. One of the comments to Model Rule 1.8 does apply the rule of 1.8(j) to a constituent of a client organization, but only to a constituent "who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters." *See* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 19 (AM. BAR ASS'N 1983). The committee's examples do not seem to come within the ambit of this provision. Indeed, in the first example, the lawyer is described as one who does not even do work for the organization. That lawyer surely would not be one who would be supervised or directed by a constituent of the organization, or one who would be consulted concerning the organization's legal matters. *Id.*

32. *See* Ciolino, *supra* note 22, at 568.

33. *See id.* at 547–48.

34. The changes can be found on the Louisiana Supreme Court's website at https://www.lasc.org/Supreme_Court_Rules?p=Rule_Changes. *Louisiana Supreme Court Rule Change Orders*, LOUISIANA SUPREME COURT (July 31, 2020) https://www.lasc.org/Supreme_Court_Rules?p=Rule_Changes [https://perma.cc/56GY-KAU9] (last visited July 31, 2020).

35. Louisiana is not alone in this respect. *See* Baker, *supra* note 4, at 253–57 (discussing approaches taken in different jurisdictions and asking, "Why would approximately one-fourth of attorney disciplinary bodies not adopt an express prohibition on attorney-client sexual relationships?"); Stilley, *supra* note 4, at 499, 512–25 (including a table showing different approaches taken in different jurisdictions).

36. *See, e.g.*, *In re* Dillon, 66 So. 3d 434 (La. 2011) (per curiam) (attorney disciplined for sexual assault; opinion states that he was also sentenced to life imprisonment); *In re* Redd, 660 So. 2d 839 (La. 1995) (per curiam) (lawyer disciplined for sexually related misconduct; opinion states that he was also convicted of simple battery); Doe v. Hawkins, 42 So. 3d 1000 (La. Ct. App. 3d

discipline. Part II begins with disciplinary cases that arise out of criminally related sexual misconduct; thereafter, it will consider disciplinary cases that arise out of non-criminally related sexual misconduct by Louisiana lawyers.

A. Criminal Sexual Misconduct

Quite a few Louisiana lawyers have been subject to professional discipline for engaging in criminally related sexual misconduct. Most of these disciplinary cases feature nonclient victims—usually adults, but sometimes minors.

1. Adult Nonclient Victims

The earliest reported disciplinary action involving sexual misconduct by a Louisiana lawyer appears to be *In re Redd*.[37] It is a criminal battery case, involving an adult, nonclient victim. Richard Redd served as the legal advisor to the Baton Rouge Police Department. His duties included evaluation of exotic dancer permit applications. After receiving some complaints about him,

> the police sent a wired confidential informant to respondent's office to apply for an exotic dancer's permit. After commenting on the female applicant's breasts, respondent requested and took photographs of her breasts. He also obtained her home telephone number and made references to oral sex. After the police arrested respondent, a search of his office yielded a camera and photographs of other nude or partially nude women. Respondent eventually pleaded guilty to a charge of simple battery involving the touching of the applicant's breasts.[38]

Professional disciplinary proceedings were initiated against Redd, "based on the conviction of a serious crime."[39]

Cir. 2010) (client, who was also an employee of the law firm, sought damages, claiming that one of the firm's partners raped her at a social event); *see also* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §1.8–.11 (2018) (referring to risks of malpractice and reversal); Feiser, *supra* note 21, at 71–73 (discussing possible state court remedies for clients).

37. *In re* Redd, 660 So. 2d 839 (La. 1995) (per curiam).

38. *Id.* at 840.

39. *Id.*

The case eventually came before the Louisiana Supreme Court. After considering the facts of the case, the court said that Redd had:

> used his position of authority, obtained because of his license to practice law, over persons whose livelihood depended on his approval of their applications. Such behavior revealed a serious flaw in respondent's fitness to practice law.
>
> Although respondent's offense did not involve his client directly, it involved betrayal of his client by misusing and taking advantage of his position as the department's legal advisor, which is as bad, if not worse, than an offense involving a client.[40]

Redd argued that a "delay" between his criminal conviction and the initiation of formal disciplinary proceedings should obviate the need for a sanction, but the court concluded that a sanction was warranted because of the "extreme seriousness" of the attorney's conduct.[41] The court suspended Redd for a year and a day.

The court obviously considered Redd's criminal conduct to be very serious, warranting formal discipline, but, in this early case of sexually related lawyer misconduct, the court did not cite any of the Rules of Professional Conduct as a basis for the discipline. The court might have referred to Rule 8.4(b), which states that "[i]t is professional misconduct for a lawyer to . . . [c]ommit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[42] Instead, the court invoked its rules for Lawyer Disciplinary Enforcement, referring to a provision defining a "serious crime" as a "felony or any other crime, the necessary element of which as determined by the statute defining such crime, reflects upon the attorney's moral fitness to practice law."[43]

Since the decision in the *Redd* case, there have been several additional Louisiana cases in which lawyers have been disciplined for sexually related criminal acts involving adult, nonclient victims. These cases have referenced Rule 8.4(b).

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40. *Id.* at 840–41.

41. *Id.* at 840.

42. LA. RULES OF PRO. CONDUCT r. 8.4(b) (2018). ABA Model Rule 8.4(b) is narrower. It provides, "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

43. *In re Redd*, 660 So. 2d at 840.

One of these cases, *In re Plaisance*,[44] is a consent discipline[45] case in which the Louisiana Supreme Court disbarred attorney Gavin Plaisance after he had placed

> a motion-sensored video camera under a ceiling tile inside the ladies [sic] restroom at the law firm where he was employed, which was later discovered by a secretary at the firm. When viewed, the videotape in the camera was found to contain excerpts of female employees using the restroom, and also showed respondent, who inadvertently caught himself on video while placing the camera in the bathroom.[46]

Given the consent discipline posture of the case, there is no discussion of the actual criminal infraction, the seriousness of the misconduct, or the justifications for the sanction. The court's opinion simply notes that the Office of Disciplinary Counsel (hereinafter the "ODC") concurred in the petition and filed a memorandum alleging that the lawyer's actions "constituted a violation of Rule 8.4(b) of the Rules of Professional Conduct pertaining to conduct adversely reflecting on a lawyer's honesty, trustworthiness and fitness."[47]

In *In re Dixon*,[48] the Louisiana Supreme Court gave attorney Jerome Dixon a three-year suspension for several acts of misconduct, including conversion of client funds and a criminal incident of sexual misconduct. With respect to the latter, according to the reported opinion, Dixon "paid a woman $20 to have sexual intercourse with him. A police officer interrupted the sexual act, and both respondent and the woman admitted that respondent had paid $20 in exchange for sexual intercourse."[49] Dixon pleaded no contest to a misdemeanor prostitution charge. The ODC thereafter charged him with a violation of Rule 8.4(b). In subsequent disciplinary proceedings, the hearing committee concluded that Dixon had violated that rule and had acted intentionally in doing so. Although the "heartland" misconduct in the case related to Dixon's mishandling of trust accounts, in its summary of Dixon's misconduct the Louisiana Supreme Court noted that the lawyer had engaged in a criminal act.[50]

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44. *In re* Plaisance, 706 So. 2d 969 (La. 1998) (per curiam).

45. A petition for consent discipline is one in which the ODC and the attorney who is subject to discipline jointly propose discipline to the Louisiana Supreme Court. *See* LA. SUP.CT. R. XIX § 20 (2019).

46. *In re Plaisance*, 706 So. 2d at 969.

47. *Id.*

48. *In re* Dixon, 55 So. 3d 758 (La. 2011) (per curiam).

49. *Id.* at 761.

50. *Id.* at 765.

In re Dillon,[51] decided the same year as *Dixon*, is a disciplinary case that arose out of an attorney's criminal conviction for sexually assaulting two women while acting under color of state law in his capacity as a deputy city attorney for the city of New Orleans. The ODC filed formal charges, alleging that Dillon had committed a criminal act in violation of Rule 8.4(b). The Louisiana Supreme Court ordered permanent disbarment.[52] In reaching that conclusion, the court relied on "Guideline 4," from its Rules for Lawyer Disciplinary Enforcement, which identifies "[s]exual misconduct which results in a felony criminal conviction, such as rape or child molestation" as a justification for permanent disbarment.[53]

The most recent case of criminal sexual misconduct by a Louisiana lawyer involving an adult nonclient victim is *In re Gaubert.*[54] According to the reported opinion, while she was an intoxicated passenger in a taxicab, attorney Jennifer Gaubert had a sexual encounter with the cab driver. The state charged her with simple battery. The driver also filed a civil lawsuit against her. Gaubert claimed that she had been the victim of extortion and video voyeurism perpetrated by the cab driver, but she was ultimately found guilty of simple battery for her conduct in the cab and of criminal mischief for her allegations against the driver. The ODC charged Gaubert with a violation of Rule 8.4(b). Focusing on the criminal convictions, the Louisiana Supreme Court ordered a year-and-a-day suspension. The reported opinion did not cite earlier cases involving sexual misconduct by Louisiana lawyers, and it did not discuss sexual misconduct, as such.

2. Adult Client Victims

The victims in the previously referenced "criminal" cases[55] were nonclients. In contrast, the 2011 decision in *In re Hammond*[56] involved

51. *In re* Dillon, 66 So. 3d 434 (La. 2011) (per curiam).

52. Permanent disbarment is what it sounds like. An attorney who is regularly disbarred can apply for readmission after five years. Attorneys who are permanently disbarred cannot. *See* LA. SUP. CT. R. XIX, §§ 20(A) & 24 (2019).

53. *In re Dillon*, 66 So. 3d at 438. At the time that the case was decided, the guidelines were found in Appendix E to Rule XIX. *See id.* They are now found in Appendix D. Guideline 4 is still the same. *See* LA. SUP. CT. R. XIX, app. D (2019).

54. *In re* Gaubert, 263 So. 3d 408 (La. 2019) (per curiam).

55. For convenience, I will sometimes refer to the disciplinary cases involving sexually related criminal conduct by lawyers as "criminal" cases. However, the cases are professional discipline cases, not cases in which the lawyers are criminal defendants.

56. *In re* Hammond, 56 So. 3d 199 (La. 2011) (per curiam).

client victims. Attorney Noland Hammond was charged with 24 counts of misconduct, the majority of which involved sexual activities targeting male, criminal defendant-clients.[57] For example, according to the opinion: (1) Hammond and his female "assistant" visited two clients in a detention center. The assistant performed oral sex on the clients while Hammond filmed the activity. Hammond told the clients that he needed semen samples in order to obtain the clients' release from incarceration;[58] (2) Hammond took a criminal defense client to his home, told the client that he needed to see him in boxer shorts, and grabbed his penis and stroked it when the client could not achieve an erection;[59] (3) Hammond solicited sexual contact with incarcerated clients when he spoke with them by telephone;[60] and (4) during a meeting with a client seeking post-conviction relief, Hammond grabbed the client's penis and said he wanted to have sex with him. When it became clear that the client would not engage in any sex acts, Hammond did no further work on the client's matter. [61]

Hammond faced criminal charges for some of his actions,[62] and several of Hammond's acts of misconduct were found to have violated Rule 8.4(b), based on the commission of criminal acts.[63] However, Hammond was found to have violated other rules as well, including Rule 1.7(a)(2), which prohibits conflicts of interests based on the personal interests of an attorney;[64] Rule 8.4(c), which makes it professional misconduct for a lawyer to engage in dishonesty, fraud, deceit, or

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57. The other charges involved neglect of client matters, failure to communicate with clients, failure to properly terminate client representation, and engaging in unauthorized practice of law following interim suspension. *Id*. at 201. However, the Louisiana Supreme Court ended up focusing on charges involving sexual misconduct and unauthorized practice of law, because those "charges, standing alone, support the disciplinary board's recommendation of permanent disbarment." *Id.*

58. Counts I and II. *Id.* at 201–02.

59. Count IV. *Id.* at 203.

60. Count III. *Id.* at 202–03.

61. Count X. *Id.* at 204.

62. According to the reported opinion, the state indicted Hammond on obscenity charges for the conduct referred to in item (1). Those charges were ultimately dismissed. *Id.* at 202.

63. For example, Hammond was found to have violated the rule in connection with items (1), (2), and (3) referred to above.

64. For example, Hammond was found to have violated the rule in connection with items (1), (2), (3), and (4) referred above. The opinion is not explicit about how Hammond's conduct violated this rule. However, it seems reasonable to conclude that Hammond had a "personal interest" in having sex with some of his clients.

misrepresentation;[65] and Rule 8.4(d), which makes it professional misconduct for a lawyer to engage in "conduct that is prejudicial to the administration of justice."[66] In some instances, the same behavior violated more than one rule.

The opinion does not provide much elaboration on how Hammond's conduct violated particular rules. But it is clear that Hammond had engaged in multiple acts of misconduct, the majority of which involved sexual misconduct, and that Hammond had abused his position as an attorney for sexually connected purposes. The Louisiana Supreme Court agreed with the disciplinary board that Hammond's misconduct was so "egregious" that he should be permanently disbarred.[67]

3. Nonadult Victims

Louisiana lawyers have also engaged in criminal sexual misconduct targeting minors. Lawyers who have done so have drawn particularly harsh disciplinary sanctions.

It appears that the earliest of these cases, decided in 1997, is *In re Hammel*.[68] There, attorney John Hammel pleaded guilty to one count of molestation of a juvenile and one count of aggravated oral sexual battery upon a juvenile. Following sentencing, the ODC filed formal charges, alleging that Hammel had engaged in criminal conduct in violation of Rule 8.4(b). Hammel did not answer the charges or appear at the hearing, so the charges were deemed admitted. The disciplinary board noted that "the underlying facts to which respondent pleaded guilty established beyond any doubt that he is morally unfit to practice law."[69] It recommended disbarment. Without engaging in a discussion of Hammel's misconduct, the Louisiana Supreme Court accepted the recommendation.

Concerns about "moral fitness" resurfaced in the 2002 decision in *In re Boudreau*.[70] The state indicted attorney Albert Boudreau on 13 counts of violating child pornography laws. He pleaded guilty to smuggling and possessing magazines containing child pornography, which are felonies

65. For example, Hammond was found to have violated the rule in connection item (1) referred to above, by "coercing" the clients "to engage in sexual acts under false pretenses." *Id*. at 211.

66. For example, Hammond was found to have violated the rule in connection with items (1), (3), and (4) above. The Board also found Hammond violated other rules, including Rule 5.5 for engaging in unauthorized practice of law. *See id.* at 213.

67. *Id.* at 214.

68. *In re* Hammel, 701 So. 2d 969 (La. 1997) (per curiam).

69. *Id.* at 969.

70. *In re* Boudreau, 815 So. 2d 76 (La. 2002) (per curiam).

under federal law. Based on this conduct, the ODC filed formal charges, alleging that Boudreau had violated Rule 8.4(b). The disciplinary board found that Boudreau had

> intentionally violated duties owed to the public and the profession by participating in the sexual exploitation of children. The board noted respondent supported "an industry that capitalizes on the degradation of children, which serves only to demoralize our society and damage children." It reasoned that because respondent is a lawyer and an officer of the court, his "blatant disregard of laws meant to protect those most vulnerable, children, is a stain upon the legal profession and dishonors every lawyer's effort to uphold the law."[71]

The Louisiana Supreme Court accepted the recommendation of the disciplinary board that Boudreau be disbarred, and it said that Boudreau's "conviction clearly reflects upon his moral fitness to practice law."[72]

The Louisiana Supreme Court ordered permanent disbarment in *In re Aguillard.*[73] According to the reported opinion, attorney Michael Aguillard

> made Internet contact with a person whom he believed to be a thirteen-year old evacuee from New Orleans. Respondent arranged to meet the girl in a park in Broussard, Louisiana for the purpose of engaging in sexual relations. In reality, the "girl" was an investigator from the Louisiana Attorney General's Office, which had been conducting an online undercover operation in cooperation with the Lafayette Police Department. When respondent arrived at the park on September 13, 2005 to meet the girl, he was arrested and charged in East Baton Rouge Parish with one count of computer-aided solicitation of a minor.
>
> Subsequent investigation of information found on respondent's computer hard drive revealed that he had previously engaged in sexual intercourse with a fifteen-year old girl from Arnaudville, Louisiana. On September 16, 2005, respondent was rearrested in St. Landry Parish and charged with carnal knowledge of a juvenile and indecent behavior with a juvenile.[74]

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71. *Id.* at 78.
72. *Id.* at 79.
73. *In re* Aguillard, 958 So. 2d 671 (La. 2007) (per curiam).
74. *Id.* at 672.

Aguillard ended up pleading guilty to a felony count of computer-aided solicitation of a minor and to two felony counts of carnal knowledge of a juvenile. The ODC charged the attorney with violations of Rule 8.4(a)[75] and 8.4(b). The disciplinary board recommended permanent disbarment, and the Louisiana Supreme Court agreed, stating that "the imposition of any sanction less than permanent disbarment would require us to ignore the seriousness of respondent's conduct and the grave harm he has done to his juvenile victim and to the public's confidence in the legal profession."[76] This time, the court did not use explicit "moral fitness" language; however, the court characterized the attorney's conduct as "egregious," so it seems fair to think that the moral fitness theme was present in *Aguillard,* as well.

The moral fitness theme came up again in *In re Domm*,[77] another case in which a lawyer was alleged to have molested a child. According to the reported opinion, attorney Edward Domm

> represented a client in a child custody matter. Respondent befriended the client and her nine-year old stepdaughter, K.H., who often stayed overnight at respondent's home to play with his young daughter. . . . K.H. gave a videotaped statement to a counselor from Child Protective Services in which she stated that she sat on respondent's lap while watching a video at his home one night and that he then touched her vagina on the outside of her clothes. Respondent voluntarily gave a statement to the police and denied these allegations; however, based upon K.H.'s statement, a warrant was issued for his arrest on one count of molestation of a juvenile.[78]

The state dropped the criminal charges after K.H.'s stepmother decided that K.H. would not testify. However, he ODC nonetheless filed formal charges, alleging, among other things,[79] that Domm had violated Rule 8.4(b). Domm did not contest the charges, so the factual allegations were deemed to have been admitted. The Louisiana Supreme Court concluded that the record supported a finding that Domm had "knowingly

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75. This part of Rule 8.4 makes it professional misconduct to violate or attempt to violate any of the Rules of Professional Conduct. *See* LA. RULES OF PRO. CONDUCT r. 8.4(a) (2018).

76. *In re Aguillard*, 958 So. 2d at 674.

77. *In re* Domm, 965 So. 2d 380 (La. 2007) (per curiam).

78. *Id.* at 382.

79. The ODC also charged Domm with neglecting a separate client matter and related misconduct.

and intentionally engaged in conduct involving moral depravity with a minor child."[80] It ordered permanent disbarment, stating: "Considering the egregious nature of respondent's misconduct in this matter together with his prior disciplinary record, we conclude respondent lacks the moral fitness to practice law in this state."[81]

4. Comment on the Criminal Cases

Many of the criminal sexual misconduct cases involved extremely reprehensible behavior by attorneys, and it is not surprising their behavior resulted in severe disciplinary sanctions. However, regardless of the relative reprehensibility of the criminally related sexual conduct, Rule 8.4(b) was available as a basis for lawyer discipline. That rule allows for the imposition of professional discipline based on criminal acts by lawyers, including criminal acts that are sexually related.

Even if Model Rule 1.8(j) had been in place at the time when the cases were decided, it would not have made a difference. Model Rule 1.8(j) is concerned with sexual relations with clients. Only one of the cases in the group—*In re Hammond*—featured client-victims. Assuming that the rule's reference to "sexual relations" were broad enough to cover the sexually oriented telephone conversations or instances of sexual touching that were involved in that case,[82] the court might have used Model Rule

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80. *Id.* at 385.

81. *Id.* In recommending permanent disbarment, the disciplinary board had relied, in part, on *In re Hinson-Lyles*, 864 So. 2d 108 (La. 2003) (per curiam), a bar admission case. *See In re Domm*, 965 So. 2d at 384. There, bar applicant Hinson-Lyles had been denied admission because, while serving as a high-school teacher, she had entered into a sexual relationship with one of her minor students. Referring to the recommendation of the disciplinary board, the Louisiana Supreme Court's opinion in *Domm* states:

> Like the teacher in *Hinson-Lyles*, respondent occupied a position of trust, as he was the only adult present when the minor victim spent the night at his home. Respondent violated that trust and the trust of the victim's stepmother by allegedly molesting the nine-year old girl. . . . As the court decided in *Hinson-Lyles*, respondent has demonstrated that he lacks the moral character to be a member of the bar.

Id.

82. Model Rule 1.8(j) has been criticized for not defining "sexual relations." *See infra* text accompanying note 286. In some states, definitions of "sexual relations" have been incorporated into the corresponding rules. For example, Utah's Rule 1.8(j) includes a provision that states that "'sexual relations' means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse." UTAH RULES OF PRO.

1.8(j) as a basis of lawyer discipline, if the rule had been in place at the relevant time. However, the Louisiana Supreme Court had little difficulty relying on other rules for its conclusion that Hammond should be permanently disbarred. The application of Model Rule 1.8(j) would not have yielded a different outcome.

B. Noncriminal Sexual Misconduct

The preceding section of this Article considered professional discipline cases in which sexual misconduct by Louisiana lawyers was examined through a "criminal act" lens; that is, cases in which lawyers were subject to professional discipline because their conduct was, at least in part, criminal in nature. Most of those cases did not involve clients. This section focuses on "noncriminal" cases, meaning disciplinary cases in which the sexual misconduct by lawyers is principally subject to rules other than 8.4(b).[83] In contrast to the cases in the criminal category, most of the cases in the noncriminal group involve clients. And these cases, in turn, can be divided into two subgroups. The first subgroup is nonconsensual—cases in which the other person did not consent to the lawyer's sexually related conduct. The second group is consensual—cases in which the person did consent to the lawyer's sexually related conduct.

1. Nonconsensual cases

This part of the Article discusses noncriminal disciplinary cases in which the lawyers' sexually related conduct was nonconsensual.

a. Nonclients

In some instances, Louisiana lawyers have been subject to disciplinary proceedings for noncriminal, nonconsensual sexual conduct involving nonclients.

The oldest of these cases, and the one that probably contributes the least to our understanding, appears to be *In re Bonnie*.[84] In that case, the Louisiana Supreme Court rejected a petition for consent discipline for a

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CONDUCT r. 1.8(j)(1) (2020). Some of Hammond's conduct would have violated that standard.

83. It is possible that the same sexually related conduct could run afoul of more than one rule. This was the case in *In re Hammond*, in which the Louisiana Supreme Court concluded that some of Hammond's sexually related conduct toward clients had violated Rule 8.4(b) as well as other rules.

84. *In re* Bonnie, 704 So. 2d 1179 (La. 1997).

public reprimand and a 12-month probation for an attorney who, "during a nine-month period of representation, made improper sexual advances towards his client's wife, and offered her sums of money in exchange for sexual favors."[85] Rejection of the petition for consent discipline indicates that the Louisiana Supreme Court considered the proposed sanction to be insufficient.[86]

The other case in this category, *In re Wiegand*,[87] contributes a bit more. *Wiegand* is a reciprocal discipline[88] case, in which the Louisiana Supreme Court disciplined a Louisiana-admitted attorney for sexually harassing female employees in his Colorado law office. According to the opinion, attorney Robert Wiegand "engaged in various behaviors" that made his female associate and his female office manager "uncomfortable and caused them emotional harm."[89] These included "touching the associate on her back, tapping the office manager on her buttocks with a rolled-up magazine, making comments about women wearing swimsuits at office pool parties, and asking about gynecological care when setting up health insurance."[90] There was some evidence that Wiegand had also been involved in setting up a surveillance camera in a restroom at his Denver-area law office.

The employees left the firm and filed discrimination claims. Following a trial, the court found in favor of the employees on their claims of sexual discrimination and premises liability. Professional disciplinary proceedings were thereafter initiated in Colorado. In those proceedings, Wiegand stipulated that his conduct had violated a Colorado rule prohibiting lawyers from engaging in "conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on the lawyer's fitness to practice law."[91] Colorado disciplinary authorities suspended him

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85. The quotation is from *In re* Ashy, 721 So. 2d 859, 865 (La. 1998) (per curiam), which this Article will discuss later. The memorandum disposition for the *Bonnie* case itself contains very little content. In the *Ashy* case, however, the Louisiana Supreme Court said that *In re Bonnie* was one of only three previous "opinions from this court that involve sexual misconduct by an attorney." *Id.*; *see In re Bonnie*, 704 So. 2d 1179.

86. *See, e.g.*, *In re* Goff, 837 So. 2d 1201, 1203 (La. 2003) (per curiam) (member of the court concurred in rejection of consent discipline primarily because the period of suspension was totally deferred).

87. *In re* Wiegand, 267 So. 3d 64 (La. 2019) (per curiam).

88. "Reciprocal discipline" refers to discipline in Louisiana that is based on a disciplinary order from another jurisdiction. *See* LA. SUP. CT. R. XIX, § 21 (2019).

89. *In re Wiegand*, 267 So. 2d at 65.

90. *Id.*

91. *Id.*

for a year and a day, stayed upon completion of a two-year period of probation.

When it received notice of the Colorado disciplinary order, the ODC initiated a reciprocal disciplinary proceeding in Louisiana, where Wiegand was also admitted to practice law. Wiegand did not oppose imposition of identical discipline in Louisiana for his conduct in Colorado. Without discussing any of the Louisiana Rules of Professional Conduct, the Louisiana Supreme Court ordered the same sanction that had been imposed in Colorado.

These two cases demonstrate that a Louisiana lawyer may be subject to professional discipline for noncriminal, nonconsensual sexual conduct involving nonclients, including, in *Wiegand*, conduct amounting to sexual harassment. Beyond that, the cases do not say much about lawyer sexual misconduct. That changes when we take up the next group of cases.

b. Clients

There have been several Louisiana cases featuring noncriminal, nonconsensual sexual conduct involving clients. Some of these cases are ones in which Rule 1.8(j) might have had indirect application had it been in place at the relevant time.

i. In re Ashy

The first case in this category, *In re Ashy*,[92] is a groundbreaking case that deserves a fair amount of attention. According to the reported opinion, Charles Williams and Regine Dade came into the office of attorney Warren Ashy and asked him to see if there were any outstanding warrants against Williams. Williams had apparently been warned that he might be the subject of a criminal investigation. At the time of this visit, Dade was a college student, living at home with her parents. The sight-impaired Williams employed her to help him with various tasks. Ashy had previously done some legal work for Dade.

After Williams and Dade had departed, and after doing some checking, Ashy called Williams and informed him that he was "hot," and that Dade might also be implicated. Ashy asked for Dade's telephone number, but Williams did not provide it. However, Dade later called Ashy, and she thereafter met with Ashy at his office. According to the reported opinion, Ashy

told her that she and Williams might both be in trouble with the

92. *In re* Ashy, 721 So. 2d 859 (La. 1998).

> law. During the course of this meeting, respondent told Dade she "had certainly grown up," was "very attractive," and asked if she "minded if he hit on her." He also asked her if she dated older married men and if she would like an older man to take care of her. When he shook her hand, he kissed her without her consent and she pushed him away.[93]

Williams and Dade returned to Ashy's office the next day. Williams gave Ashy $10,000 to represent both of them. Later that day, Dade met with Ashy again. According to Dade's later testimony before a hearing committee:

> Tuesday afternoon he suggested that I come back following the meeting with Mr. Williams by myself, because he had a client coming in. He didn't have enough time to speak with me. So I came back and it was during office hours so I wasn't real nervous and I did have to leave because I taught aerobics that afternoon at 5:30 and I had to leave and get across town. So I got there, I guess, around 4:00 or 4:15 and we spoke. And he suggested that he could sell his soul to a friend of his that would make me disappear in the eyes of the law and if I did—and I immediately questioned what I would have to do in return for this selling of his soul. And he said that he wanted a relationship with me—an ongoing sexual relationship me.[94]

Following what the opinion refers to as some "misrepresentations and threats,"[95] the following occurred, according to Dade's testimony:

> I said well I'll do what I have to do but I just don't want to get in trouble and he said that he wanted me to tell him that we will make love, he wanted me, he proceeded to touch my breast and my rear end and he put my hand on his crotch, he told me he wanted me to touch him. Ah he kissed me, he you know held me to him, he

93. *Id.* at 860.

94. *Id.* at 860–61.

95. *Id.* at 868. It is not entirely clear what the "misrepresentations" were. The ODC later charged Ashy with misleading his clients into believing that they were being criminally investigated. *See id.* at 862. However, the Louisiana Supreme Court ultimately concluded that the ODC had not proven this misconduct by clear and convincing evidence. Insofar as "threats" are concerned, the court likely was focused on the fact that Ashy had "used his position to proposition his client in a sexual manner with the threat that he would not exert all his legal efforts in defending her case if she did not consent." *Id*. at 864.

wouldn't let me pull away.[96]

Dade also testified that Ashy had given her $200 so she could buy "something sexy from Victoria's Secret and a nice dress to wear to his office."[97]

Dade did not enter into a sexual relationship with Ashy. In fact, a few days after the encounter described above, Ashy told her, in a telephone conversation, that their relationship had "headed in the wrong direction" and that he was "finished with all that."[98] Williams, for his part, had come to doubt that law enforcement authorities were investigating him and felt that Ashy had "swindled" him. He contacted the police, "who investigated the matter as a possible theft by fraud case."[99] Ashy ended up refunding the fee. And Dade reported Ashy to the ODC, which initiated disciplinary proceedings.[100]

The matter eventually came before the Louisiana Supreme Court. It concluded that the ODC had proven by clear and convincing evidence that Ashy had "attempted a sexual relationship with [Dade] in exchange for certain efforts he would exert on her behalf as her lawyer."[101] It then said, "In light of this factual finding, the issue becomes whether respondent's actions violated the Rules of Professional Conduct."[102]

The court noted that "such conduct is not specifically addressed by the Rules of Professional Conduct."[103] But it found guidance in a formal ethics opinion by the American Bar Association Standing Committee on Ethics and Professional Responsibility:

> The American Bar Association has addressed the general issue of sexual relationships between attorneys and clients in Formal

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96. *Id.* at 868.

97. *Id.* at 861.

98. *Id.* at 862.

99. *Id.* at 861. The district attorney ultimately decided not to file criminal charges. *Id.* at 862 n.4.

100. According to the court, the ODC's formal charges:

> essentially alleged two acts of misconduct on the part of respondent: (1) in order to receive a fee, respondent misled his clients into believing they were the subject of a criminal investigation; and (2) respondent attempted to have a sexual relationship with Dade in exchange for representing her in connection with the non-existent criminal charges.

Id. at 863. The Louisiana Supreme Court ultimately concluded that the ODC had not proven the first act of misconduct by clear and convincing evidence. *Id.*

101. *Id.* at 864.

102. *Id.*

103. *Id.*

Ethics Opinion No. 92-364 and concluded as follows:

> A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, and therefore may violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility.

While recognizing that the present rules did not specifically address the issue, the opinion found that the following existing rules were potentially implicated:

> First, because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that the sexual relationship will have resulted from exploitation of the lawyer's dominant position and influence and, thus breached the lawyer's fiduciary obligations to the client. Second, a sexual relationship with a client may affect the independence of the lawyer's judgment. Third, the lawyer's engaging in a sexual relationship with a client may create a prohibited conflict between the interests of the lawyer and those of the client. Fourth, a non-professional yet emotionally charged, relationship between attorney and client may result in confidences being imparted in circumstances where the attorney-client privilege is not available, yet would have been absent the personal relationship.[104]

The Louisiana Supreme Court also considered what courts in other jurisdictions had done in other cases involving lawyer sexual misconduct.[105] Then, referring to the matter before it, the court said:

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104. *Id.*

105. *Id.* at 865–67. The court regarded some of those cases as having "factual situations similar to the case at bar." *Id.* at 866. After referring to the cases, the court said:

> Although in the above cases the punishment varied with the specific facts of each case, in all instances the sexual misconduct resulted in a violation of the existing rules of attorney conduct, even though those states did not have a specific rule governing sexual relations or sexual misconduct with clients.

Id. at 867.

> While this case does not involve a consensual sexual relationship, it involves conduct in which an attorney used his position to proposition his client in a sexual manner with the threat that he would not exert all his legal efforts in defending her case if she did not consent. This presents the intolerable situation envisioned by the drafters of the ABA opinion that "the client may not feel free to rebuff unwanted sexual advances because of fear that such a rejection will either reduce the lawyer's ardor for the client's cause or, worse yet, require finding a new lawyer."[106]

The court said that it had "never addressed this situation."[107] But it said that "even though sexual relations or sexual misconduct with a client is not specifically addressed in our present Rules of Professional Conduct, [Ashy's] conduct violates several existing rules."[108]

Which ones? Initially, the court focused on a rule prohibiting conflicts of interest:

> First, respondent's conduct violates Rule 1.7(b) which states: "A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless; (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) The client consents after consultation." As stated in [*In re Piatt*, 951 P. 2d 889 (Ariz. 1997)], such conduct violates Rule 1.7(b) because "sexual harassment by a lawyer serves the lawyer's interest and not the client's. Asking wholly inappropriate questions and making obscene comments to a client undermines trust in the lawyer and the representation." Furthermore, as in *Piatt*, this case went beyond sexual harassment. Respondent told Dade that unless she responded sexually to him he would not put forth his best efforts to represent her. "It is hard to imagine a more egregious case of putting one's interests ahead of the client's." *Id*., 191 Ariz. 24, 951 P.2d 889. Clearly, in this case, respondent could not have reasonably believed his representation of Dade would not be adversely affected by his conduct, nor did Dade consent after consultation.[109]

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106. *Id.* at 864 (referring to ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-364 (1992)).

107. *Id.* at 865. The court was aware of older Louisiana sexual misconduct cases, such as *Redd* and *Plaisance*, referred to previously, but they were not cases involving sexual misconduct with clients.

108. *Id.* at 867.

109. *Id.*

Ashy, then, had engaged in a prohibited conflict of interest. He had also engaged in sexual harassment of a client by "[a]sking wholly inappropriate questions and making obscene comments." And he had gone "beyond sexual harassment" by telling Dade "that unless she responded sexually to him he would not put forth his best efforts to represent her." There was another theme lurking in the background. "[P]utting one's interests ahead of the client's" is one way of describing a breach of fiduciary duty.

These were not the only theories on which the court found Ashy's conduct to be problematic. The court also said:

> Respondent's conduct also violates Rule 2.1 which states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." As the annotations to that rule provide:
>
> > "Emotional detachment," in the words of the ABA's Ethics Committee, is "essential to the lawyer's ability to render competent legal services." A lawyer who engages in a sexual relationship with a client, the committee concluded, risks losing "the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment." Because of this threat to independent judgment, and because of the problems of confidentiality and conflicts of interest that lawyer-client sex presents, the committee concluded that a lawyer would be "well advised to refrain from such a relationship."
>
> . . . In this case, respondent promised to undertake special efforts on behalf of Dade only if she entered into a sexual relationship with him and not based on what efforts were necessary to her legal defense based on his independent professional judgment.[110]

The fact that Dade did not enter into a sexual relationship with Ashy did not matter. Ashy had proposed to link the quality of his legal services to Dade's sexual availability. His professional judgment had already been affected. As the court stated: "A client should come to an attorney with the confidence that the attorney will use his independent legal judgment in putting forth his best legal efforts to represent the client."[111]

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110. *Id.*
111. *Id.* at 868.

The court was not done. It indicated that Ashy had violated two additional professional standards. Near the end of the opinion, the court said that "[a]n attorney who threatens to limit his efforts on his client's behalf if the client fails to engage in a sexual relationship with him has committed a very serious ethical offense. This undermines confidence in the legal system and is prejudicial to the administration of justice."[112] Rule 8.4(d) of the Louisiana Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice."[113] This is one of the vaguer standards articulated in the rules.[114] It would have been helpful if the court had been more explicit about how the rule actually applied in this case. Ashy might have violated the standard if he had materially limited his professional efforts on Dade's behalf because she had refused to accede to his sexual demands. But it does not appear that Ashy materially limited his professional efforts. Instead, he threatened to do so.

A threat by the lawyer to materially limit professional efforts on behalf a client might well run afoul of several different rules. For example, it might be regarded as an attempt to violate Rule 1.1, the competency rule, in violation of Rule 8.4(a).[115] It might also be considered to involve a "significant risk that the representation" of a client "will be materially limited . . . by a personal interest of the lawyer," in violation of Rule 1.7(a)(2).[116] It might even be considered an attempt to engage in conduct prejudicial to the administration of justice, which could, again, implicate Rule 8.4(a). Nevertheless, it seems somewhat aggressive to conclude that

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112. *Id.*

113. MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 1983).

114. *In re Ashy*, 721 So. 2d at 867; *see* 2 HAZARD ET AL., *supra* note 6, § 69.06 (identifies problems with the rule, including its application to conduct that "seems quite far from prejudicing the 'administration' of any particular proceeding or of 'justice' generally").

115. LA. RULES OF PRO. CONDUCT r. 1.1, 8.4(a) (2018). Rule 1.1 requires lawyers to "provide competent representation to a client." And Rule 8.4(a) says, "It is professional misconduct for a lawyer to . . . [v]iolate or attempt to violate the Rules of Professional Misconduct." *Id.* r. 8.4(a).

116. *Id.* r. 1.7(a)(2). Rule 1.7(a)(2) provides that, subject to some exceptions, a lawyer should not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." *Id.* The lawyer's threat to limit legal services unless the client meets the lawyer's personal sexual demands could be seen as such a risk.

an unfulfilled threat to limit professional services actually prejudices the administration of justice.[117]

The court went on to indicate that Ashy's conduct had violated a fourth professional standard. After quoting some of the provisions of Rule 8.4, the misconduct rule,[118] the court said:

> Rule 8.4 also reaches instances of criminal sexual misconduct or sexual exploitation of a nature that indicates the lawyer is unworthy of the confidence reposed in him or her." Annotations to Model Rule 8.4, p. 563. We find that respondent's conduct here to be "sexual exploitation of a nature that indicates he is unworthy of the confidence reposed in him.[119]

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117. Another aggressive expression of Rule 8.4(d) surfaced in *In re Downing*, 930 So. 2d 897 (La. 2006) (per curiam). In that case, a lawyer was disciplined for incompetent performance in a family law matter, which resulted in an improper arrest of the client's former spouse and exposed the client to a lawsuit. *Id.* The court concluded that the lawyer had violated Rule 1.1 (the competency rule) and Rule 8.4(d). In a footnote, the court said:

> The proscription against conduct that is prejudicial to the administration of justice most often applies to litigation-related misconduct. . . . However, Rule 8.4(d) also reaches conduct that is uncivil, undignified, or unprofessional, regardless of whether it is directly connected to a legal proceeding. *See, e.g., In re* Ashy, 98–0662 (La.12/1/98), 721 So.2d 859 (attorney who made unwanted sexual advances toward a client was found to have violated Rule 8.4(d), among other provisions of the Rules of Professional Conduct).

Id. at 12 n.5. Applied literally, this word formula would allow lawyers to be subject to formal discipline for mere "professionalism" missteps—something that would be rather at odds with the efforts made by the Louisiana Supreme Court to distinguish "professionalism" from "ethics" in its rules on continuing legal education. *See* LA. SUP. CT. R. XXX R. 3(c) (2018). I discussed the court's efforts to distinguish those terms in N. Gregory Smith, *Ethics v. Professionalism and the Louisiana Supreme Court*, 58 LA. L REV. 539 (1998).

118. *In re* Ashy, 721 So. 2d at 867–68. The court said:

> Respondent's conduct also violates Rule 8.4 which provides that "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct . . .; (b) commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice . . . ."

Id.

119. *Id.* at 868.

The court's quotation does not appear to have been entirely accurate. If one turns to page 563 of the version of the American Bar Association's Annotated Model Rules of Professional Conduct,[120] which would have been in effect at the time of the *Ashy* decision, one finds the following: "Rule 8.4(b) also reaches instances of criminal sexual misconduct or sexual exploitation of a nature that indicates that the lawyer is unworthy of the confidence reposed in him or her."[121] The apparent source of the court's quotation, then, referred to Rule 8.4(b), not to Rule 8.4 as a whole. Rule 8.4(b) was relevant to cases in the criminal sexual misconduct category. But the State did not charge Ashy with a crime for his sexually related conduct toward Dade, and the court does not otherwise indicate that his conduct ran afoul of Rule 8.4(b). Citation matters aside, in this portion of its opinion, in this case of first impression, the court might have intended to introduce a broader application of Rule 8.4—an application that is not tethered to the particular subparts of the rule but can be employed to discipline a lawyer for sexual exploitation of a client that indicates that the lawyer is unworthy of the confidence reposed in the lawyer by the client.

Dade testified that Ashy kissed her, touched her breast, put her hand on his crotch, and would not let her pull away. This conduct could be considered sexually exploitative. However, the court seemed to give more attention to something else. The court said that "[Ashy] told Dade that unless she responded sexually to him he would not put forth his best efforts to represent her."[122] If Dade had entered into a sexual relationship with Ashy on this basis, Ashy's conduct would have been terribly exploitative. As things developed, however, she did not enter into such a relationship, and Ashy did not continue to be her lawyer. Even so, it seems that the proposal of better legal services in exchange for a sexual relationship was critical to the court's determination that Ashy had violated professional standards. One of the few places in the opinion where the court seems to make an explicit "finding" appears to relate to that proposal:

> Accordingly, based on our review of the record and the hearing committee's credibility determination based on the witnesses' demeanor, we find that the ODC proved by clear and convincing

120. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1996).

121. *Id.* at 563.

122. *In re Ashy*, 721 So. 2d at 867. On a related note, Dade told the hearing committee: "And ah he told me that if I didn't sleep with him that being where he was he would do what he could to you know take care of everything but he wouldn't guarantee that everything would be taken care of but if I did everything would disappear." *Id.* at 861 n.2.

> evidence that respondent attempted a sexual relationship with Dade in exchange for certain efforts he would exert on her behalf as her lawyer.[123]

This "finding" seems to be the factual basis for the court's conclusion that Ashy violated Rules 1.7, 2.1, and 8.4. If that assessment is accurate, then, according to the opinion, an attorney may be found to have engaged in sexual exploitation of a client, and thereby to have violated Rule 8.4, if the attorney proposes to provide legal services whose quality will be tethered to the existence of lawyer-client sexual relationship. It would not be necessary that the sexual relationship actually come into being, or that the lawyer actually provide legal services on the sexually conditioned basis. It would be enough that the lawyer proposes to do so.

The last two sexual misconduct themes from *Ashy*—that lawyer sexual misconduct toward clients may be prejudicial to the administration of justice under Rule 8.4(d), and that sexual exploitation of clients violates a broader conception of Rule 8.4—do not appear to have had much staying power. Later sexual misconduct cases that refer to *Ashy* tend to focus on the conflict of interest theme, Rule 1.7, or the professional independence theme, Rule 2.1, or both.[124]

At the end of the opinion in *Ashy*, the Louisiana Supreme Court compared the conduct of Ashy to that of Redd. The Louisiana Supreme Court had suspended Redd for a year and a day. However, the court said that "the conduct in this case is more egregious than the conduct in *In re Redd*."[125] It also noted that, in the earlier case, "the attorney had no fiduciary relationship with the victim of the sexual misconduct as she was not a client."[126] The hearing committee and the disciplinary board had both recommended a public reprimand for Ashy, but the court found this to be too lenient. It ordered a two-year suspension.

In this case of first impression, one gets the impression that the Louisiana Supreme Court was trying out different theories of professional misconduct, and that some of those trials worked better than others. Perhaps the court's conceptual burden would have been lighter if Model Rule 1.8(j) been in place at the time the case was decided. Although Ashy

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123. *Id.* at 864.

124. LA. RULES OF PRO. CONDUCT r. 1.7, 2.1 (2018). However, without citing *Ashy*, Justice Weimer used a Rule 8.4(d) analysis in his concurring opinion in *In re Fuerst,* 157 So. 3d 569, 579 (La. 2014) (per curiam), a sexual misconduct case that we will consider later. So, it would be premature to consider the theory to be dead.

125. *In re Ashy*, 721 So. 2d at 868.

126. *Id.*

did not have sexual relations with Dade, he tried to have them. He attempted to do something that would have violated Rule 1.8(j) if it had been in place at the relevant time. The attempt to violate Rule 1.8(j) would have constituted a clear violation of Rule 8.4(a)—the rule that makes it professional misconduct to "attempt to violate the Rules of Professional Conduct."[127] This would have been something of an "indirect" application of the Rule 1.8(j). However, there was more to the *Ashy* case than an attempt to have sexual relations with a client. There was sexual touching, and there was Ashy's threat to limit his professional services if Dade did not enter into a sexual relationship. Even if Rule 1.8(j) had been in effect, it is likely that the court would still have regarded the threat as an additional serious, indeed, "egregious," matter and found that the conduct had violated a separate professional standard. In the absence of Rule 1.8(j), the Louisiana Supreme Court took the opportunity to strongly condemn lawyer sexual misconduct with respect to clients.

ii. In re Touchet

Two years after the *Ashy* decision, the Louisiana Supreme Court took up *In re Touchet*,[128] a case in which the ODC charged attorney Francis Touchet with six instances of sexual misconduct toward female clients. According to the reported opinion, Touchet had: (1) attempted to solicit sexual favors from a divorce client in lieu of legal fees and made sexually suggestive remarks to her; (2) implied to a paternity-case client that he would waive his fees in return for sexual favors; (3) implied to a divorce client that he would waive his fees in return for sexual favors and made sexually suggestive remarks to her; (4) pressured a divorce client into having a sexual relationship with him, solicited sexual favors in lieu of fees, made sexually suggestive remarks to her, and touched her without her consent; (5) solicited sexual favors from a divorce client in lieu of fees, made sexually suggestive remarks to her, and touched her without her consent; and (6) solicited sexual favors from a business client, made sexually suggestive remarks to her, tried to kiss her without her consent, touched her without her consent, and exposed himself to her.

The ODC's formal charges alleged conflicts of interest, in violation of Rule 1.7; commission of a criminal act, in violation of Rule 8.4(b); dishonesty, fraud, deceit, or misrepresentation, in violation of Rule 8.4(c); and conduct prejudicial to the administration of justice, in violation of

127. LA. RULES OF PRO. CONDUCT r. 8.4(a) (2018).

128. *In re* Touchet, 753 So. 2d 820 (La. 2000) (per curiam).

Rule 8.4(d).[129] However, when the case reached the Louisiana Supreme Court, it narrowed the disciplinary focus:

> In *Ashy*, we addressed for the first time in Louisiana jurisprudence whether sexual advances by an attorney toward a client could constitute a violation of the Rules of Professional Conduct. . . .
>
> We concluded such conduct could represent a violation of several professional rules, including Rule 1.7(b) (conflict of interest) and Rule 2.1 (duty to exercise independent judgment) of the Rules of Professional Conduct.
>
> The concerns we expressed in *Ashy* are clearly illustrated in the instant matter. By attempting to sexually exploit his clients, respondent unquestionably violated his professional duty to protect their interests. Respondent's conduct is made even more reprehensible by the fact that many of his clients consulted him in connection with emotionally-charged domestic matters, and respondent attempted to use their vulnerability to further his sexual interests.[130]

The court did not expressly mention two of the theories it had used in the *Ashy* case to conclude that that Ashy had engaged in misconduct: (1) that he had engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d); and (2) that he had sexually exploited his client in a manner that indicates that he was unworthy of the confidence reposed in him by his client, in violation of Rule 8.4. If the court had been inclined to reinforce or develop these two misconduct themes, *Touchet* would have been a good case in which to have done so. After all, the court stated, in *Touchet*, that the "concerns we expressed in *Ashy* are clearly illustrated in the instant matter."[131] The ODC had actually charged Touchet with a violation of Rule 8.4(d). The court's opinion states that Touchet had attempted to "*sexually exploit* his clients."[132] In addition, Touchet's behavior was much more egregious than Ashy's. But the court did not reinforce or develop these Rule 8.4 misconduct themes.[133] If it is reasonable to consider the Louisiana Supreme Court to have been trying

129. *Id.* at 822.
130. *Id.* at 823.
131. *Id.*
132. *Id.* (emphasis added).
133. Neither did the court focus on an allegation by the ODC that Touchet had violated Rule 8.4(b).

out different misconduct theories to deal with the lawyer's sexual behavior in the *Ashy* case, it appears to have narrowed its theoretical focus in *Touchet.*

The court disbarred Touchet. This sanction is considerably more severe than that two-year suspension that it had ordered in *Ashy*. However, the cases are not the same. There were more "victims" in *Touchet*. "As the disciplinary board observed," said the court, "this fact alone justifies the imposition of a harsher sanction than imposed in *Ashy*."[134] The court also mentioned that many of the victims were particularly vulnerable.

In the absence of sexual relations between attorney and client, Rule 1.8(j), it if had been in effect, would not have had any more utility in *Touchet* than in *Ashy*. Even so, the misconduct in *Touchet* was severe, and it warranted severe discipline.

iii. In re DeFrancesch

In re DeFrancesch[135] is something of a hybrid case. It features both consensual and nonconsensual sexually related conduct by an attorney. Because the disciplinary proceedings were initiated on account of the nonconsensual conduct, and because that conduct is the primary focus of the case, it seems best to discuss the case along with others in the nonconsensual category. However, some of the statements in the case are potentially relevant to situations involving consensual sexual relations between attorney and client.

In 1999, Nicole Wattigney hired attorney Robert DeFrancesch to represent her in connection with a misdemeanor drug possession charge. She ultimately pleaded guilty to the charge. After the representation ended, DeFrancesch and Wattigney had sexual relations on several occasions, in exchange for which DeFrancesch provided financial assistance to Wattigney. Thereafter, in 2001, Wattigney was charged with felony drug possession. DeFrancesch agreed to handle the matter for $2,000, which Wattigney was to pay in weekly installments. When Wattigney did not make a payment that was due on October 15, DeFrancesch "proposed that she accompany him to Mississippi for a sexual rendezvous as a 'punishment' for failing to pay timely."[136] In a later recorded conversation, DeFrancesch

> explained to Ms. Wattigney that she would be required to have sex with him as a "punishment" for not paying her fee installments on

134. *Id.* at 823.
135. *In re* DeFrancesch, 877 So. 2d 71 (La. 2004) (per curiam).
136. *Id.* at 72.

> time. Ms. Wattigney expressed reluctance to agree to respondent's demands, explaining that she had recently been engaged and was "trying to make everything right" with her fiancé. Respondent acknowledged that Ms. Wattigney might not be "enthused about doing it," but analogized his demand for sex "as a penalty fee, like, [on a] Discover card." Respondent told Ms. Wattigney that once she took care of her "business," then "we'll be square and I'll be taking care of you again." When Ms. Wattigney continued to protest, respondent assured her that so long as she paid her fee installments on time each week thereafter, "this will never happen again, okay. But, if you miss, then that's the punishment, that's the late fee, that's the whatever you want to call it, okay."[137]

In a subsequent recorded conversation, DeFrancesch withdrew his request that Wattigney have sex with him. He appeared in court when Wattigney entered a guilty plea in her criminal case.

The ODC charged DeFrancesch, among other things, with charging an unreasonable fee, in violation of Rule 1.5(a); having a conflict of interest, in violation of Rule 1.7(b); engaging in a prohibited transaction with a client, in violation of Rule 1.8(a);[138] failing to exercise independent professional judgment, in violation of Rule 2.1; and engaging in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d). The hearing committee concluded that DeFrancesch had violated the rules as charged.[139]

In its opinion in the case, the Louisiana Supreme Court compared the attorney's conduct to the conduct of attorneys in two earlier decisions, *In re Ashy*,[140]a case that has already been discussed, and *In re Gore*,[141] a case that will be discussed later. In discussing the *Ashy* case, the court said, in part:

> We determined the lawyer's conduct violated Rule 2.1, because his sexual overtures to his client threatened his ability to exercise independent professional judgment and render candid advice. Likewise, we identified a violation of the conflict of interest

137. *Id.*

138. Rule 1.8 has a number of subparts, setting forth different conflicts of interest. The subpart that seems to have been relevant in this case was 1.8(a), which imposes limitations on business transactions between the lawyer and the client and which limits a lawyer from acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client.

139. *Id.* at 73.

140. *In re* Ashy, 721 So. 2d 859 (La. 1999) (per curiam).

141. *In re* Gore, 752 So. 2d 853 (La. 2000) (per curiam).

> provisions in Rule 1.7(b), as the lawyer placed his own interests ahead of his client's interests by refusing to put forth his best efforts unless the client responded to him sexually.[142]

Just as it had done in *Touchet*, the court, in referring to *Ashy,* focused on Rules 1.7 and 2.1. Even though the hearing committee had concluded that DeFrancesch had violated Rule 8.4(d), as charged by the ODC, the court in *DeFrancesch* did not take the occasion to reinforce or to develop the theories, mentioned in *Ashy*, that the lawyer in that case had engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d); or that he had sexually exploited his client in a manner indicating that he was unworthy of the confidence reposed in him by his client, in violation of Rule 8.4.

In comparing the conduct of DeFrancesch to that of the lawyers in *Ashy* and in *Gore*, the Louisiana Supreme Court stated:

> Although respondent's misconduct is not identical to the misconduct at issue in either *Ashy* or *Gore*, those cases provide us with some guidance. As in *Gore*, respondent and Ms. Wattigney had a prior consensual sexual relationship, although this relationship had terminated by the time of the instant misconduct. As in *Ashy*, there is an element of coercion in respondent's implied threat that he might cease to represent Ms. Wattigney if she did not submit to the "sex as a penalty" arrangement; however, unlike *Ashy*, respondent never threatened to limit his efforts on his client's behalf if she refused to engage in a sexual relationship with him. Indeed, respondent correctly points out he ultimately withdrew his request for sex and continued to represent Ms. Wattigney in her criminal case until it was concluded to her satisfaction.
>
> Nonetheless, as we observed in *Ashy*, the particular evil that results from a lawyer's sexual relationship with a client is the loss of emotional detachment which in turn threatens the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment. . . . The potential for harm which results whenever a lawyer allows his personal interests to conflict with his client's interests is so great that any such violation must be viewed as being very serious, even if actual harm is not readily identifiable.[143]

142. *In re DeFrancesch*, 877 So. 2d at 76.
143. *Id.* at 76–77.

The court concluded that DeFrancesch had violated the rules as charged by the ODC. It also concluded that a two-year suspension was appropriate; however, because of mitigating factors, it deferred all but one year and a day of the suspension.

The language, quoted above, about the "particular evil" warrants some consideration. The court was referring to "the loss of emotional detachment" that comes with a sexual relationship with a client. Inasmuch as DeFrancesch did not actually enter into a new sexual relationship with Wattigney, it is not obvious that the court actually needed to discuss this "evil." But it did so anyway, and its discussion indicates that the evil has two different dimensions. First, the court mentioned that "the loss of emotional detachment" that comes with a sexual relationship with a client, "threatens the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment." That could result in a violation of Rule 2.1. Second, the court mentioned "the potential for harm which results whenever a lawyer allows his personal interests to conflict with his client's interests." That could result in a violation of Rule 1.7.[144]

There is a suggestion in the court's language that professional misconduct inevitably results from a sexual relationship between a lawyer and a client. The court did not say that the "particular evil" *might* result, or *sometimes* results, from the sexual relationship. The court said that it *results*. Moreover, the court immediately went on to say that "[t]he potential for harm which results whenever a lawyer allows his personal interests to conflict with his client's interests is so great that any such violation must be viewed as being very serious, even if actual harm is not readily identifiable."[145] The word "violation" is not a trivial word in the context of lawyer discipline. That violation arises from the conflict between the lawyer's personal interests and the interests of the client. It arises, very seriously, according to the court, even if there is no readily identifiable harm to the client. The potential for harm is enough. In this case, it seems that the court might have been of the view that a sexual relationship between the lawyer and the client amounts to misconduct per se.

If a sexual relationship between the lawyer and the client amounts to misconduct per se, that misconduct would occur regardless of whether the client gave informed consent to the representation. This seems to be consistent with a basic teaching of Model Rule 1.8(j), which renders the conflict of interest resulting from sexual relations between the lawyer and the client non-consentable. However, the court's language in *DeFrancesch*

144. *Id.*
145. *Id.*

may also go beyond that rule, because it is not necessarily limited to the situation in which sexual relations commence after the attorney-client relationship has been formed. If the "particular evil" referenced in *DeFrancesch* were understood to arise whether or not the sexual relationship antedates the attorney-client relationship, the calculus would be different than the one used by the American Bar Association in Model Rule 1.8(j). That is because the ABA rule prohibits "sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[146]

iv. In re Banks

The next case this Article will address is *In re Banks.*[147] The ODC charged Attorney Ronnie Banks with a number of acts of misconduct, only one of which involved sexual misconduct. According to the reported opinion,

> Jacqueline Evans consulted respondent regarding the representation of her son, Brandon Evans, who was facing felony criminal charges. During this initial visit, respondent made unwanted sexually suggestive comments to Ms. Evans, who believed respondent was requesting sexual favors in exchange for his representation of her son. Consequently, she decided not to retain respondent.[148]

Banks visited Brandon in jail anyway and falsely told him that he had been hired to be his lawyer. Evans filed a complaint with the ODC when Banks sent her a bill for $1,250 and threatened collection efforts if she did not pay it. Based on these events, the ODC charged Banks with having engaged both in conflicts of interest, in violation of Rule 1.8,[149] and in

146. MODEL RULES OF PRO. CONDUCT r. 1.8(j) (AM. BAR ASS'N 1983).

147. *In re* Banks, 18 So. 3d 57 (La. 2009) (per curiam).

148. *Id.* at 61.

149. The reference to Rule 1.8 was probably erroneous. The rule has a number of subparts, but none of them were referenced in the opinion. The disciplinary board acknowledged that the ODC charged Banks with a violation of Rule 1.8, but it noted that Rule 1.8 addresses "specific" conflicts of interest, while "Rule 1.7 is the *general* rule on conflicts of interests with current clients." *See In re* Ronnie Banks, Sr., 07-053, p. 16 (La. Att'y Disc. Bd. 2009), https://www.ladb.org/DR/Default.aspx?DocID=6497&TAB=search&fname=ronnie&lname=banks [https://perma.cc/97ME-S6S8]. It also noted that the hearing committee had analyzed the situation under Rule 1.7 and concluded that it had properly done so. *Id*. at 17.

conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Rule 8.4(c). The ODC also charged him with failing to cooperate with its investigation.

Banks "did not address the encounter with Ms. Evans"[150] before the hearing committee. But the committee concluded that "Ms. Evans' testimony was credible, and the gist of the charge was that respondent made sexually suggestive comments to Ms. Evans and attempted to sexually seduce her in his office."[151] The disciplinary board agreed, and concluded: "Here, the record supports the Committee's finding that Respondent attempted to sexually seduce Ms. Evans, thereby putting his personal interests ahead of the interests of his client. Therefore, the Committee properly concluded that Respondent violated Rule 1.7."[152]

The just-quoted language indicates that both the disciplinary board and the hearing committee considered Ms. Evans to be a "client" of the disciplined lawyer. Inasmuch as Ms. Evans decided not to retain Banks as an attorney, and inasmuch as it was her son who was facing felony charges, it would be reasonable to question the conclusion that Ms. Evans was Banks's client. However, because the hearing committee and the disciplinary board regarded Ms. Evans as a client for purposes of the disciplinary proceedings, it seems appropriate to view the case as one involving nonconsensual sexual conduct relating to a client.

Summarizing the attorney's acts of misconduct in the case, the Louisiana Supreme Court said:

> Respondent has engaged in numerous instances of serious attorney misconduct, including pleading no contest to misdemeanor theft, making false statements to a trial judge, charging excessive fees and/or failing to refund unearned fees, failing to provide competent representation to his client, neglecting legal matters, commingling and converting client funds, making sexually suggestive comments to Ms. Evans and lying to her son about his representation, and making false statements to the ODC and otherwise failing to cooperate in its investigations. The record supports the numerous rule violations found by the disciplinary board.[153]

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150. *In re Banks*, 18 So. 3d at 62.

151. *Id.*

152. *See In re* Banks, 07-053, p. 17 (La. Att'y Disc. Bd. 2009) https://www.ladb.org/DR/Default.aspx?DocID=6497&TAB=search&fname=ronnie&lname=banks [https://perma.cc/6Z7S-TZQU] (last visited August 7, 2020).

153. *In re Banks*, 18 So. 3d at 63.

Without further discussion of the specific acts of misconduct, and in light of several aggravating factors, the court ordered permanent disbarment.

The *Banks* case does not break new ground. In the end, the court dealt with the sexual misconduct element of the case—conduct that can be perceived as amounting to sexual harassment of a client—as a conflict of interest under Rule 1.7.[154] That rule has been relevant to other sexual misconduct cases in this category. If Model Rule 1.8(j) had been in effect at the time of the decision, it would not have been violated, because the lawyer did not have sexual relations with Ms. Evans. However, the court might have utilized an indirect application of the rule. It might have concluded that the attorney had attempted to violate Rule 1.8(j) by seeking to have sexual relations with Ms. Evans. Such an attempted violation of the rule could then have constituted a violation of Rule 8.4(a), which states that it is professional misconduct to attempt to violate the Rules of Professional Conduct.

v. In re Johnson

The last case in this category, and the one that will receive the least amount of attention, is *In re Johnson.*[155] It is a reciprocal discipline case,[156] in which the Louisiana Supreme Court disciplined a Louisiana-admitted lawyer for conduct in Missouri that could be considered sexual harassment of a client.

The Louisiana Supreme Court noted, in its opinion in the case, that "the exact nature of respondent's conduct is somewhat unclear based on the limited information contained in the Missouri judgment."[157] But it said that "the crux of the misconduct seems to be that respondent engaged in a conflict of interest by showing his client lewd photographs and making suggestive sexual comments to her, and commingled his personal funds with trust funds in his operating account."[158] The notion that a lawyer

154. *Ashy* also referred to sexual harassment of client in conflict-of-interest terms. *See supra* text accompanying note 109.

155. *In re* Johnson, 177 So. 3d 116 (La. 2015) (per curiam).

156. "Reciprocal discipline" refers to discipline in Louisiana that is based on a disciplinary order from another jurisdiction. *See* LA. SUP. CT. R. XIX, § 21 (2019).

157. *In re Johnson*, 177 So. 3d at 118.

158. *Id.* The court noted that there had been no finding that Johnson had converted client funds.

engages in a conflict of interest when the lawyer sexually harasses a client is consistent with what the court said in *Ashy* and in *Banks*.[159]

The court said that it had been unable to find Louisiana cases "involving a conflict of interest based solely upon a lawyer's sexually suggestive comments towards a client,"[160] but it observed that it had ordered "suspensions in the range of three to nine months, all or part of which may be deferred" in cases of "consensual lawyer-client sexual relationships."[161] The court also noted that, although the Missouri order had been one for indefinite suspension, it had allowed the attorney to reapply for admission within six months, "perhaps suggest[ing] [that Missouri] did not find his conduct to be particularly egregious."[162] The Louisiana Supreme Court did not disagree. Certainly, the conduct of the lawyer was not as egregious as the lawyer's conduct in *Touchet*, conduct which resulted in disbarment. In *Johnson*, the court ordered indefinite suspension,[163] which is the same sanction that the Missouri disciplinary authorities had imposed.

2. Consensual Sexual Relationship Cases

Now we turn to cases involving consensual sexual relationships. The principal themes from the *Ashy* case have sounded in some of them. But there have been other thematic developments as well.

a. Nonclients

One Louisiana case, *In re Bordelon*,[164] features a consensual sexual relationship between an attorney and a nonclient. In that case, Denise

159. *See supra* text accompanying notes 109 and 154. The ABA Model Rules of Professional Conduct include a rule, Rule 8.4(g), that, among other things, prohibits sexual harassment by lawyers. As of this writing, Louisiana has not adopted Rule 8.4(g). But, as indicated, the Louisiana Supreme Court has imposed discipline on Louisiana lawyers for engaging in sexual harassment of a client. *Cf. In re* Wiegand, 704 So. 2d 1179 (La. 1997) (Louisiana-admitted lawyer was subject to discipline for sexual harassment of employees).

160. *In re Johnson*, 177 So. 3d at 118.

161. *Id.* I will consider the consensual relationship cases in the next section of the Article.

162. *Id.*

163. This is not a sanction that is specifically provided for in the applicable Louisiana rules, but the court observed that "only under extraordinary circumstances should there be a significant variance from the sanction imposed by the other jurisdiction." *Id.* at 119.

164. *In re* Bordelon, 894 So. 2d 315 (La. 2005) (per curiam).

Seidman contacted attorney Michael Bordelon about the status of a personal injury matter that another lawyer was handling. She had contacted Bordelon after she had been unable to reach the attorney who was handling her case. But her original attorney resurfaced, and the personal injury case settled.

Bordelon and Seidman thereafter commenced a consensual sexual relationship that continued through the fall of 1992. During the time they were involved in the sexual relationship, Bordelon asked whether Seidman could "invest" some of her settlement money by loaning him $20,000 for the down payment on a house. Seidman agreed to make the loan, and Bordelon executed an unsecured promissory note in her favor. He thereafter made some payments on the note.

In 1994, after the end of the consensual sexual relationship, the police arrested Seidman on drug charges. She reached out to Bordelon, who obtained her release from jail. She also moved into Bordelon's residence for several months. While there, Bordelon had her execute an affidavit stating that the promissory note had been lost but that it had been paid in full. Later, however, Seidman left Bordelon's residence and demanded full repayment of the loan balance. When Bordelon rejected her demand, Seidman filed a complaint with the ODC, alleging, among other things, that Bordelon had refused to repay the loan and that he had coerced her into signing the lost note affidavit.

The ODC dismissed the complaint, finding no evidence that Bordelon and Seidman had created an attorney-client relationship prior to the signing of the note. It also found no evidence of coercion or duress in the signing of the affidavit. However, the disciplinary board remanded the matter to the ODC for further investigation. The ODC thereafter filed formal charges, alleging, among other things, that Bordelon had breached his duty of loyalty to his client, in violation of Rule 1.7(b); had engaged in a prohibited business transaction with a client, in violation of Rule 1.8(a); and had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Rule 8.4(c). The ODC also alleged that Bordelon had violated Rule 8.1(a) by making misrepresentations in the disciplinary investigation.[165]

It is not entirely clear from the case whether, or to what extent, the sexual relationship between Bordelon and Seidman figured into the formal charges. It is possible that the alleged violation of Rule 1.7(b) was based, at least in part, on the existence of the sexual relationship, but the ODC

165. That rule prohibits lawyers from knowingly making false statements of material fact in connection with a bar admission application or a disciplinary matter. *See* LA. RULES OF PRO. CONDUCT. r. 8.1(a) (2018).

filed those charges prior to the time the *Ashy* case was handed down. Given the seminal nature of the *Ashy* case, there was not any significant Louisiana jurisprudence on attorney-client sexual relationships at the time the ODC filed the formal charges, and the ODC might not have been looking at the sexual relationship through a conflict-of-interest lens. It is possible that the 1.7(b)-conflict-of-interest allegations related more to the borrowing of money from the client than to the existence of the sexual relationship.[166] However, in response to the formal charges, Bordelon denied that he had ever had an attorney-client relationship with Seidman, and he refused to admit or deny that he had had a sexual affair with Seidman, on the ground that issue was "immaterial, as there was never an attorney-client relationship."[167] There would have been little reason to deny the existence of the affair unless the ODC had claimed that there was one.

As it turns out, however, the ultimate focus in the case was neither on the sexual relationship nor on the borrowing. When the case reached the Louisiana Supreme Court, the focus was on the existence of the attorney-client relationship:

> The record supports the finding made by the hearing committee and the disciplinary board that no attorney/client relationship existed between respondent and Ms. Seidman. While it is true as a general principle that the existence of an attorney/client relationship "turns largely on the client's subjective belief that it exists,". . . we conclude that in this case, Ms. Seidman could not have reasonably formed a subjective belief that respondent was acting as her attorney. Ms. Seidman consulted with respondent concerning a personal injury suit that had been tried in federal court, and after an appeal, remanded for a new trial on damages only if Ms. Seidman would not accept a reduction of the award. Respondent told Ms. Seidman that he was not capable of handling the matter and that he would assist her in finding a lawyer to re-try the case. While respondent was in the process of doing this, Ms. Seidman accepted a settlement of the case through her original attorney, without respondent's input. Clearly, no attorney/client relationship existed under these facts. Moreover, as a practical matter we find it is telling that Ms. Seidman mentioned nothing about an attorney/client relationship in her original complaint to the ODC; she characterized her relationship with

166. Regardless, the alleged violation of Rule 1.8(a), the business-transaction-with-client rule, did relate to the borrowing.

167. *In re Bordelon*, 894 So. 2d at 318.

> respondent as that of "a friend." Ms. Seidman did not begin to claim that she thought respondent was her attorney until after the ODC dismissed the complaint, citing the absence of an attorney/client relationship as the basis of its determination that no professional misconduct occurred.[168]

In the absence of an attorney-client relationship, the court concluded that it should dismiss the formal charges dealing with violations of 1.7(b) and 1.8(a). However, the court found that Bordelon had made false statements in the disciplinary proceedings with respect to the repayment of the loan, and it concluded that he had thereby violated Rules 8.1(a) and 8.4(a) of the Rules of Professional Conduct. Consequently, it ordered a 60-day suspension.

Although it is clear from the court's recitation of the facts of the case that there had been a sexual relationship between Bordelon and Seidman, that sexual relationship was not material to the disciplinary outcome. It appears that the sexual relationship was not material because there had been no attorney-client relationship between the parties during the relevant time. If that is so, one of the teachings of the case is that, in the absence of an attorney-client relationship, a consensual sexual relationship between a lawyer and another person, without more, does not amount to professional misconduct. This is not a surprising outcome.

b. Clients

There have also been Louisiana disciplinary cases involving consensual sexual relationships between lawyers and their clients. Cases in this category are ones to which Model Rule 1.8(j) would have been applicable if it had been adopted in Louisiana at the relevant time. However, the absence of that rule did not mean that the attorneys were able to escape discipline. On one ground or another, the lawyers in the reported cases were found to have engaged in professional misconduct.

i. In re Schambach

The earliest of the consensual sexual relationship cases, decided a year after the *Ashy* decision, is *In re Schambach.*[169] Beginning in 1985, Attorney Robert Schambach represented Dianna Womble in several matters. After the attorney-client relationship had been in place for a few years, Schambach "began engaging in an extra-marital affair with Ms.

168. *Id.* at 322.

169. *In re* Schambach, 726 So. 2d 892 (La. 1999) (per curiam).

Womble."[170] Thereafter, in 1991, Schambach borrowed $40,000 from Womble, in two separate transactions, and gave her a promissory note. By 1993, the personal relationship between Schambach and Womble had deteriorated. She filed suit to recover on the promissory note. She also filed a complaint with the ODC, claiming that Schambach had taken "advantage of his position as her attorney by luring her into an illicit sexual affair during a vulnerable period in her life and borrowing over $40,000 in funds and failing to repay her."[171] After an investigation, the ODC filed charges, primarily alleging that Schambach had violated the conflict of interest prohibition of Rule 1.7, and the prohibition in Rule 1.8(a) against entering into business transactions with clients.

The hearing committee found that Schambach had "acted wrongfully in having a sexual affair with his client and in entering into a business transaction with her."[172] It recommended an 18-month suspension. The disciplinary board recommended a year-long suspension instead. However, the Louisiana Supreme Court thought that the sanction should be more severe. It noted that neither the hearing committee nor the disciplinary board had had the benefit of its decision in *Ashy* at the time they had rendered their decisions. The court described the *Ashy* opinion in this way:

> In *Ashy*, we imposed a two year suspension on an attorney who attempted to develop a sexual relationship with a female client in exchange for making certain efforts on her behalf as her lawyer. We found that although sexual relations or sexual misconduct with a client was not specifically addressed in the present Rules of Professional Conduct, such conduct could violate several existing rules. For example, applying Rule 1.7(b), we found sexual harassment of a client could adversely affect the quality of representation by undermining the client's trust in the attorney. Likewise, applying Rule 2.1, we found a sexual relationship could impair the lawyer's objectivity and independent professional judgment.[173]

In this case, decided a year after *Ashy*, the court did not explicitly refer to the violations of Rule 8.4 that it had found in *Ashy*.

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170. *Id.* at 893.

171. *Id.* Womble's allegation, expressed in this way, appears to raise an issue about whether the sexual relationship was actually consensual. But that issue was not explored in the case.

172. *Id.* at 894.

173. *Id.* at 895–96.

As in *Ashy*, the court noted that the personal interests of the lawyer had interfered with his professional responsibilities, but it seemed to focus most of its attention on the financial burdens that Schambach had imposed on his client:

> Although the instant case, involving a consensual relationship, is distinguishable in some ways from *Ashy*, we find that respondent violated the Rules of Professional Conduct by allowing his personal relationship with Ms. Womble to interfere with his professional responsibilities toward her. During his on-going representation of Ms. Womble, respondent borrowed a substantial sum of money (originating from funds he had previously recovered on her behalf as her attorney) from her when he knew she was disabled and in a vulnerable position. He then discharged this debt in bankruptcy, leaving Ms. Womble with virtually no funds for her living expenses and forcing her to file for bankruptcy. Respondent made no effort to make restitution to Ms. Womble until the eve of the disciplinary hearing in this case. Although we recognize that Ms. Womble ultimately testified on respondent's behalf at the hearing, the marked change in her testimony from statements in her earlier complaint, especially in light of respondent's payment of restitution, calls into question the credibility of her hearing testimony. Taken as a whole, we find the record supports the conclusion that respondent violated his duties to Ms. Womble, and this violation resulted in serious harm to her.[174]

The court ordered a three-year suspension, which was more severe than the two-year suspension handed down in *Ashy*.

In what way did the sexual relationship with Womble interfere with the attorney's professional responsibilities toward her? There is no indication that Schambach had provided deficient legal services to Womble. Nor is there explicit mention, in Rule 1.7 terms, that the sexual relationship with the client had created a substantial risk that Schambach's representation of Womble would be materially limited by his personal interests. Given that the court had earlier stated, in referring to *Ashy*, that a sexual relationship with a client "could adversely affect the quality of representation by undermining the client's trust in the attorney"[175] it does not appear that the court regarded this risk as an inevitable consequence of

174. *Id.* at 896.
175. *Id.* at 895.

a sexual relationship between lawyer and client. As we have seen, the opinion in *DeFrancesch* can be read to articulate a different proposition.[176]

In contrast, the case for a violation of Rule 1.8(a), the business transaction with client rule, could have been quite strong, but the court does not refer to the elements of that rule in its analysis.[177] The court seems to have been more focused on the financial exploitation of the client that was facilitated by the existence of the sexual relationship. Stated another way, it seems that the concern was not so much that the attorney was using his attorney-client relationship to sexually exploit his client, but that the attorney was using the sexual relationship to financially exploit his client.

What if Schambach had fully complied with Rule 1.8(a) in borrowing money from Womble? In other words, suppose that the borrowing had been fair and reasonable to Womble; that Schambach had advised Womble, in writing, of the desirability of seeking the advice of independent legal counsel in connection with the borrowing; that Womble had given informed written consent to the transactions; and that the other requirements of the rule had been fully satisfied.[178] Would Schambach then have been a candidate for discipline? It is not obvious that he would have been. The court does not state, in *Schambach*, that a consensual sexual relationship with a client, without more, is a ground for discipline.

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176. *See supra* text accompanying note 145.

177. Rule 1.8(a) states:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

LA. RULES OF PRO. CONDUCT r. 1.8(a) (2018).

178. It might have been difficult to satisfy all of these requirements. Schambach might have wanted to borrow money from Womble instead of from a bank precisely because the transactions and their terms would been more advantageous to him. In addition, Womble's vulnerability might have interfered with her ability to give informed consent.

Schambach is a case in which Rule 1.8(j) could have made a difference in the analysis if not in the ultimate sanction. Schambach had entered into a consensual sexual relationship with Womble after their attorney-client relationship had come into being. That clearly would have violated the model rule, and the court would have said so had the rule been in place at the time.

ii. In re Gore

The issue of consensual sexual relationships with clients surfaced again in the 2000 case of *In re Gore*.[179] According to the reported opinion:

> Brenda Sanders retained respondent [Brent Gore] in 1990 to represent her in various business matters. In the course of the representation, respondent and Ms. Sanders entered into a consensual sexual relationship. In November 1991, respondent filed a petition for divorce on Ms. Sanders' behalf, and he represented her until a final judgment of divorce was rendered in May 1992.[180]

The series of relationships appears to go like this: initially, there was only an attorney-client relationship; thereafter, while the attorney-client relationship continued, a sexual relationship commenced; thereafter, while the sexual relationship continued, the lawyer undertook a new matter on behalf of the client.

Sanders ended up filing a complaint against Gore with the ODC. Initially, the ODC was disinclined to initiate formal disciplinary proceedings. A footnote in the case states:

> The record reflects that following its investigation of Ms. Sanders' complaint, the ODC rejected formal charges against respondent in March 1995, concluding that an attorney/client relationship of a sexual nature, standing alone, did not violate any existing rule of professional conduct in Louisiana. Although the hearing committee affirmed the dismissal of the complaint on the same ground, a panel of the disciplinary board ultimately reversed.[181]

179. *In re* Gore, 752 So. 2d 853 (La. 2000) (per curiam).
180. *Id.* at 854.
181. *Id*. at 855 n.2.

The ODC did not regard an attorney-client sexual relationship, standing alone,[182] to be problematic. The hearing committee apparently agreed. However, the board reversed, and the ODC thereafter filed formal charges, alleging violations of several rules:

> The ODC alleges that at no time during the representation did respondent inform Ms. Sanders that a potential conflict of interest existed, in violation of Rules 1.4(b) (failure to communicate with a client), 1.7(b) (conflict of interest), 1.16(d) (termination of the representation), 2.1 (failure to exercise independent professional judgment in representing a client), 8.4(a) (violation of the Rules of Professional Conduct), and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct. The ODC further alleges that at the time respondent filed a Motion for Judgment of Divorce on Ms. Sanders' behalf, alleging that Ms. Sanders and her husband had lived separate and apart for more than six months, he knew that Ms. Sanders and her husband still lived together; that he misrepresented these facts to the court; and that he failed to correct the misrepresentation. The ODC asserts this conduct violated Rules 1.3 (failure to act with diligence and promptness in representing a client), 1.7(b), 3.1 (bringing a claim without a good faith basis for doing so), 3.3 (candor toward the tribunal), 3.4 (fairness toward opposing parties and counsel), 8.4(a), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) of the Rules of Professional Conduct.[183]

At this point in the proceedings, this was no longer a case of a consensual sexual relationship with a client, standing alone.

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182. One might question whether a sexual relationship with a client can ever really "stand alone." If the attorney is providing legal services to the client, the sexual relationship could have an effect on the professional relationship and the professional services rendered. *See In re* DeFrancesch, 877 So. 2d 71, 77 (La. 2004) (per curiam). If the relationship is nonconsensual, there would be other issues. *See id*.; *In re* Ashy, 721 So. 2d 859, 867–68 (La. 1998).

183. *In re Gore*, 752 So. 2d at 854 (footnote omitted). Later, the ODC added a third count to the formal charges, alleging that Gore had, among other things, "engaged in improper communications with a judge and knowingly assisted a judge in conduct violating the Rules of Judicial Conduct." *Id.* at 854 n.1. However, the ODC ultimately dismissed this third count for lack of clear and convincing evidence. *Id.*

Gore ended up filing a petition for consent discipline in which he admitted a violation of Rule 1.7. According to the opinion in the case:

> Following the institution of formal charges, respondent filed a petition for consent discipline. In his petition, respondent admits that he began representing Ms. Sanders in early 1990 in connection with a variety of business matters. At some point thereafter, respondent and Ms. Sanders began a consensual sexual relationship. In late 1991, respondent represented Ms. Sanders in connection with her divorce from her husband, whom she alleged was abusing her. Although Ms. Sanders desired the divorce (which was uncontested by her husband) and consented to respondent's representation of her, respondent admits that he failed to advise his client that a potential conflict of interest existed, in violation of Rule 1.7(b) of the Rules of Professional Conduct.[184]

Gore proposed a six-month suspension, followed by two years of supervised probation, subject to some conditions.

The disciplinary board recommended acceptance of the proposed consent discipline. It was of the view that, although Gore had been involved in an attorney-client sexual relationship that had given rise to a conflict of interest, he had not "take[n] advantage of the relationship," as had the lawyers in *Ashy* and in *Schambach*.[185] The Louisiana Supreme Court agreed:

> Respondent has admitted that he engaged in the misconduct set forth in the petition for consent discipline. Although the instant case involves a sexual relationship between respondent and his client, it is nonetheless distinguishable from *Ashy* and *Schambach*, as there is no allegation that respondent attempted to use his position as attorney to coerce sex or money from Ms. Sanders. Nonetheless, we agree that the relationship had the potential to create a conflict of interest, especially in light of the fact that respondent was representing Ms. Sanders in connection with a divorce proceeding. Based on our review of the record, we find the proposed consent discipline is appropriate under the

184. *Id.* at 854. Rule 1.7 is the basic conflict-of-interest rule. The version that was in effect at the time of the *Gore* decision was somewhat different from the current rule, but the differences are not material for purposes of this article.

185. *Id*. at 855. There was also evidence that Sanders was far from an unwilling participant in the sexual relationship with Gore. *Id*. at 855 n.4.

circumstances.[186]

The opinion states that Sanders "consented" to Gore's representation of her in the divorce matter while they were involved in a sexual relationship.[187] She was willing to allow her sexual partner to be her lawyer. There is no suggestion of "exploitation" by Gore. However, the opinion notes that Gore failed to advise Sanders of the potential conflict of interest involved in his representation of Sanders in the divorce case while he was involved in a sexual relationship with her.[188] What if he had advised her? More particularly, what if Gore, in compliance with the requirements of Rule 1.7, had advised her of the risk that the representation could be limited by his personal interest in the sexual relationship, and had obtained her consent to the representation?

In order to do this, Gore would have had to reasonably believe that the representation of Sanders in the divorce case would not have been adversely affected by his own interests. Would such a belief have been reasonable? There is reason to question that.[189] The sexual relationship with the lawyer might, for example, have complicated the divorce case, perhaps by providing some litigation advantages to a spouse who

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186. *Id.* at 856.

187. *Id.* at 854.

188. *Id.*

189. *See In re* Halverson, 998 P.2d 833 (Wash. 2000) (en banc), *abrogated on other grounds*, *In re* Anschell, 69 P.3d 844 (Wash. 2003) (en banc). In *Halverson*, the Washington Supreme Court considered whether it was reasonable for an attorney to believe that his representation of a client in a divorce would not be adversely affected by his later-arising sexual relationship with the client:

> It was not objectively reasonable for Halverson to believe that the representation would not be adversely affected by the sexual relationship, nor did Halverson disclose to Wickersham the risks involved or the material implications of the sexual relationship upon the dissolution proceeding. Consequently, Halverson's failure to obtain written consent was more than a mere technical violation of the rule.
>
> Halverson should have known that discovery of the affair could worsen the relationship between Wickersham and Sarles and, thus, unnecessarily complicate the dissolution proceeding. Further, Halverson should have known that the affair could impact the custody determination of Wickersham's daughter. Finally, Halverson should have known that discovery of the affair by his wife might lead to his withdrawal as Wickersham's attorney. Thus, Halverson's subjective belief that the relationship would not adversely affect the representation was not objectively reasonable.

Id. at 840.

discovered the relationship.[190] Moreover, in order to comply with the provisions of Rule 1.7, Sanders would also need to have given her informed consent, confirmed in writing, to the representation. Could she have done so? There is reason to question whether a client who becomes involved in a sexual relationship with a lawyer is fully capable of providing informed consent to the representation.[191] That might be especially true in a divorce situation, where the client might be regarded as "vulnerable." *Gore* does not attempt to provide answers to these "questions."

If Rule 1.8(j) had been in effect at the relevant time, the case likely would have proceeded differently. Gore would have violated the rule by entering into a sexual relationship with Sanders while he had an ongoing attorney-client relationship with her. He could not have entered into the sexual relationship with the informed consent of the client, because, as we have seen, Model Rule 1.8(j) is "non-consentable."

Later on, while the sexual relationship continued, and when Sanders asked Gore to take on her divorce case, other considerations would have come into play. As the court stated in its opinion in the case, the "relationship," meaning the sexual relationship, "had the potential to create a conflict of interest, especially in light of the fact that respondent

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190. *See, e.g.*, *id.*; Bd. of Pro. Resp. v. Knudsen, 444 P.3d 72 (Wyo. 2019) (client, with whom lawyer was having a sexual relationship, expressed anxiety that the sexual relationship, if discovered, would be detrimental to her divorce case); *In re* Fuerst, 157 So. 3d 569, 579 (La. 2014) (per curiam) (Knoll, J., concurring) ("Depending upon the stage of the underlying proceeding, the sexual relationship could raise fault issues and impair the former spouse's ability to seek support. By interjecting himself into the former client's personal life, the lawyer might be transformed into a witness in the proceeding. At the very least, the relationship might increase acrimony between the spouses and impact issues such as child support and property settlements.").

191. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 17 (AM. BAR ASS'N 1983) ("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."); *see also* Malinda L. Seymore*, Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 YALE J. L. & FEMINISM 175, 179 (2003) (noting the argument that there cannot be real consent in the unbalanced relationship between attorney and client); Awad, *supra* note 18, at 132–33 (saying that attorney-client relationship is inherently unequal and that in most cases, especially emotionally charged ones, it is unlikely that the client could give consent); Vincent, *supra* note 18, at 652–53 (suggesting some requirements for consent to be "informed").

was representing Ms. Sanders in connection with a divorce proceeding."[192] The court did not get into specifics; however, as suggested above, one of the risks of representing a client in a divorce case while the attorney and the client are involved in a sexual relationship is that the sexual relationship can create complications in the divorce case. Looking at this through the lens of Rule 1.7, Gore should have considered whether his representation of Sanders in her divorce case would have been materially limited by his personal interest in continuing the sexual relationship with her.

The foregoing discussion indicates that Model Rule 1.8(j) could have made a difference had it been in effect at the time of the *Gore* case. But it would not have made *all* the difference. There would still have been the potential conflict of interest in taking on the divorce case at the same time that the sexual relationship was going on. Rule 1.7 would still have been applicable. And it would have been violated, because Gore admitted that he had not advised Sanders about the potential conflict of interest.

iii. In re Ryland

Not every Louisiana case involving consensual sexual relationships between lawyers and clients has resulted in significant disciplinary sanctions. If the actual harm to the client is relatively minimal, even if the court concludes that the relationship involved a conflict of interest, the sanction could be relatively minimal. That was the outcome in *In re Ryland*,[193] a case in which the Louisiana Supreme Court imposed a fully deferred 90-day suspension on a lawyer who had entered into a consensual sexual relationship with a client and little or no actual harm had resulted.

Attorney Darrel Ryland represented Anita Gremillion in a domestic relations matter. The day after the judge signed a consent judgment as to child custody and support, but while the legal representation in the domestic matter continued, Ryland and Gremillion entered into a consensual sexual relationship. The affair lasted several months. When it ended, Ryland withdrew from his representation of Gremillion in the domestic matter. He self-reported to the ODC. Gremillion also filed a complaint with the ODC.

The ODC alleged that Ryland's conduct had violated Rule 1.7(a)(2), conflict of interest, and 8.4(a) violation of the Rules of Professional Conduct. Ryland admitted that his conduct had violated the rules. He also conceded that his misconduct had "presented a risk of potential harm to

192. *In re Gore*, 752 So. 2d at 856.

193. *In re* Ryland, 985 So. 2d 71 (La. 2008) (per curiam).

Ms. Gremillion."[194] However, the hearing committee concluded that "there was no clear and convincing evidence of any actual harm."[195] At the next level in the process, the disciplinary board

> found that respondent knowingly violated duties owed to his client by entering into a sexual relationship with her, which constitutes a prohibited conflict of interest. While there was potential for great harm to Ms. Gremillion in terms of custody, parental fitness, visitation, and community property, there is no evidence in the record that she suffered any actual harm due to her relationship with respondent.[196]

The Louisiana Supreme Court concluded that Ryland had "violated Rules 1.7 and 8.4(a) of the Rules of Professional Conduct," as the ODC had charged, "by engaging in a consensual sexual relationship with a client whom he was representing in a divorce matter."[197] It said that "[t]his conduct had the potential to cause harm" to the client.[198]

We should note two things about this conclusion. First, it is fairly narrowly focused in terms of the Rules of Professional Conduct. The court found that Ryland's consensual sexual relationship had created a conflict of interest under Rule 1.7. Rule 8.4(a) does not articulate an additional behavioral standard; it simply defines "professional misconduct" to include violations or attempted violations of the other rules. There was no discussion of Rule 2.1, on professional independence; Rule 8.4(d), on conduct prejudicial to the administration of justice; or Rule 8.4, for conduct that sexually exploited the client in a manner indicating that the lawyer was unworthy of the confidence reposed in him by his client. With respect to a consensual sexual relationship with a client that caused no actual harm, the focus was on the conflict of interest.

Second, the court's conclusion used a word formula that is different from the one we saw in *Gore*. In that case, the court had said that the sexual relationship "had the *potential* to create a conflict of interest."[199] In this case, the court said that entering into a sexual relationship with the client "*constitute[d]* a prohibited conflict of interest."[200] It appears that the court

194. *Id.* at 72.
195. *Id.*
196. *Id.* at 73.
197. *Id.* at 73–74.
198. *Id.* at 74.
199. *In re* Gore, 752 So. 2d 853, 856 (La. 2000) (per curiam) (emphasis added).
200. *In re Ryland*, 985 So. 2d at 73 (emphasis added).

considered the sexual relationship with the divorce client to be a conflict of interest per se.

The court then turned to the matter of the sanction. It considered some of its earlier cases involving lawyer sexual impropriety such as *Ashy*, *Schambach*, *Touchet*, *Gore*, and *DeFrancesch.* The court quoted from its opinion in *DeFrancesch,* giving emphasis to some of the words:

> Nonetheless, as we observed in *Ashy*, the particular evil that results from a lawyer's sexual relationship with a client is the loss of emotional detachment which in turn threatens the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment. . . . The potential for harm which results whenever a lawyer allows his personal interests to conflict with his client's interests is so great that any such violation must be viewed as being very serious, *even if actual harm is not readily identifiable*. The baseline sanction for this misconduct is a suspension from the practice of law.[201]

When we encountered this language earlier, we noted that it seems to incorporate a misconduct-per-se element. The language indicates that the particular evil *results* from a lawyer's sexual relationship with the client. In the present context, the court emphasized the seriousness of the resulting violation. The violation, it said, "must be viewed as being very serious." Nonetheless, the sanction that the court imposed in *Ryland* was not all that severe:

> Based upon this jurisprudence, we find that the fully deferred suspension recommended in this matter is appropriate. Like the respondent in *Gore*, respondent did not cause actual harm to his client as a result of their sexual relationship, nor did he threaten to limit his efforts on her behalf unless she agreed to the sexual relationship. However, this case does not involve the additional misconduct seen in *Gore*, and thus does not warrant the period of actual suspension we imposed in that case.[202]

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201. *Id*. at 75–76 (citations omitted).

202. *Id.* at 76. The court ordered a conditional, fully deferred 90-day suspension. In *Gore*, the sanction had been a six-month suspension, followed by two years of supervised probation. The "additional misconduct" in *Gore* was probably Gore's admitted violation of Rule 1.3 for not having been more diligent in investigating factual representations made by his client. *See In re Gore*, 752 So. 2d at 854.

If Model Rule 1.8(j) had been in effect at the time of the *Ryland* case, Ryland would have violated it. He admitted that he had had sexual relations with a client. However, the application of the rule likely would not have yielded a different outcome. After all, the court in *Ryland* concluded that, by entering into a sexual relationship with his client, Ryland had engaged in a conflict of interest. Model Rule 1.8(j) is a conflict-of-interest rule. And the court in *Ryland* referred to its earlier teaching in *DeFrancesch* about the need to view the violation as "very serious, even if actual harm is not readily identifiable."[203] A serious conflict of interest is likely the same conclusion that would have resulted from a violation of Rule 1.8(j).

iv. In re Yokum

In 2012, the Louisiana Supreme Court considered *In re Yokum*,[204] a case in which the ODC had charged attorney Leonard Yokum with several counts of misconduct, including misconduct related to a sexual relationship with a client. According to the opinion, Yokum began a consensual sexual relationship with client Angela Spiers while he continued to provide legal services to her and to Extreme Auto Mart, Inc., a corporation in which both Yokum and Spiers had interests. Based on this, the ODC charged Yokum with violating Rule 1.7(a), the basic conflict of interest rule. The hearing committee, in a finding that was cited with apparent approval in the opinion, said that "[t]he relationship with Ms. Spiers not only created apparent conflicts of interest between respondent and her, it permitted Ms. Spiers to become deeply involved in the daily operation of respondent's law practice and adversely affected a number of his other professional relationships."[205]

The opinion states, with respect to Spiers's impact on Yokum's law practice, that

> perhaps the most significant evidence of Ms. Spiers' impact on respondent's law practice is seen in Count IX. In that matter, respondent induced Mr. Delaney, in his capacity as the executor of his sister's succession, not only to "invest" in Extreme Auto Mart but also to loan a substantial amount of money to Ms. Spiers so that she could purchase a residence in Mississippi. Respondent's principal motivation for this transaction was to get Ms. Spiers out of his life after their relationship soured; it had

203. *In re Ryland*, 985 So. 2d at 75 (emphasis removed).
204. *In re* Yokum, 85 So. 3d 645 (La. 2012) (per curiam).
205. *Id.* at 655.

nothing to do with Mr. Delaney's best interests.[206]

The ODC alleged, among other things, that Yokum had thereby again violated Rule 1.7(a), and had violated Rule 1.8(a), the rule on business transactions with clients, as well. The hearing committee concluded, in a finding cited with apparent approval by the Louisiana Supreme Court, that Yokum had "used his fiduciary relationship with Mr. Delaney to foster his own personal motives, failed to disclose the romantic and business relationship he had with Ms. Spiers, and, thus, misled Mr. Delaney into loaning money to Ms. Spiers' business and to purchase the real estate in Mississippi."[207] As it turned out, Spiers defaulted on these obligations "fairly quickly."[208]

Although the hearing committee generally agreed with Yokum's claim that his sexual relationship with Spiers had not adversely affected his independent judgment in advising her in her personal legal affairs or those of Extreme Auto Mart, that did not eliminate the conflict of interest. In a footnote that cited the *Ryland* case, the Louisiana Supreme Court observed "that in prior cases, this court has held that a violation of Rule 1.7 occurs when a lawyer engages in a consensual sexual relationship with a client, regardless of whether the conflict of interest caused actual harm to the client."[209] In this instance, the relationship with Spiers had led to problems, like the transactions with Delaney. For the various acts of misconduct described in the opinion, the court ordered a three-year suspension.

The *Yokum* case does not reflect any new developments in the Louisiana Supreme Court's approach to consensual sexual relationship cases. Instead, it confirms the important teaching of *In re Ryland* that a consensual sexual relationship results in a conflict of interest. It also demonstrates how a consensual sexual relationship between a lawyer and a client can result in problems for clients other than the one involved in the relationship.

v. In re Martin

The most recent of the consensual-sexual-relationship-with-client cases is *In re Martin*.[210] There, Shelley Martin represented a client identified as "M.S." and her husband "W.S" in farming and business

206. *Id.* at 656.
207. *Id.* at 658.
208. *Id.*
209. *Id.* at 656 n.8 (citing *In re* Ryland, 985 So. 2d 71 (La. 2008) (per curiam)).
210. *In re* Martin, 252 So. 3d 867 (La. 2018) (per curiam).

matters. During the representation, Martin "commenced a sexual relationship with W.S. and introduced him to the drug culture in which she was engaged."[211] According to the reported opinion, Martin's conduct "resulted in the acrimonious divorce of M.S. and W.S."[212] In subsequent disciplinary proceedings, the ODC alleged that Martin's conduct, as described above, had violated Rules 1.7 and 8.4(a).[213] These are the same rules that were relevant in *Ryland.*

Martin was engaged in other instances of misconduct as well, some of them criminally related. One of these arose out of an arrest after Martin and W.S. had been "caught by police in a bathroom of the Lamar Dixon Center in possession of cocaine, crack cocaine, and a crack pipe."[214] Based on this event, the ODC charged Martin with violations of Rules 8.4(a), for violating the Rules of Professional Conduct; 8.4(b), for commission of a criminal act; and 8.4(d), for conduct prejudicial to the administration of justice.[215]

Martin did not answer the formal charges, so the ODC's factual allegations were deemed admitted. The Louisiana Supreme Court concluded that the record supported a finding that Martin had committed various acts of misconduct, including engaging in a sexual relationship with a client.[216] It ordered disbarment.

Although the court clearly considered Martin's sexual relationship with the client to be disciplinable, it did not discuss the issue in any detail. By this point in the development of the Louisiana sexual misconduct cases, perhaps there was little need to have done so.

vi. Consent Discipline Cases and an Operative Louisiana "Rule"

In addition to the consensual sexual relationship cases discussed above, and *In re Fuerst*,[217] which will be discussed in the next section of this Article, in recent years there have been several "consent discipline"[218] cases in which the Louisiana Supreme Court disciplined Louisiana lawyers for entering into consensual sexual relationships with clients.

211. *Id.* at 869.
212. *Id.*
213. *Id.*
214. *Id.* at 870.
215. *Id.*
216. *Id.* at 872.
217. *In re* Fuerst, 157 So. 3d 569 (La. 2014) (per curiam).
218. These are cases in which the ODC and the attorney file a joint motion that includes, among other things, stipulations of fact, conditional admission of rules violated, and the agreed-upon discipline. *See* LA. SUP. CT. R. XIX, § 20 (2019).

Because these cases are very brief and do not discuss the sexual misconduct of the lawyers in any detail, there is no need to discuss them individually. However, there are nonetheless some things to note about them.

The cases in question were decided from 2004 through 2014. In the five most recent consent discipline cases, each lawyer admitted to having engaged in a conflict of interest after the ODC had commenced an investigation into allegations that the lawyer had entered into a consensual sexual relationship with a client.[219] In the sixth and earliest of the cases, the attorney and the ODC submitted a joint petition for consent discipline after the ODC had commenced an investigation into allegations that the lawyer had engaged in a sexual relationship with a client, had prepared a will for a client naming the lawyer's wife as a legatee, and had engaged in other conflicts of interest.[220]

The five most recent consent discipline cases confirm that the current disciplinary landscape is considerably different than it was prior to the *Gore* decision in 2000. We should recall that, in *Gore*, the ODC initially did not seek formal discipline against the attorney, "concluding that an attorney/client relationship of a sexual nature, standing alone, did not violate any existing rule of professional conduct in Louisiana."[221] A few years later, in *Ryland*, the court said the attorney had "violated Rules 1.7 and 8.4(a) of the Rules of Professional Conduct by engaging in a consensual sexual relationship with a client whom he was representing in a divorce matter."[222] Thereafter, the *Yokum* decision confirmed the essential teaching of *Ryland* that a consensual sexual relationship with a client results in a conflict of interest. In addition, in the five most recent consent discipline cases, one of which[223] the court decided two years before

219. *See In re* Kendig, 140 So. 3d 1165 (La. 2014) (per curiam); *In re* Becnel, 99 So. 3d 1005 (La. 2012) (per curiam); *In re* Adams, 23 So. 3d 894 (La. 2009) (per curiam); *In re* Prendergast, 23 So. 3d 894 (La. 2009) (per curiam); *In re* Boellert, 926 So. 2d 492 (La. 2006) (per curiam). In *In re Boellert*, the lawyer also admitted to a violation of Rule 2.1. *In re Boellert* 926 So. 2d 492.

220. *In re* Fadaol, 873 So. 2d 649 (La. 2004) (per curiam). There have also been a couple of cases in which attorneys submitted petitions for permanent resignation from the practice of law, in lieu of discipline, after the ODC had commenced investigations into allegations that they had entered into sexual relationships with clients. *See In re* Stewart, 253 So. 3d 1275 (La. 2018); *In re* Karam, 872 So. 2d 466 (La. 2004) (there were additional allegations of misconduct in *Karam*).

221. *In re* Gore, 752 So. 2d 853, 855 n.2 (La. 2000) (per curiam).

222. *In re* Ryland, 985 So. 2d 71, 73–74 (La. 2008) (per curiam).

223. *In re Boellert*, 926 So. 2d 492.

Ryland, the court did not even engage in a discussion of the problems associated with consensual sexual relationships between lawyers and their clients. After the ODC began its investigation, the lawyers in those cases were willing to stipulate that they had engaged in a conflict of interest. As a practical matter, it could be said, based on these consent discipline cases, and on *Ryland* and *Yokum*, that the operative "rule" in Louisiana is that lawyers who engage in consensual sexual relationships with clients thereby engage in a conflict of interest. That is the same outcome that we would expect to see from an application of Model Rule 1.8(j), which is itself a conflict of interest rule.

The conflict of interest articulated in Model Rule 1.8(j) is non-consentable. If the operative rule in Louisiana is indeed the one described in the foregoing paragraph, does it include that concept? Or, looking at the issue in reverse, could a Louisiana lawyer who proposes to establish a consensual sexual relationship with a client avoid discipline by making pertinent disclosures, obtaining the informed consent of the client, and otherwise satisfying the requirements of Rule 1.7(b)? That is not yet clear. In *Gore,* the Louisiana Supreme Court referred to the attorney's failure to make disclosures to his client as being problematic, which could indicate that the conflict was consentable. However, the court did not bring this up in *Ryland* or mention it in the consent discipline cases. In the next case that we will take up, *In re Fuerst*,[224] Justice Knoll wrote, in concurrence, that "[w]hen a sexual relationship arises during the course of the representation, immediate termination of the attorney-client relationship is a mandatory step in ameliorating the harm to the client's legal interests."[225] To the extent that Justice Knoll's view were to prevail, it would seem to leave little room for the notion that a Louisiana lawyer who proposes to undertake a consensual sexual relationship with a client could avoid a conflict of interest by obtaining the informed consent of the client.

224. *In re* Fuerst, 157 So. 3d 569 (La. 2014) (per curiam).

225. *Id.* at 578. *Cf.* Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 268 (5th Cir. 2001). The attorney who had been involved in a consensual sexual relationship with a client was later subject to a motion for disqualification in litigation on behalf of the client; the court rejected the motion, noting that the sexual relationship had ended before the litigation began, and that the client had consented to the representation after full disclosure. The court said that "[p]rior sexual relationships do not give rise to the type of ethical violation requiring disqualification under the rules." *Id.*

c. Prospective Clients, Former Clients, and Imputed Disqualification

Previously, in the consensual-sexual-relationship category of cases, this Article has discussed cases involving sexual relationships with nonclients and sexual relationships with clients. In contrast, *In re Fuerst*[226] considers whether Louisiana lawyers can be disciplined for having consensual sexual relationships with prospective clients and former clients. It also considers whether a conflict of interest arising out of a consensual sexual relationship with a client should be imputed to the other lawyers at the firm.

According to the reported decision, attorney Randy Fuerst, a family law practitioner, had "consensual sexual relationships with six women who had at one time either retained his services or consulted with him regarding their divorce cases. With one exception, these sexual relationships did not occur while the attorney-client relationship was ongoing."[227] The ODC filed formal charges, alleging that Fuerst's

> relationships violated the following provisions of the Rules of Professional Conduct: Rules 1.7(a)(2) (a lawyer shall not represent a client if the representation involves a concurrent conflict of interest wherein there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or third person, or by a personal interest of the lawyer), 1.8(b) (a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent), 1.10 (imputation of conflicts of interest), 2.1 (in representing a client, a lawyer shall exercise independent professional judgment and render candid advice), and 8.4(d) (conduct prejudicial to the administration of justice).[228]

The hearing committee and the disciplinary board both concluded that Fuerst had engaged in misconduct only with respect to one of the individuals, a person identified as "MRW." Fuerst had represented her in divorce proceedings. According to the reported opinion, after the representation had commenced, and "[d]uring the six-month waiting period to file the rule to show cause why the divorce should not be granted,

226. *In re Fuerst*, 157 So. 3d 569.
227. *Id.* at 571.
228. *Id.* at 572.

respondent and MRW engaged in a sexual relationship."[229] Since MRW was a client at the relevant time, the hearing committee concluded that Fuerst had violated Rules 1.7(a) and 8.4(d). The disciplinary board agreed but found that Fuerst had violated Rule 2.1 as well. Although the client had not been actually harmed by the relationship with Fuerst, the board indicated that the "the risk for harm was great."[230] In light of the decisions this Article considered earlier, these outcomes are not surprising. The only element that seems to depart somewhat from recent Louisiana jurisprudential treatment is the conclusion that Fuerst had violated Rule 8.4(d), the rule about conduct prejudicial to the administration of justice. The court had articulated that theory of misconduct in *Ashy*.[231] But, as this Article has discussed, it did not receive much attention in later Louisiana sexual misconduct cases.[232]

When the case came before the Louisiana Supreme Court, it concluded that the evidence supported the finding of the hearing committee and the disciplinary board that Fuerst had "committed attorney misconduct by engaging in a sexual relationship with a current client, MRW."[233] The court did not cite any of the Rules of Professional Conduct with respect to this conclusion.

However, the ODC contended that Fuerst had engaged in additional acts of misconduct. In particular, the ODC argued that "the ethical prohibitions against attorney-client sexual relationships should be extended to former clients, and should likewise apply in instances in which the lawyer has been consulted by a prospective client but no attorney-client relationship is ultimately formed."[234] The court characterized this as a matter of first impression. After considering the ODC's contention, the court ended up rejecting it, stating, without further elaboration, "We find

229. *Id.* at 571. There is language in the opinion that suggests that the initial sexual encounter between Fuerst and MRW might have alone been enough to have violated the rules, at least in the view of the hearing committee. *Id.* at 573–74. However, the Louisiana Supreme Court did not discuss that in its opinion; it referred to the "sexual relationship" between MRW and Fuerst. *Id*. at 571. For its part, the disciplinary board had noted, in its opinion, that the sexual relationship had gone on for "about four months." *See In re* Fuerst, 12-DB-042, p. 8 (La. Atty. Disc. Bd. 2014), https://www.ladb.org/DR/Default.aspx?DocID=8179&TAB=search&lname=fuerst [https://perma.cc/87PS-QWBK].

230. *In re Fuerst*, 157 So. 3d at 576.

231. *See In re* Ashy, 721 So. 2d 859, 867–68 (La. 1998).

232. Justice Weimer also referenced Rule 8.4(d) in his concurring opinion in *Fuerst*. *See In re Fuerst*, 157 So. 3d at 579–80 (Weimer, J., concurring).

233. *Id.* at 577.

234. *Id.*

no support for this position in the Rules of Professional Conduct."[235] It concluded, then, that Fuerst had not engaged in professional misconduct by having consensual sexual relationships with persons who were either prospective or former clients.

Two justices of the Louisiana Supreme Court saw things differently. Justice Knoll and Justice Weimer concurred in the ultimate result in the case,[236] but they were of the view that a consensual sexual relationship with a former client was problematic, or at least that it could be. In her concurring opinion, Justice Knoll said, among other things:

> When a sexual relationship arises during the course of the representation, immediate termination of the attorney-client relationship is a mandatory step in ameliorating the harm to the client's legal interests. However, termination does not entirely eliminate the lawyer's ethical obligations to his now former client. Rather, as shown by Rule 1.9, an attorney has continuing duties toward former clients which do not cease merely because the professional relationship has ended.[237]

Articulating a broad notion of the duties of an attorney to a former client, Justice Knoll said that "the attorney must continue to act in a way so as not to actively harm the former client's best interests even after the professional relationship ceases."[238] As applied to the present case, she said that Fuerst

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235. *Id.*

236. The result was a six-month suspension, with three months conditionally deferred.

237. *Id.* at 578. As this Article previously noted, when discussing *Ryland*, Justice Knoll seems to have been of the view that immediate termination of the attorney-client relationship is required when a sexual relationship arises during the course of the representation.

238. *Id.* at 579. This expression of a lawyer's duty to a former client is broader than the one set forth in Rule 1.9 itself. The Rules of Professional Conduct treat former clients differently than current clients. For example, Rule 1.7, which deals with conflicts of interest, and Rule 2.1, which requires independent professional judgment, have been relevant to a number of the Louisiana sexual misconduct cases we have considered. However, both of those rules articulate duties owed to "clients." Rule 1.9, on the other hand, is a rule that articulates duties owed to "former clients." Setting aside aspects of Rule 1.9 that deal with lawyers who move from one law firm to another, Rule 1.9 incorporates three main prohibitions: (1) a prohibition against using information relating to the representation of the former client to the disadvantage of the former client; (2) a prohibition against revealing information relating to the representation of the former client; and (3) a prohibition against representing another person in the same matter that was

> had a duty to refrain from entering into a sexual relationship with his former clients until the underlying proceedings are concluded. By failing to do so, respondent has placed his personal interests ahead of his professional obligations. He has potentially jeopardized his clients' legal matters and burdened them by forcing them to find new legal representation.[239]

Justice Weimer agreed. But he also said that

> an attorney's duty to refrain from entering into a sexual relationship with a former client stems from the prohibition against conduct prejudicial to the administration of justice, as described in Rule 8.4(d). This duty would terminate when the underlying proceedings are concluded or when the sexual relationship would pose no adverse legal consequences to the client.[240]

This is an expansive understanding of Rule 8.4(d),[241] one that apparently was not shared by the majority in *Fuerst*.

Returning to the majority opinion in *Fuerst*, we should note something else about the court's discussion of the prospective-client and former-client issues. As phrased by the court, the question was whether "the ethical prohibitions against attorney-client sexual relationships should be extended to former clients, and should likewise apply in instances in which the lawyer has been consulted by a prospective client but no attorney-client relationship is ultimately formed."[242] It seems significant that the court

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involved in the representation of the former client, or in a matter substantially related to it, when the interests of the other person and the former client are materially adverse. *See* LA. RULES OF PRO. CONDUCT r. 1.9 (2018). The third prohibition, which can be considered a conflict of interest prohibition, is much narrower than the conflict of interest prohibitions in Rule 1.7.

239. *In re Fuerst*, 157 So. 3d at 579 (Knoll, J., concurring).

240. *Id.*

241. Justice Weimer added:

> [T]he proscription against conduct that is prejudicial to the administration of justice most often applies to litigation-related misconduct. *Louisiana State Bar Ass'n v. Harrington*, 585 So.2d 514, 520 n.4 (La.1990) (citing examples). However, Rule 8.4(d) also reaches conduct that is uncivil, undignified, or unprofessional, regardless of whether it is directly connected to a legal proceeding.

Id. at 579–80. This Article mentioned some problems with this view of Rule 8.4(d) in *supra* note 117.

242. *In re Fuerst*, 157 So. 3d at 577.

referred to "the ethical *prohibitions* against attorney-client sexual relationships."[243] The expression seems to confirm something that we mentioned earlier: by this point in the development of Louisiana sexual misconduct cases, the Louisiana Supreme Court had come to see sexual relationships between attorneys and clients as being subject to "prohibitions."[244]

There was another issue in *Fuerst*: imputed disqualification. Fuerst filed a divorce petition on behalf of a person identified in the opinion as "MLDG." After the attorney-client relationship had commenced, MLDG expressed an interest in dating Fuerst. He told her that he could not date a client. She responded by informing Fuerst that she would obtain another attorney. Fuerst referred her to another lawyer in the firm with which Fuerst was associated—in an "of counsel" capacity—and filed a motion to withdraw. After Fuerst had withdrawn, Fuerst and MLDG commenced a consensual sexual relationship that persisted for several years. In the later disciplinary proceedings, MLDG testified that her relationship with Fuerst had been "positive and beneficial to her."[245]

The Louisiana Supreme Court concluded that the sexual relationship between Fuerst and MLDG gave rise to an imputed conflict of interest under Rule 1.10. This is a rule that provides, among other things:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.[246]

The court said this about the application of the rule:

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243. *Id.* (emphasis added).

244. This is not necessarily the same as saying that all sexual relationships between attorneys and their clients are prohibited. For example, the court has not indicated that it would violate professional standards for a lawyer to represent his or her own spouse in legal matters. If that issue were to arise, it is possible that the court would conclude, as did the drafters of Model Rule 1.8(j), that the prohibition against sexual relations with clients should not apply to pre-existing sexual relationships. However, it possible for a lawyer who represents the lawyer's spouse to have a conflict of interest. The issue is discussed in *infra* text accompanying note 281.

245. *In re Fuerst*, 157 So. 3d at 574.

246. LA. RULES OF PRO. CONDUCT r. 1.10(a) (2018).

> Although respondent's sexual relationship with MLDG does not constitute misconduct [presumably because the client terminated his representation of her before commencing the sexual relationship with him], we do find that he violated Rule 1.10 by referring her legal matter to another lawyer in the law firm with which he was associated as "Of Counsel." A lawyer who is "Of Counsel" to a law firm is considered to be a member of the firm for purposes of analyzing imputed disqualification questions . . . . After respondent was discharged by MLDG, he was required to refer her divorce case to a lawyer outside his law firm prior to the time that he became involved in a personal relationship with her.[247]

The court thought that Fuerst's sexual relationship with MLDG gave rise to a conflict of interest that was imputed to the other lawyers at the firm. In terms of the language of Rule 1.10 itself, the analysis would appear to go something like this: Fuerst, practicing alone, would have been prohibited from representing MLDG in the divorce case at the same time that he was having a sexual relationship with her; because he would have been prohibited from so representing her, the other lawyers in the firm were also prohibited from "knowingly" representing her during the pendency of the sexual relationship between Fuerst and MLDG; therefore, Fuerst should not have referred the matter to another lawyer in the firm.

This seems like a rather dubious conclusion in light of the actual language of Rule 1.10(a), quoted above. It is reasonable enough to conclude that a sexual relationship with a client gives rise to a conflict of interest under Rule 1.7. Several Louisiana decisions, including *In re Ryland,* have said so. The problem with the court's analysis is that it does not consider the exception mentioned in the rule. That is, it does not deal with the portion of Rule 1.10(a) that states: "unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."[248] If anything counts as a "personal interest" of the lawyer, a sexual relationship between the lawyer and another person would seem to qualify. If that is so, there would be no conflict of interest to impute to the firm unless the "personal interest . . . present[s] a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."[249] As applied to *Fuerst*, the question would be whether there was a significant

247. *In re Fuerst*, 157 So. 3d at 577.
248. LA. RULES OF PRO. CONDUCT r. 1.10(a) (2018).
249. *Id.*

risk that Fuerst's sexual relationship with MLDG would materially limit the work of other firm lawyers on MLDG's divorce case. If there was such a risk, it is not identified in the opinion. In the absence of such a risk, there should have been no imputed disqualification.[250]

Nonetheless, the court concluded that there had been a violation of Rule 1.10, and that Fuerst had violated it. In light of that, and the separate conflict of interest involving MRW, the court ordered a six-month suspension, three months deferred, on condition that Fuerst engage in no additional misconduct.

If the imputed disqualification issue in *Fuerst* had arisen under the Model Rules of Professional Conduct, instead of under the Louisiana Rules of Professional Conduct, the imputed disqualification issue would have been handled differently. That issue, at least in the first instance, would have been dealt with under Model Rule 1.8(k), which states, "While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them."[251] The imputation cuts off at subpart (i) of Model Rule 1.8; that is, it does not pick up the prohibition against sexual relations with clients found in subpart (j) of Model Rule 1.8. On this point, a comment to Model Rule 1.8 states: "The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers."[252] In *Fuerst*, the Louisiana Supreme Court came to the opposite conclusion.

There is one other matter to mention. Fuerst told his client, MLDG, that he could not date a client, so MLDG elected to terminate the lawyer-client relationship with him in order to engage in a sexual relationship with him. Assuming that the actions taken by Fuerst and MLDG had been sufficient to make MLDG a former client, and assuming that Fuerst had

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250. An imputation rule for sexual relationships could be somewhat unwieldy. Would lawyers be expected to enter information about their sexual relationships into the conflicts database for their law firms? *See* Moss & Chamblin, *supra* note 20, at 51. On the other hand, it has been argued that imputation could be helpful in some instances. *See* Vincent, *supra* note 18, at 679; *see also* Alberto Bernabe, *Coming Soon to a Law Practice Near You: The New (and Improved?) Illinois Rules of Professional Conduct*, 39 LOY. U. CHI. L. J. 691, 716–17 (2008) (arguing that "problems arise regardless of whether the rule imputes the conflict to the firm").

251. MODEL RULES OF PRO. CONDUCT r. 1.8(k) (AM. BAR ASS'N 1983).

252. *Id.* r. 1.8 cmt. 20. It should be noted, though, that the ABA Model Rules include the same imputed disqualification concept in Model Rule 1.10(a) that is found in Louisiana Rule 1.10(a). If there were to be a situation in which the sexual relationship between a law firm lawyer and a law firm client could "present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm," an imputation of the sexual-relationship conflict of interest might be imputed under that rule.

not referred her to another lawyer in his law firm—and thus had avoided the imputed disqualification problem addressed by the court—then, absent other factors, it appears that Fuerst would have been able to engage in the sexual relationship with MLDG without running afoul of professional standards. As mentioned earlier, the court concluded that "the ethical prohibitions against attorney-client sexual relationships" did not extend to former clients.[253] More to the point, the court actually said that Fuerst's sexual relationship with MLDG did "not constitute misconduct."[254] If Model Rule 1.8(j) had been in effect in Louisiana at the relevant time, it appears that Fuerst could have been able to avoid a Rule 1.8(j) violation by ending the attorney-client relationship before commencing the sexual relationship. Model Rule 1.8(j), by its terms, refers to clients. It is part of Model Rule 1.8, the title of which is "Conflict of Interest: Current Clients: Specific Rules".[255] Former clients are covered by another rule.[256] So this likely would have worked under the Model Rules, as well.[257]

III. SHOULD LOUISIANA RECONSIDER ADOPTION OF MODEL RULE 1.8(J)?

Louisiana lawyers have been subject to professional discipline for a variety of sexually related conduct. As discussed in the foregoing sections of this Article, the Louisiana Supreme Court has disciplined them for: (1) engaging in criminally related sexual conduct, regardless of whether the victims were clients or nonclients; (2) sexually harassing a client or a nonclient; (3) attempting to coerce a client into providing sexual favors or

253. *In re* Fuerst, 157 So. 3d 569, 577 (La. 2014) (per curiam).

254. *Id.*

255. MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 1983). The Louisiana version of Rule 1.8 has the same title. *See* LA. RULES OF PRO. CONDUCT r. 1.8 (2018).

256. *See* LA. RULES OF PRO. CONDUCT r. 1.9 (2018).

257. Some commentators have suggested that this would have been permissible. *See* Awad, *supra* note 18, at 191 (arguing that states "should adopt express rules that prohibit attorney-client sexual relations during representation"; if such a rule is in place, an attorney who wishes to enter into a romantic or sexual relationship with a client, need only "refer the client to a colleague or other attorney before commencing the romantic or sexual relationship"); Livingston, *supra* note 20, at 63 (arguing that the rules should prohibit lawyers from initiating sexual relationships with clients during the period of representation; however, "[i]f both parties wish to pursue a sexual relationship immediately, lawyers can arrange for competent substitute counsel and can end the professional relationship").

attempting to engage in sexual relations with the client; and (4) entering into a consensual sexual relationship with a client.

Although Louisiana lawyers are generally not subject to discipline for having consensual sexual relationships with prospective clients or former clients, according to *Fuerst*, they are apparently subject to discipline under an imputed disqualification theory if they terminate representation of a client, arrange to have the client represented by another lawyer in the same law firm, and then commence a consensual sexual relationship with the person the lawyer used to represent.

In *In re Bordelon*,[258] a lawyer's sexually related conduct did not give rise to a violation of professional standards. The attorney in that case had a consensual sexual relationship with a nonclient.[259] In all of the other cases this Article has discussed, the lawyer's sexually related conduct gave rise to violations of applicable professional standards, on one theory or another.

Given this state of affairs, we might renew the question that was asked, and answered in the negative, in connection with the work of the Louisiana Ethics 2000 Committee: Should the Louisiana Rules of Professional Conduct be amended to incorporate Model Rule 1.8(j)?[260] One way to begin to answer that question would be to consider whether the sexual misconduct cases we have considered might have come out differently if Rule 1.8(j) had been in place at the relevant time.

A. Would Model Rule 1.8(j) Have Made a Difference in Louisiana's Sexual Misconduct Cases?

The criminal cases involving lawyer sexual misconduct almost certainly would not have been decided differently if Model Rule 1.8(j) had been in place at the time. In the first place, most of the criminal cases involved victims who were nonclients. Because Model Rule 1.8(j) focuses on sexual relations with clients, it simply would not have been applicable to most of them. However, in *In re Hammond*, the lawyer did engage, directly or indirectly, in sexually related acts involving some clients, and

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258. *In re* Bordelon, 894 So. 2d 315 (La. 2005) (per curiam).

259. *Id.* The court did not discipline the attorney for the sexual relationship with the nonclient, but the court did discipline the attorney for making false statements in the disciplinary proceedings regarding the payment of a loan.

260. The timing might be good. One commentator recently stated: "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." Baker, *supra* note 4, at 245.

the Louisiana Supreme Court permanently disbarred him. Depending on the definition of "sexual relations", the attorney's sexual assaults on his clients could have been found to violate Rule 1.8(j). However, the serious criminality of Hammond's sexually related conduct would probably have been the main focus of attention. And there is no professional sanction more severe than the one that the court imposed.

Some of the noncriminal cases discussed earlier could be considered sexual harassment cases. In a couple of those cases, the Louisiana Supreme Court disciplined lawyers for engaging in sexual harassment of nonclients. Inasmuch as Rule 1.8(j) deals with sexual relations with clients, it would not have applied to them.

This Article also discussed instances in which lawyers were subject to professional discipline for engaging in sexual harassment of clients. For example, in *In re Ashy,*[261] the lawyer made sexually related comments to his client and attempted to coerce her into having sexual relations with him. The Louisiana Supreme Court concluded that the attorney had violated Rules 1.7, 2.1, and 8.4. If Model Rule 1.8(j) had been in effect at the time, the Louisiana Supreme Court might have concluded that Ashy had *attempted* to violate that rule by attempting to have sexual relations with his client, thereby running afoul of Rule 8.4(a), which prohibits lawyers from attempting to violate one of the Rules of Professional Conduct. This would have been an indirect application of Rule 1.8(j). But it is not likely that the outcome would have been different in that case, given the court's serious treatment of the sexual misconduct issue and its conclusion that the lawyer's sexually related conduct had violated several rules.

The other sexual harassment case that is relevant here is *In re Johnson.*[262] There, the lawyer showed his client "lewd photographs" and made "suggestive sexual comments to her." The court characterized the lawyer's conduct as involving a conflict of interest. The reported decision does not detail the content of the "comments." But if they did not involve a request for sexual favors or an attempt to get them, it is unlikely that Model Rule 1.8(j) would have been applicable, even indirectly. However, even if the facts could have supported an indirect application of the rule, it is not likely that the end result would have been different. *In re Johnson* was a reciprocal discipline case, and the usual outcome is to impose the same discipline as in the first jurisdiction.[263]

261. *In re* Ashy, 721 So. 2d 859 (La. 1999) (per curiam).
262. *In re* Johnson, 177 So. 3d 116 (La. 2015) (per curiam).
263. *See id.* at 119.

This Article considered additional noncriminal cases in which lawyers tried, apparently unsuccessfully, to coerce their clients into providing sexual favors or into having sexual relations. If Rule 1.8(j) had been in effect, those cases might have been analyzed differently. As noted above with respect to *Ashy*, instead of, or in addition to, finding a conflict of interest under Rule 1.7 or an impairment of the lawyer's professional judgment under Rule 2.1, the Louisiana Supreme Court might have found that the lawyers had attempted to violate Rule 1.8(j) and had thereby violated Rule 8.4(a). Nonetheless, it seems unlikely that the court would have considered the lawyers' misconduct to have been more reprehensible, or more deserving of serious discipline, than the court actually did in those cases.

Model Rule 1.8(j) would not have applied to *In re Bordelon*,[264] the case in which an attorney had a consensual sexual relationship with a nonclient. The rule's prohibition against sexual relations is limited to clients.

The cases in which lawyers did enter into consensual sexual relationships with clients are cases to which Model Rule 1.8(j) would have been applicable, if it had been in effect at the relevant time. In these cases, the court could simply have concluded that the lawyers had engaged in sexual relations with clients and had thereby violated the clear prohibition of the rule. The court would not have needed to refer to other rules, at least for the sexual misconduct elements of those cases.[265] However, as we saw when discussing the consensual sexual relationship with client cases, the court was able to discipline the lawyers under existing rules. So, while the analysis in these cases likely would have been different if Model Rule 1.8(j) had been in place, it is not obvious that application of the rule would have yielded different outcomes in the end.

In re Fuerst, the one Louisiana case in which the court disciplined a lawyer under an imputed disqualification theory for sexually related conduct, could have been decided differently—on the imputed disqualification issue—if, in adopting Model Rule 1.8(j), the court would also have adopted the language from Model Rule 1.8(k) indicating that conflicts of interest arising under Model Rule 1.8(j) are not imputed to other lawyers at the firm. Absent other factors, the application of that language likely would have led to the conclusion that Fuerst did not violate

264. *In re* Bordelon, 894 So. 2d 315 (La. 2005) (per curiam).

265. Whether the sanctions would have been different is a different question. For now, we should simply note that once a lawyer is found to have committed a violation of one of the Rules of Professional Conduct, a number of factors can be relevant to the determination of the appropriate sanction. *See* LA. SUP. CT. R. XIX §10(C) (2019) (factors to be considered in imposing sanctions).

the Rules of Professional Conduct by entering into a sexual relationship with a client he had previously referred to another lawyer in the firm. However, inasmuch as the court also disciplined Fuerst for entering into a sexual relationship with another client, while she continued to be a client, it is not obvious that the disciplinary outcome would have been different in the end.

The other teaching of the *Fuerst* case—that prohibitions against sexual relationships between lawyers and clients do not apply to former clients or prospective clients—likely would have come out the same way, because Model Rule 1.8(j) does not say anything about sexual relationships with former clients or prospective clients, and the title to Model Rule 1.8 is "Conflict of Interest: Current Clients: Specific Rules."[266]

This exercise of attempting to discern whether adoption of Model Rule 1.8(j) would have made a difference in the decided Louisiana sexual misconduct cases does not, by itself, indicate that the case for adoption is a particularly compelling one. However, there are some additional considerations. Some of these suggest the wisdom of adopting Model Rule 1.8(j). Others suggest the reverse.

B. Additional Considerations

1. Considerations in Favor of Adoption

The reported Louisiana sexual misconduct cases do not deal with all of the issues relating to lawyer sexual misconduct involving clients. There are additional issues that have not yet arisen for which Model Rule 1.8(j) could offer some assistance. One of these is whether a Louisiana lawyer could have a conflict of interest in representing the lawyer's own spouse, or another person with whom the lawyer already has a committed sexual relationship.[267] Model Rule 1.8(j) expressly excludes pre-existing existing sexual relationships from the scope of the rule, so any uncertainty on that point would be diminished by the adoption of Model Rule 1.8(j).[268]

On a related point, it should be noted that, so far, the Louisiana cases have not endeavored to draw a clear distinction between consensual sexual

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266. MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 1983). The title to Louisiana Rule 1.8 is the same. *See* LA. RULES OF PRO. CONDUCT r. 1.8 (2018).

267. The issue has received some attention in the literature. *See, e.g.*, Sande L. Buhai, *Emotional Conflicts: Impaired Dispassionate Representation of Family Members*, 21 GEO. J. LEGAL ETHICS 1159, 1174–75 (2008).

268. This Article uses "diminished" instead of "eliminated" because adoption of the rule would not eliminate the possibility of a conflict of interest connected with a pre-existing sexual relationship. *See infra* note 281.

relationships that precede the representation and consensual sexual relationships that follow it. Some language in *DeFrancesch*, dealing with the emotional attachment arising from a sexual relationship, might be relevant to a lawyer-client sexual relationship case regardless of the whether the sexual relationship was in place before the attorney-client relationship commenced.[269] But the American Bar Association has taken the position that "[i]ssues 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."[270] Assuming that the Louisiana Supreme Court wished to treat pre-existing sexual relationships more leniently than ones that commence after formation of the lawyer-client relationship, it could do so by adopting Model Rule 1.8(j).

So far, the Louisiana cases do not appear to have featured a situation in which the attorney commenced a sexual relationship with an agent or representative of an organizational client. However, as noted previously in this Article, a comment to Model Rule 1.8 has something to say about this:

> 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.[271]

The idea is that a lawyer's sexual relationship with an agent of the client who supervises, directs, or regularly consults with the lawyer about the client's legal matters could impair the representation of the client. Although this is one of those situations in which the Model Rules have included a substantive rule in a comment,[272] if the Louisiana Supreme Court were disposed to adopt the provision, it could always make it part of the text of its version of Rule 1.8(j).[273] Adoption would give guidance to lawyers on an issue that the Louisiana Supreme Court has not yet addressed.

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269. *In re* DeFrancesch, 877 So. 2d 71, 76–77 (La. 2004) (per curiam).

270. *See* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 18 (AM. BAR ASS'N 1983).

271. *See id.* r. 1.8 cmt. 19.

272. I have discussed the problem elsewhere. *See* N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 LA. L. REV. 1, 68–69 (2000).

273. Some states have done this. *See* Stilley, *supra* note 4, at 512–25.

Adoption of Model Rule 1.8(j) would close the door on a potential informed-consent argument. Given the current state of Louisiana law on sexual relations between lawyers and clients, a lawyer who is charged with a conflict of interest for having sexual relations with a client might attempt to argue that the sexual relations were permissible because of the informed consent of the client. That is, the lawyer might attempt to show that, before the lawyer entered into sexual relations with a client, the lawyer obtained the client's informed consent to a continuation of the representation, in compliance with the conflict of interest waiver provisions set forth in Rule 1.7(b). However, some commentators,[274] and one of the comments to the ABA Model Rules of Professional Conduct,[275] question whether a client can actually give informed consent in this situation. Adoption of Model Rule 1.8(j) would preclude the informed-consent argument, at least in the case in which there is no pre-existing sexual relationship between the lawyer and the client, because, under the rule, the conflict of interest would be non-consentable.

Adoption of the rule would also send a message. It would send a message that Louisiana lawyers engage in professional misconduct if they have sexual relations with their clients, unless the lawyer and the client were already involved in a consensual sexual relationship before the attorney-client relationship commenced.[276] Adoption might deter lawyers from commencing sexual relations with their clients, thereby avoiding the harms that the rule was intended to address. It could also provide a standard for clients, letting them know whether their lawyer would violate ethical obligations by having sexual relations with them.[277]

In addition, adoption of Model Rule 1.8(j) would be a step in the direction of legal uniformity. Louisiana's Rules of Professional Conduct largely track the black letter rules in the American Bar Association's

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274. *See supra* note 189.

275. *See* MODEL RULES OF PRO. CONDUCt r. 1.8 cmt. 17 (AM. BAR ASS'N 1983).

276. "Messaging" was one of the reasons for the promulgation of Model Rule 1.8(j). *See supra* text accompanying note 10; *see also* Feiser, *supra* note 21, at 54 ("For some legal scholars, the primary benefit of such bright-line rules is that they would put attorneys on clear notice that severe discipline awaits if they engage in any sexual conduct with clients, thereby protecting the integrity of the legal profession by providing a shield from the inherent, serious risks in such relationships."); Seymore, *supra* note 191, at 219 (adoption of an explicit prohibition against attorneys representing clients with whom they have a sexual relationship "sends an important message about valuing women's voices and makes explicit that sex with clients is unethical, exploitative, and harmful").

277. *See supra* text accompanying note 10.

Model Rules of Professional Conduct. Many other states have adopted the rule.[278] Louisiana could join them.

Finally, as one writer put it, even though "black letter prohibitions like Model Rule 1.8(j) are not perfect, . . . the profession should not allow the perfect to be the enemy of the good."[279] Moreover,

> [e]ven 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.[280]

2. Considerations Against Adoption

There are some contrary arguments. In the first place, it is evident from the reported decisions that the Louisiana Supreme Court has been able to discipline lawyers for sexually related conduct under the existing rules. Many of those cases would not have been covered by Rule 1.8(j) even if it had been in place. In addition, in the cases involving sexual relations with existing clients—cases to which Rule 1.8(j) would have been applicable—the lawyers were subject to discipline anyway, based on the circumstances present in those cases. Because the court has managed to deal with lawyer sexual misconduct in the absence of Rule 1.8(j), the case for its adoption may not be all that strong.

It is true that Rule 1.8(j) deals with an issue that has not yet come before the court: whether a lawyer might be subject to discipline for representing the lawyer's own spouse, or some other person with whom the lawyer has a pre-existing sexual relationship. Adoption of Rule 1.8(j) would indicate that the lawyer could indeed undertake such representation, because of the exception for pre-existing sexual relationships articulated in the rule. But adoption of the rule might also give rise to misunderstanding. Although the language of 1.8(j) might cause some lawyers to think that it is not a problem to represent a person with whom the lawyer has a pre-existing sexual relationship, that is not necessarily so. In a given instance, the lawyer's emotional attachment arising out of a pre-existing relationship could interfere with the quality of the representation,

278. *See* Baker, *supra* note 4, at 253; Stilley, *supra* note 4, at 499, 512–25 (including a table showing different approaches taken in different jurisdictions); *see also Jurisdictional Rules Comparison Charts*, *supra* note 4.

279. Baker, *supra* note 4, at 258.

280. *Id.* (footnote omitted).

giving rise to a conflict of interest under Rule 1.7, or an impairment of professional judgment under Rule 2.1.[281] In a situation like this, the bright line rule of 1.8(j) might misleadingly render other client-protection standards less apparent.[282] Adopting a clarifying rule that seems to indicate that pre-existing sexual relationships are not a problem might not bring the hoped-for clarity.

The contention that Rule 1.8(j) would close the door on an informed-consent argument is a strong one only to the extent that the door should be closed. Rule 1.8(j) is a one-size-fits-all kind of proposition. In the cases in which it applies—cases in which lawyers have sexual relations with existing clients—it allows for no consideration of individual circumstances or informed consent arrangements. Many conflicts of interest can be resolved with the informed consent of the client, if some conditions can be satisfied.[283] It might be quite difficult to satisfy the conditions. It might be difficult for the lawyer to show that the client was truly able to give informed consent. But to close the door altogether does not allow for those possibilities. Different circumstances may justify different outcomes, or so it has been argued.[284]

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281. A 1992 ABA ethics opinion acknowledged that "[a] sexual relationship predating the professional relationship could, in some circumstances, raise the same ethical problems as are here considered." ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-364, n.1 (1992). But the opinion went on to say that the likelihood of the problems "should be considerably less when the sexual relationship predates the professional one." *Id*. A number of commentators have expressed the concern that problems can arise regardless of whether the sexual relationship preceded the attorney-client relationship. *See, e.g*, Bernabe, *supra* note 250, at 717; Bower & Stern, *supra* note 21, at 544–45; Feiser, *supra* note 21, at 80; *see also* Buhai, *supra* note 267 (arguing that emotional conflicts can interfere with representation and that lawyers should be required to take emotional conflicts into account before representing anyone with whom they have emotional or family ties, including spouses).

282. *See* Seymore, *supra* note 191, at 219–21 (the existence of the exclusion for pre-existing sexual relationships "stands as tacit approval for representing sexual intimates"). One of the comments to Model Rule 1.8 suggests that a pre-existing sexual relationship with a client might still give rise to a conflict of interest. *See* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 18 (AM. BAR ASS'N 1983). However, the comment is much less prominent than Model Rule 1.8(j) itself.

283. *See* LA. RULES OF PRO. CONDUCT r. 1.7(b) (2018).

284. *See, e.g.*, Bower & Stern, *supra* note 21, at 541 ("A rule that bars all sexual relationships is far too simplistic to account for all the intricacies of human interactions."); William K. Shirey, *Dealing with the Profession's "Dirty Little Secret": A Proposal for Regulating Attorney-Client Sexual Relations*, 13 GEO. J.

The argument in favor of adopting an express rule, like the one set forth in the comments to Model Rule 1.8, that prohibits sexual relations with some representatives of organizational clients, might not be very strong. Rule 1.7 already deals with impairments to the representation caused by the personal interests of the lawyer. That kind of impairment is what the rule on sexual relations with representatives of organizations is trying to avoid. In that respect, an additional rule may be unnecessary. In addition, representatives of organizational clients might need less individual protection from sexually connected invitations by lawyers for their organizations than do the vulnerable clients that appear in some of the reported sexual misconduct cases.[285] The matter of a lawyer having sexual relations with the representative of an organizational client has not yet arisen in Louisiana. If it were to arise, there is little reason to think that the Louisiana Supreme Court would lack the legal tools to deal with it.

The argument that adoption of the rule would send a clear message to lawyers is not free from doubt. As noted earlier, there is the possibility that adoption of Model Rule 1.8(j) could cause misunderstanding with respect to the representation of spouses or other persons with whom lawyers might have committed sexual relationships. There is also a definitional issue. Rule 1.8(j) does not define "sexual relations." In the absence of a definition, a lawyer might think that the expression refers only to sexual intercourse, even though other forms of sexual behavior involving clients might give rise to the same kinds of risks that the rule is intended to prevent.[286] On the other hand, one could construe "sexual relations" to

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LEGAL ETHICS 131 (1999) ("[A]ny regulation by the bar of attorney-client sexual relations must account for the complex variety of relationships that can and do exist between attorneys and their clients."); Jennifer L. Myers et al., *To Regulate or Not to Regulate Attorney-Client Sex? The Ethical Question in Pennsylvania*, 69 TEMP. L. REV. 741, 763–64 (1996) ("[W]ithin each specific relationship there will be diversity because every case is unique."); *see also* Feiser, *supra* note 21, at 79 ("[P]er se bans do not show enough respect for the choices that many women make, giving short shrift to the fact that women may be capable of choosing how to conduct their private lives."); Buckner & Sall, *supra* note 20, at 41 ("Imposing on lawyers a blanket prohibition on sexual relations with clients is a statement that lawyers and clients who become sexual partners cannot act as adults in their interpersonal relations and must instead be told 'no,' like children.").

285. *See* Herrin, *supra* note 21, at 308 (arguing that ban on sexual relations should not apply to representatives of corporations, because the nature of the attorney-client relationship in that context is "a far cry from the type of power-imbalanced relationship that the rule contemplates").

286. *See* Feiser, *supra* note 21, at 80 ("Nor does it make sense to fail to define the term 'sexual relationship,' possibly leaving the door open to one-time sexual encounters or other forms of coercion that pose the same dangers as actual sexual

encompass other forms of sexual behavior, perhaps including "sexting," that might not be well-suited for a per se rule.[287] Whatever types of conduct one might construe the rule to cover, there is also the question of whether "sexual relations" should be understood to apply to a single instance of that conduct or whether it should be understood to apply only to repeated instances of that conduct.[288] If one of the purposes of Model Rule 1.8(j) is to send a clear message to lawyers that would guide their behavior toward clients, the rule, at least in this respect, might be seen to fall somewhat short.

In the absence of Model Rule 1.8(j), disciplinary authorities who were required to consider a complaint about the sexually related conduct of a lawyer would not need to struggle with whether or not the conduct came within the definition of "sexual relations." They would instead focus on whether the conduct in question created a conflict of interest under Rule 1.7; impaired the independent professional judgment of the lawyer, in violation of Rule 2.1; or ran afoul of some other rule, such as Rule 8.4(b).

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relationships."); Seymore, *supra* note 191, at 221 ("[T]he rule ought, for the sake of clarity and completeness, to include a definition of sexual relationship. It is not helpful in the grievance process if a lawyer can argue that nothing short of vaginal intercourse constitutes a sexual relationship."). The case of *In re* Peters, 959 So. 2d 846 (La. 2007) (per curiam), which this Article has not mentioned elsewhere, seems relevant here. In that case, a Louisiana lawyer had a romantic interest in a client whom he was representing in a divorce. Although the hearing committee found that Peters "did not have an intimate relationship" with the client while he represented her, "he did have personal feelings for her." *Id.* at 855. Peters admitted that, "on one occasion, there was 'a sexual encounter' which was 'physical in a sexual sense;'" however, the client "denied that her relationship with respondent went beyond kissing at a Christmas party." *Id.* at 851 n.4. The committee believed that his feelings for the client "clouded his judgment" and caused Peters to fail to inform her of her husband's desire for reconciliation. *Id.* at 855. For the conflict of interest and other misconduct, Peters was suspended from the practice of law for three years.

287. "Sexting" has been treated differently in different jurisdictions. *See, e.g.*, State ex rel. Okla. Bar Ass'n v. Stout, 451 P.3d 155 (Okla. 2019) (instance of sexual intercourse with a client violated Rule 1.8(j), but instances of sexting with clients were subject to Rule 1.7); *In re* Stanton, 376 P.3d 693 (Alaska 2016) (sexting and physical touching short of sexual intercourse were found to violate Alaska Rule 1.8(j)); Disciplinary Couns. v. Detweiler, 989 N.E.2d 41 (Ohio 2013) (per curiam) (lawyer who engaged in sexting with client found to have violated Ohio's version of Rule 1.8(j), which prohibits lawyers from soliciting or engaging in sexual activity with a client); *see also* Dane S. Ciolino, *Is Sexting 'Sex'?*, LA. LETHAL ETHICS (Mar. 21, 2020), https://lalegalethics.org/is-sexting-sex/ [https://perma.cc/GF3K-G6XJ] (sexting should not count as "sex").

288. *See* Feiser, *supra* note 21, at 80.

Under this approach, for example, "sexting" would not constitute a per se violation of professional standards, but it could be disciplinable if it gave rise to a violation one of the existing Rules of Professional Conduct. This approach is the same one that the Louisiana Supreme Court has been using to deal with the lawyer sexual conduct cases that have come before it, with considerable success.

The separate contention that adoption of the rule would send a message to lawyers and their clients that lawyer sexual misconduct will not be tolerated would be less persuasive if one were to conclude that the message has already been sent. The cases that this Article has discussed should already alert Louisiana lawyers to the dangers of inappropriate sexually related conduct, criminal or otherwise. Some of those cases involve consensual sexual relations with clients, which is the situation targeted by Model Rule 1.8(j). The disciplinary outcomes in those cases constitute messages that lawyers should heed.

Maybe Louisiana lawyers would get the message better if it were included in the Louisiana Rules of Professional Conduct instead of being articulated in published opinions of the Louisiana Supreme Court. However, lawyers who do not pay much attention to published opinions in which attorneys are disciplined for sexual misconduct might not pay much attention to the language of the Rules of Professional Conduct.[289] Even if Louisiana were to adopt Model Rule 1.8(j), its inclusion as one of the many unlabeled subparts to Rule 1.8 might not be very obvious to a lawyer who lacks familiarity with the codified rules. However, as a practical matter, a Louisiana lawyer who is unsure about the propriety of having sexual relations with a client could find out about that rather quickly using the Internet.[290]

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289. On a related note, one commentator has stated that, based on his review of the cases in which jurisdictions have adopted *per se* bans, the "outright bans or near-outright bans" on sexual relationships with clients are not deterring the major problems. Feiser, *supra* note 21, at 56. Of course, it is possible that incidents of sexual misconduct would have been greater in those jurisdictions in the absence of the bans.

290. As a simple experiment, on July 15, 2020, I did a Google search for "Sex with clients Louisiana." The first three results included information about either *Ashy* or *Fuerst*, both of which would be helpful on this issue. The second entry was to a blog posting by Professor Dane Ciolino that included these words in the title: "Sex with Clients is Verboten." *See* Dane S. Ciolino, *Sex with Clients Is Verboten. What About Sex with Former Clients and Prospective Clients?* LA. LEGAL ETHICS, https://lalegalethics.org/sex-clients-verboten-sex-former-clients-prospective-clients/ [https://perma.cc/3M2U-XHAA] (July 15, 2020).

It might be easier for clients to find out what the Rules of Professional Conduct say about lawyer sexual misconduct than to find out what cases say about it. However, clients who are concerned about the behavior of their lawyers might simply contact the ODC. As a practical matter, though, a Louisiana client who wants to find out whether lawyers can get into trouble for having sexual relations with their clients could probably come up with an answer pretty quickly using a web browser.[291]

Uniformity of rules may be a good thing, but it is not likely to be achieved in this area of the law. Louisiana is not the only state not to have adopted Model Rule 1.8(j).[292] Some states that have adopted it have incorporated additional elements.[293] Still other states have adopted rather different rules.[294] And, as evidenced by the promulgation of Model Rule 1.8(j) itself, the ABA changes its model rules from time to time. In a future day, it might even change Model Rule 1.8(j). Uniformity could be hard to come by. In any event, if the Louisiana Supreme Court were to adopt a new rule, rather than attempting to achieve uniformity, it could make some sense to for the court to attempt to fashion the best rule possible. The state variations in rules dealing with lawyer sexual misconduct could offer an opportunity to improve on the ABA's model.

C. Some State Variations

If the Louisiana Supreme Court were disposed to add a rule on sexual relations with clients, it could certainly adopt Model Rule 1.8(j) as is. But there are other options. Although many states have adopted Model Rule 1.8(j),[295] some states have fashioned rules on lawyer sexual misconduct that are different from the ABA's model.[296] Some of these variations might be regarded as superior to the ABA's model, at least in some respects. We should consider some of them.

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291. *See id.*

292. *See* Baker, *supra* note 4, at 253; Stilley, *supra* note 4, at 499, 512–25 (including a table showing different approaches taken in different jurisdictions); *see also Jurisdictional Rules Comparison Charts*, *supra* note 4.

293. *See supra* note 292.

294. *See supra* note 292.

295. *See supra* note 292.

296. *See* Baker, *supra* note 4, at 243, 253–57 (discussing state variations); Stilley, *supra* note 4, at 512–25 (including a table showing jurisdiction-by-jurisdiction approaches).

1. Oklahoma

Some states have adopted Model Rule 1.8(j) but have added additional provisions to it. Oklahoma's rule provides an example: "A lawyer shall not have sexual relations with a client unless: (1) a consensual sexual relationship existed between them when the client-lawyer relationship commenced and (2) the relationship does not result in a violation of Rule 1.7(a)(2)."[297] The second exception signals that a pre-existing sexual relationship can still give rise to a conflict of interest. The reference to Rule 1.7(a)(2) is to the Oklahoma rule that generally prohibits a lawyer from representing a client when there is a significant risk that the representation will be materially limited by, among other things, a personal interest of the lawyer.[298] A sexual relationship with a client could qualify as a "personal interest."

This Article earlier noted that one of the arguments against adoption of Model Rule 1.8(j) is that it could cause misunderstanding.[299] The language of Model Rule 1.8(j) might cause some lawyers to think that it is not a problem to represent a person with whom the lawyer already has an existing sexual relationship. However, it is possible that, in a given instance, the lawyer's emotional attachment relating to an existing sexual relationship could interfere with the quality of the representation, giving rise to a conflict of interest under Rule 1.7, or an impairment of professional judgment under Rule 2.1. The Oklahoma variation helps avoid that misunderstanding.

2. Ohio

Ohio's version of Rule 1.8(j), while succinct, departs from the ABA model in a couple of respects: "A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[300] The rule prohibits "sexual activity," which is a broader expression than "sexual relations." In a 2013 case, the Ohio Supreme Court indicated that the prohibition was broad enough to cover "sexting." [301]

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297. OKLA. RULES OF PRO. CONDUCT r. 1.8(j) (2008).

298. *Id.* r. 1.7(a)(2).

299. *See supra* text accompanying note 281.

300. OHIO RULES OF PRO. CONDUCT r. 1.8(j) (2020).

301. In a 2013 case, the Ohio Supreme Court indicated that the prohibition was broad enough to cover "sexting." *See* Disciplinary Couns. v. Detweiler, 989 N.E.2d 41 (Ohio 2013) (per curiam).

The Ohio rule also prohibits solicitation of such activity. The anti-solicitation provision, while potentially helpful on messaging, might not be all that consequential from a disciplinary perspective, because Ohio Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Ohio Rules of Professional Conduct."[302] Solicitation of sexual activity with a client could be seen as an attempt to violate the rule against engaging in sexual activity with a client.

3. Washington

Washington's version of Rule 1.8(j) appears to build on the ABA model, but it incorporates several additional features. It states, in part:

> A lawyer shall not: (1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or (2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.[303]

The Model Rules of Professional Conduct have a comment that applies Model Rule 1.8(j) to some constituents of client organizations,[304] but the Washington rule integrates a provision about client representatives into the black letter provisions of the rule. However, the Washington provision on representatives is substantively different from the ABA's. It is broader, in one respect, because it covers all representatives of clients, whereas the ABA version applies only when the client is an organization, and it focuses on constituents of the organization who supervise, direct, or regularly consult with the lawyer concerning the organization's legal matters.[305] On the other hand, where the ABA provision applies, it is a bright-line affair; in contrast, the Washington provision engages when sexual relations with the representative "would, or would likely, damage or prejudice the client in the representation."

The Washington rule also includes a definitional provision. It states that "[f]or purposes of Rule 1.8(j), 'lawyer' means any lawyer who assists in the representation of the client, but does not include other firm members

302. OHIO RULES OF PRO. CONDUCT r. 8.4(a) (2020).
303. WASH. RULES OF PRO. CONDUCT r. 1.8(j) (2018).
304. *See* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 19 (AM. BAR ASS'N 1983).
305. *Id.*

who provide no such assistance."[306] A comment explains that this provision "specifies that the prohibition applies with equal force to any lawyer who assists in the representation of the client, but the prohibition expressly does not apply to other members of a firm who have not assisted in the representation."[307] Lawyers at the firm who do not provide legal assistance to the client are therefore not barred from engaging in sexual relations with the firm's client. The exclusion is in addition to Washington's Rule 1.8(k),[308] which, like the corresponding provision of the ABA model rule,[309] excludes Rule 1.8(j) itself from the general rule about imputing conflicts of interests of individual lawyers to the other lawyers at the firm.

Washington's rule uses two expressions that are departures from the comparable language of the ABA model rule. One is a reference to "at the time," rather than "when," when referring to the point at which the prohibition applies. This departure may not be all that consequential, but it might tend to make it a bit clearer that the exception to the rule applies only when there is an existing sexual relationship already in place at the time that the representation commences.

The other expression is "current." The Washington rule focuses the ban on sexual relations with "current" clients, clearly indicating that the rule does not apply to former clients. As we saw, that was an issue in *Fuerst*.[310] However, the inclusion of "current," while clarifying, may not be all that necessary, because the title to Washington Rule 1.8 is "Conflict of Interest: Current Clients: Specific Rules."[311]

4. Minnesota

Minnesota adopted a rule on sexual relations with clients before the promulgation of Model Rule 1.8(j).[312] Like the Washington rule, the current Minnesota rule, identified as Rule 1.8(j) of the Minnesota Rules of Professional Conduct, incorporates several elements not included in the ABA model:

> (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the

306. WASH. RULES OF PRO. CONDUCT r. 1.8(j)(3) (2018).
307. *Id.* r. 1.8 cmt. 23.
308. *See id.* r. 1.8(k).
309. *See* MODEL RULES OF PRO. CONDUCT r. 1.8(k) (AM. BAR ASS'N 1983).
310. *See In re* Fuerst, 157 So. 3d 569, 577 (La. 2014) (per curiam).
311. WASH. RULES OF PRO. CONDUCT r. 1.8 (2018).
312. *See* Awad, *supra* note 18, at 142.

> client-lawyer 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 shall be 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; (4) if a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director of the Office of Lawyers Professional Responsibility, in determining whether to investigate the allegation and whether to charge any violation based on the allegations, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.[313]

Earlier, we noted that the absence of a definition of "sexual relations" in Model Rule 1.8(j) could give rise to some concerns.[314] The Minnesota rule includes a definition. The definition picks up both intimate touching by the lawyer and lawyer-caused intimate touching of the lawyer by the client.[315]

The Minnesota rule includes a provision about organizational clients that departs from the ABA model in a couple of respects. First, in contrast to the ABA approach, the Minnesota provision, like the comparable provision in Washington, is incorporated into the text of the rule, rather than being relegated to a comment. Second, rather than referring to "a constituent of the organization who supervises, directs or regularly

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313. MINN. RULES OF PRO. CONDUCT r. 1.8(j) (2019).

314. *See supra* text accompanying note 286.

315. The Oregon rule does the same but adds another element. The relevant Oregon provision states:

> For purposes of this rule: "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party . . . .

OR. RULES OF PRO. CONDUCT r. 1.8(j) (2020).

consults with that lawyer concerning the organization's legal matters,"[316] the Minnesota version covers "any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization." In further contrast to the ABA version, the Minnesota provision excludes in-house attorneys from the scope of the rule. They are subject to Rule 1.7, the basic conflict of interest rule, instead.

Like the Washington rule, the Minnesota rule creates an exception for other lawyers at the firm who are not providing legal services to the client. This exception is in addition to Minnesota Rule 1.8(k),[317] which, like the corresponding provision of the ABA Model Rules,[318] excludes Rule 1.8(j) itself from the general rule about imputing conflicts of interests of individual lawyers to the other lawyers at the firm.

Finally, the Minnesota version of the rule includes a provision designed to protect the interests of clients when anyone other than the client alleges that the lawyer has violated the sexual misconduct rule. Unless the complaint is summarily dismissed, the Minnesota disciplinary agency is required to consider whether investigation of the claim or filing a charge related to the claim would unduly burden the client.

5. California

California was the first state to adopt an express rule on attorney-client sexual relations,[319] but its rule has not been static.[320] The current rule, Rule 1.8.10 of the California Rules of Professional Conduct, is titled "Sexual Relations with Current Client." It states:

(a) A lawyer shall not engage in sexual relations with a current

316. MODEL RULES OF PRO. CONDUCT r. 1.8, cmt. 19 (AM. BAR ASS'N 1983).

317. MINN. RULES OF PRO. CONDUCT r. 1.8(k) (2019).

318. MODEL RULES OF PRO. CONDUCT r. 1.8(k) (AM. BAR ASS'N 1983).

319. *See* Awad, *supra* note 18, at 137–38.

320. *See New Rules of Professional Conduct Effective November 1*, THE STATE BAR OF CALIFORNIA, http://www.calbar.ca.gov/About-Us/News/News-Releases/new-rules-of-professional-conduct-effective-november-1 [https://perma.cc/T6JP-VSUN] (last visited August 7, 2020) (stating that some 70 new and amended rules became effective on November 1, 2018, including a stricter rule against sex with clients); Neil J. Wertlieb, *The Disruptive and Controversial New Rules*, DAILY JOURNAL: CALIFORNIA LAWYER, https://www.dailyjournal.com/mcle/288 [https://perma.cc/4A38-4FAZ] (last visited August 7, 2020) (saying that the new rule represents a "major shift" and that the revising commission had "concluded that the current rule had not worked as intended – evidenced by the fact that in the 25 years since the rule's adoption, there had been virtually no successful disciplinary prosecutions" under it).

> client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
> (b) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.
> (c) If a person* other than the client alleges a violation of this rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.[321]

Like the Washington rule, the California rule makes it clear that the prohibition against sexual relations applies to "current" clients, which would exclude former clients from the scope of the rule.

The California rule excludes the lawyer's spouse or registered domestic partner from the scope of the rule. Inasmuch as the rule also excludes pre-existing sexual relationships, this language might have rather limited applicability. But it does highlight the two specifically identified exclusions.

Like the Minnesota rule, California's rule includes a definition of "sexual relations," but it is not the same definition. Minnesota's definition makes it clear that "sexual relations" includes lawyer-induced intimate touching of the lawyer by the client. The California rule differs in another way as well—it adds a purpose element to the definition.

Like the Minnesota rule, the California version of the sexual misconduct rule includes a provision offering protection to the interests of the client when someone other than the client alleges a violation of the rule. There are some procedural differences between the protective provisions, but their aim is the same.

6. Iowa

Iowa is another jurisdiction that adopted a rule on lawyer-client sexual relations before the promulgation of Model Rule 1.8(j).[322] Iowa's current rule, Rule 32:1.8(j) of the Iowa Rules of Professional Conduct, includes some elements that we have seen before, but it also offers something new:

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321. CAL. RULES OF PRO. CONDUCT r. 1.8.10 (2020). The asterisks indicate that "person" is defined in the "Terminology" portion of the rules. *See id.* r. 1.0.1(g-1).

322. *See* Awad, *supra* note 18, at 139–40.

> 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.[323]

Like some of the other rules this Article has considered, the Iowa rule reaches representatives of clients; however, unlike the ABA version, the Iowa rule does not qualify the word "representative" in a way that limits its application to constituents of client organizations who oversee or direct the representation. In this respect, it is like the comparable Washington provision; however, unlike that provision, there is no limiting language about damage or prejudice to the client. It has a broad sweep.

Iowa's rule, like California's, includes an exception for spouses. Unlike California's rule, however, it does not include an exception for domestic partners.

The new element is the rule's characterization of the exemptions for spouses and pre-existing sexual relationships as "provisionally exempt." The Iowa rule expressly requires the lawyer to consider whether there might still be a conflict of interest in one of these situations and whether any harm might come to the client or the representation as a result. Moreover, the rule says that "the lawyer should immediately withdraw from the legal representation" if there is "any reasonable possibility" that the representation may be impaired, or the client harmed, if the sexual relationship continues.

7. Alabama

The Alabama rule on sexual misconduct is quite different from the others we have considered. Alabama Rule 1.8 has two subparts that work together:

> (l) A lawyer shall not engage in sexual conduct with a client or representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship, including,

323. IOWA RULES OF PRO. CONDUCT r. 32:1.8(j) (2020).

> but not limited to: (1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of legal representation; (2) continuing to represent a client if the lawyer's sexual relations with the client or the representative of the client cause the lawyer to render incompetent representation.
> (m) Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.[324]

Subpart (l) prohibits "sexual conduct," by the lawyer, which is a broader expression than "sexual relations." However, instead of articulating a flat ban, the Alabama rule applies only to sexual conduct that exploits or adversely affects the interests of the client or the attorney-client relationship. The rule gives examples of prohibited conduct, including demanding sexual relations as a condition of legal representation, but the scope of the rule is not limited to the stated examples.

The protected "interests" of the client are not spelled out. Presumably, they would include those that are involved in the representation. But the client could have other interests as well, including physical, psychological, or spiritual interests, that could be affected by sexual relations with a lawyer. The reach of the expression is not clear from the language of the rule.

The Alabama rule, like others already mentioned, expressly applies to representatives of clients. Like the Iowa rule, the Alabama rule does not qualify the word "representative" in a way that limits its application to constituents of client organizations who oversee or direct the representation. However, the provision about representatives is also subject to the limitation about sexual conduct that exploits or adversely affects the interests of the client or the attorney-client relationship.

Subpart (m) provides that, except for spousal relationships and sexual relationships that existed at the commencement of the attorney-client relationship, "sexual relations"[325] between the attorney and the client "shall be presumed to be exploitive." The presumption is rebuttable. But spousal relationships and pre-existing sexual relationships do not appear to be altogether free from the prohibition in subpart (l); instead, they

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324. ALA. RULES OF PRO. CONDUCT r. 1.8(l) & (m) (2008).

325. The expression "sexual relations" seems narrower than the earlier reference to "sexual conduct."

appear to be free from the presumption that they are exploitive.[326] On this reading, for example, a pre-existing sexual relationship that exploited the interests of the client would still violate the rule.

8. Florida

Florida is another jurisdiction that adopted a sexual misconduct rule before the ABA promulgated Model Rule 1.8(j).[327] The current version of the rule is different in both structure and substance from the from the ABA model. Structurally, it is located in Florida's misconduct rule, Rule 4-8.4,[328] instead of being located in Florida's equivalent of Rule 1.8.[329] Substantively, it is closer to Alabama's rule than to Model Rule 1.8(j).

Like the rule in Alabama, the Florida rule on sexual misconduct eschews a per se approach and focuses on particular harms to be prevented. It provides, in part: "A lawyer shall not . . . engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship."[330] These are the same harms that are referenced in the Alabama rule. Moreover, consistent with the Alabama rule, the Florida rule uses "sexual conduct" instead of "sexual relations" as the focus of the rule's prohibition. Like the Alabama rule, the Florida rule does not expressly limit the "interests" of the client that are protected by the rule.[331]

The Florida rule, like Alabama's, incorporates a presumption, but uses different words to express it:

> If the sexual conduct commenced after the lawyer-client relationship was formed it shall be presumed that the sexual

326. On a related note, a comment to the Alabama rule states that "before proceeding with the representation" in a situation in which there is a spousal relationship or a sexual relationship that pre-dates the attorney-client relationship, "the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship." ALABAMA RULES OF PRO. CONDUCT r. 1.8 cmt. Sexual Relations Between Lawyer and Client (2008).

327. *See* Awad, *supra* note 18, at 138–39.

328. *See* FLA. RULES OF PRO. CONDUCT r. 4-8.4 (2020).

329. *See id.* r. 4-1.8.

330. *Id.* r. 4-8.4(i).

331. However, the comments to the Florida rule state, in part: "The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. Attorneys have a duty to exercise independent professional judgment on behalf of clients. Engaging in sexual relationships with clients has the capacity to impair the exercise of that judgment." *Id.* r. 4–8.4 cmt.

> conduct exploits or adversely affects the interests of the client or the lawyer-client relationship. A lawyer may rebut this presumption by proving by a preponderance of the evidence that the sexual conduct did not exploit or adversely affect the interests of the client or the lawyer-client relationship.[332]

This provision does not, like Alabama's, explicitly refer to a "spousal relationship." However, like the comparable Alabama provision, it indicates that the presumption does not apply to sexual conduct[333] that preceded the formation of the attorney-client relationship. The Florida rule also explains how the presumption may be overcome.

The Florida rule includes a provision, like the ones in Washington and Minnesota, that excludes lawyers in the same firm who do not provide legal services to the client:

> The prohibition and presumption stated in this rule do not apply to a lawyer in the same firm as another lawyer representing the client if the lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the file concerning the legal representation.[334]

According to this provision, lawyers who do not "personally" provide legal services to the client are not prohibited from engaging in sexual conduct with the client. However, they have to be "screened from access to the file concerning the representation." The file access screening requirement is new. The other rule variations referenced in this part of the Article did not include it.

9. A Comment on the Variations

This discussion of sexual misconduct rules in different jurisdictions, while not exhaustive, demonstrates that there is considerable variety among those rules.[335] Among the variations are ones that adopt the ABA model rule but add provisions to it; adopt a per se ban that is different from the one in Model Rule 1.8(j); and adopt a rule that is not a per se ban, but

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332. *Id.*

333. I noted, above, that the Alabama rule used a narrower "sexual relations" expression in describing the presumption.

334. FLA. RULES OF PRO. CONDUCT r. 4-8.4(i) (2020).

335. There are other variations as well. For a survey of the different rules, see Stilley, *supra* note 4, at 512–25. *See also* Baker, *supra* note 4, at 353–57 (discussing different rules in different jurisdictions); *Jurisdictional Rules Comparison Charts*, *supra* note 4.

that instead prohibits sexual conduct by lawyers that causes particular harms.

Some of the state rules that depart from Model Rule 1.8(j) have features that one could regard as improvements on the ABA model. Among these are definitions of "sexual relations"; black letter provisions that deal with sexual relations between lawyers and representatives of organizational clients; and provisions that make it clear that, even in the case in which the lawyer has a pre-existing sexual relationship with the client, sexual relations with the client can still give rise to a conflict of interest.

If, at some point, Louisiana were to reconsider its earlier decision not to add an explicit rule about sexual misconduct to the Louisiana Rules of Professional Conduct, there would be a number of "models" that it could consider.

CONCLUSION

Written rules are teachers. Adding an explicit rule to the Louisiana Rules of Professional Conduct that prohibits lawyers from engaging in sexual relations with clients could be good for the Louisiana legal profession and for the clients served by Louisiana lawyers.

If the Louisiana Supreme Court were to add a rule on sexual relations with clients to the Louisiana Rules of Professional Conduct, it could take advantage of some of the state variations we have seen and create a rule that might be better than Model Rule 1.8(j). For example, if the court chose to adopt a per se ban on initiating sexual relations with existing clients, the court could devise a rule that includes: (1) a definition of "sexual relations"; (2) a provision on the application of the rule when the client is an organization, like a corporation; and (3) a provision making it clear that, when a lawyer takes on the representation of a person with whom the lawyer has a pre-existing sexual relationship, the lawyer is still subject to the basic conflict of interest rule on personal interests of the lawyer that materially impair the representation of the client.[336]

It might also be beneficial to adopt a provision, like those in California and Minnesota, that require disciplinary authorities to consider the

336. Even more broadly, the court could adopt a provision stating that the lawyer is still subject to the other rules relating to the lawyer's responsibilities to the client. Either approach should be adequate to deal with the concern, apparently shared by the several members of Louisiana's Ethics 2000 Committee, that adoption of Model Rule 1.8(j) "could serve as a safe-harbor sheltering lawyers engaged in sexual conduct that is inappropriate." *See supra* discussion accompanying note 31.

potential harm to the client caused by the disciplinary process itself, if the complaint about the lawyer's sexual misconduct comes from someone other than the client. In addition, it might be somewhat helpful to incorporate a provision, like that included in the Washington rule, indicating that the exception to the rule for pre-existing sexual relationships applies only when the pre-existing sexual relationship is still in place at the time that the representation commences.

Alternatively, the court could consider adopting a rule, more like Alabama's or Florida's, that does not feature a per se ban but instead focuses on sexual conduct by the lawyer that exploits clients, adversely affects the interests of clients, or adversely affects the lawyer-client relationship. This type of rule would have a potentially broad scope but would apply only when the conduct causes one of the specified harms. Such a rule could be more difficult to administer than a per se rule, because there would need to be a showing that the sexual conduct caused one of the harms contemplated by the rule,[337] but that might not be much different, in practice, from what the Louisiana Supreme Court has been doing in sexual misconduct cases that have come before it. In the noncriminal cases, the court has primarily been looking to see whether the conduct created a conflict of interest or impaired the independent professional judgment of the lawyer. Those are the kinds of harms that should be covered by a rule of this type. Even if this approach were taken, the court could incorporate some of the additional provisions mentioned above that have been developed in other jurisdictions.

If the court were inclined to reconsider the imputed disqualification rule it articulated in *Fuerst*, it could take the approach reflected in Model Rule 1.8(k) and exclude the sexual misconduct rule from the general imputation provision found in Rule 1.8. Under this approach, the rule would prohibit an individual lawyer who engages in sexual relations with a client from representing that client, but it would not automatically bar the other lawyers in the firm from doing so. Even so, they would still need to pay attention to Rule 1.10(a). Under that rule, if the sexual relationship between the individual lawyer and the client were to "present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm," the conflict of interest would still be imputed to the other lawyers in the firm. In the event that the court were inclined to depart from the *Fuerst* approach to imputed disqualification, it might also consider adoption of a provision, like ones found in several of the state

337. Incorporation of an evidentiary presumption, like the ones set forth in the Alabama and the Florida rules, might mitigate the difficulty in administering the rule.

variations, that excludes lawyers in the firm who do not provide legal services to the affected client.

Sometimes, delay can be a good thing. By not acting earlier to adopt Model Rule 1.8(j), the Louisiana Supreme Court is in a position to take advantage of lessons learned and rules developed by other jurisdictions.

However, lawyer sexual misconduct can take many forms. As demonstrated in the reported Louisiana cases, it can arise out of criminal sexual conduct involving clients or nonclients. It can arise out of noncriminal, nonconsensual sexual conduct involving clients and nonclients. And it can arise out of sexual relations with existing clients. Model Rule 1.8(j) focuses only on sexual relations with clients. And it focuses only on some of those—ones that do not involve a pre-existing consensual sexual relationship between the lawyer and the client. If other situations involving sexually related lawyer conduct do not require the adoption of a specific sexual misconduct rule, perhaps the situation of sexual relations with clients does not require one either. So far, the absence of such a rule has not prevented the Louisiana Supreme Court from dealing with the various instances of lawyer sexual misconduct that have come before it. In any event, the difficulties of fashioning the right rule, suggested both by the criticisms of Model Rule 1.8(j) and by the existence of different sexual misconduct rules that have developed in different jurisdictions, might incline the Louisiana Supreme Court to simply continue to do what it has been doing, which is disciplining lawyers whose sexual behavior runs afoul of existing rules.

In the meantime, Louisiana lawyers should be aware, from the reported cases, that they may be disciplined for sexual conduct that violates the criminal law, for sexual harassment of clients and nonclients, for nonconsensual sexual conduct that breaches their fiduciary obligations to clients, or for commencing consensual sexual relations with existing clients. As to the latter point, we should recall that, based on the most recent cases involving consensual sexual relationships with clients, including consent discipline cases, it appears that the operative rule in Louisiana is that a lawyer who engages in sexual relations with an existing client will be found to have engaged in professional misconduct. Cases can be teachers, too.