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Dating Among the Profession: Ethical Guidance in the Area of Personal Dating Conflicts of Interest

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COMMENTS

DATING AMONG THE PROFESSION: ETHICAL GUIDANCE IN THE AREA OF PERSONAL DATING CONFLICTS OF INTEREST*

I. INTRODUCTION

Alice Attorney (Attorney) went across town to another firm to conduct a deposition relevant to the personal injury case in which she represented Debbie Defendant (Defendant). There she was introduced to the opposing firm's newest employee, Pete Paralegal (Paralegal). Paralegal had been hired recently to help the firm with the case being brought against Attorney's client.

Following the deposition, when Attorney and Paralegal were the only people left in the conference room, Attorney asked Paralegal if he would like to join her for lunch. Several days after the lunch with Paralegal, Attorney called Paralegal at home and asked him to attend a party with her the following weekend. Paralegal accepted.

After the party, Attorney and Paralegal began to meet regularly for dinner and a movie. Meanwhile, Attorney never informed Client of her dates with the paralegal for opposing counsel, and Paralegal never informed his boss, the supervising attorney on the case, that he was dating the opposing counsel.

While at dinner one evening, Paralegal mentioned that he was envious of Paul Plaintiff, who was spending the week powder-skiing in Utah. Attorney immediately realized that Plaintiff could never engage in such a vigorous activity if he actually sustained the injuries claimed in his suit. Subsequently, Attorney hired an investigator to gather evidence of Plaintiff's full recovery.

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* The author wishes to thank her parents and her fiancé, Mark, for their encouragement and never-ending support.

In this hypothetical example, there was no purposeful exchange of confidential information. Instead, Paralegal disclosed facts that he did not realize were helpful to opposing counsel's case.

Recent changes in society have demanded guidance in the area of personal dating relationships[1] and the conflicts of interests associated therewith. As increasing numbers of women enter the legal field,[2] the possibility of personal dating conflicts of interest increases. It is not uncommon today to find attorneys, paralegals, secretaries, and other law-related employees who work in different offices in the same city who date. The high current enrollment of women in law school[3] indicates that women will comprise a greater percentage of the future bar.[4] In addition, more women have entered the work force since the onset of World War II. These increases indicate a probable, if not certain, increase in personal relationships among those in the legal profession and other law-related fields, and an increase in the creation of personal dat-

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1. The phrase "personal dating conflicts of interest," for the purpose of this comment, refers to social contact, dating, and/or personal relationships between individuals who both work in the legal profession, law-related fields, or other professional fields including but not limited to public interest organizations and local, state, or federal governmental agencies. This social contact is not casual, but rather more serious and ongoing. It is not a one-time meeting. The two individuals involved may have a professional relationship before or simultaneously with their personal relationship.

A personal dating relationship may also be defined as a connection of social engagements with a member of the opposite sex among the private affairs of an individual. 1 WORLD BOOK DICTIONARY 528 (1990). *See also infra* text accompanying notes 122-125. Today, dating need not be with a member of the opposite sex, but may include social engagements with members of the same sex.

The term "personal dating conflicts of interest" does not include any reference to the attorney-client relationship in which the client would have a personal relationship with his or her attorney, conflicts of interest arising where spouses are adverse counsel, or conflicts were there is a blood bond. These situations, however, may be used as illustrations and as support for points made in this comment.

2. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975). It was not until the late nineteenth century that American women earned the right to attend law school and to be licensed as lawyers. Cornelia H. Tuite, *Women Lawyers and Lawyering*, *in* 3 THE PROFESSIONAL LAWYER 6 (ABA ed. 1992).

3. Women comprised 24% of the bar and 44% of the students entering ABA-accredited law schools in 1993. *Back to the Future*, 13 CAL. LAW. 128 (1993). This is a substantial increase from 1970, in which 8.1% of law school students and only 4.7% of lawyers in the United States were women. *Id.*

4. ABA Comm. on Ethics and Professional Responsibility, *supra* note 2.

ing conflicts of interest. This increase highlights the need for a rule governing this area of conflict of interest.[5]

The State Bar of California attempted to resolve the problem of disclosure of confidential and privileged information in personal dating relationships and the conflicts of interest associated with such relationships by adopting Rule 3-320.[6] Rule 3-320 delineates particular relationships with opposing counsel, including certain personal relationships, which require disclosure to the client. The State Bar intended to address an area of conflict of interest not previously addressed by Rules 5-101[7] and 5-102[8] of the California Rules

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5. Further evidence of the need for ethical guidance in the area of personal dating conflicts of interest comes from recent articles in legal magazines. *See generally, e.g.,* Arthur Garwin, *Lawyers in Love . . . and in Conflict*, 78 ABA J. 94 (1992); Margo Kaufman, *Lawyers in Love: The Ups and Downs of Office Romances*, 13 CAL. LAW. 46 (1993).

6. *See* BRIAN SHEPPARD, PROFESSIONAL RESPONSIBILITY FOR CALIFORNIA LAWYERS 46 (1991), which states the rule as follows:

> Rule 3-320. Relationship With Other Party's Lawyer.
>
> A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, *or has an intimate personal relationship with the member*, unless the member informs the client in writing of the relationship.

Id. (emphasis added). The California State Bar has discussed this rule.

> Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another member who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter.

1 STATE BAR OF CALIFORNIA COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT IV, at 26 (1987) [hereinafter COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT].

7. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, *Rules of Professional Conduct of the State Bar of California, in* 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 239, 249 (1987). Rule 5-101 states:

> A member of the State Bar 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 in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

Id.

Rule 5-101 was approved by the California Supreme Court in December 1974 and became effective January 1975. *Id.* at 239. Rule 5-101 has been renumbered as Rule 3-300 in the amended Rules of Professional Conduct, ap-

of Professional Conduct. While Rule 3-320 addresses the need for a rule in this area, the Rule applies only to relationships with another party's lawyer and does not include a class of persons[9] for whom the risk of breaches of confidentiality is equally great. Furthermore, as the Rule stands, the language speaking to this conflict of interest area[10] does not clearly define its terms, nor does the Rule provide clear guidance regarding the appropriateness of disclosure.

This comment addresses the background relating to personal dating conflicts of interest, including a brief history of the American Bar Association's Model Canons, Code, and Rules;[11] a brief synopsis of selected California case law prior to the recent adoption of Rule 3-320 of the California Rules of Professional Conduct;[12] and the legislative history of Rule 3-320. An analysis of Rule 3-320 as applicable to personal dating conflicts of interest and a proposal for an amendment to Rule 3-320 of the California Rules of Professional Conduct follows. The conclusion summarizes the main points of the comment regarding personal dating conflicts of interest.

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proved by the California Supreme Court in November 1988, effective May 1989, and amended in 1992. *Rules of Professional Conduct of the State Bar of California, in* SELECTED STATUTES, RULES, AND STANDARDS ON THE LEGAL PROFESSION 603, 603 (West 1990) [hereinafter Rules of Professional Conduct].

8. MORGAN & ROTUNDA, *supra*, note 7, at 249.

> Rule 5-102. Avoiding the Representation of Adverse Interests.
>
> (A) A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment.
>
> (B) A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

Id.

Rule 5-102 was approved by the California Supreme Court in December 1974 and became effective January 1975. *Id.* at 239. Rule 5-102 was renumbered and amended as Rule 3-310 in the amended Rules of Professional Conduct. Rules of Professional Conduct, *supra* note 7, at 603.

9. The class of persons to whom the author is referring includes those employees such as secretaries, paralegals, and clerks who actively work on, and participate in, a client's case.

10. *See supra* note 6 for the specific language.

11. Note that the ABA's Model Canons, Code, and Rules have not been adopted by California. They do not apply to California attorneys, but they do provide a general background of acceptable ethical conduct.

12. *See infra* part II.D.

II. BACKGROUND

A. *ABA Canons of Professional Ethics*

1. *Historical Aspects*

The American Bar Association adopted the Canons of Professional Ethics (ABA Canons) in 1908.[13] The ABA Model Code of Professional Responsibility superseded the Canons in 1969.[14] Until 1969, the ABA Canons were considered a "general guide"[15] regarding ethical duties of a lawyer in the legal profession. Although the Preamble to the ABA Canons explains the purpose of the Canons to be a guide of ethical duties and responsibilities of those engaged in the legal profession, it also refers to what could be called an underlying purpose—the creation of a well-respected public image.[16] "[I]t is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the *public* shall have absolute confidence in the integrity and impartiality of its administration."[17]

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13. CANONS OF PROFESSIONAL ETHICS, *in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 231, 231 (1990) [hereinafter CANONS OF PROFESSIONAL ETHICS].

14. *Id.*

15. *Id.* The Random House College Dictionary defines the word "guidance" as the "act or function of guiding; leadership; direction." THE RANDOM HOUSE COLLEGE DICTIONARY 586 (1980). One meaning of "guide" is "to supply [a person] with advice or counsel." *Id.* However, "guide" also means "to *force* (a person . . .) to move in a certain path." *Id.* (emphasis added). If one applies the alternate meaning of "guide" to the ABA Canons' purpose of general guidance, the Canons' purpose could be interpreted to mean that the ABA Canons force a lawyer into a certain path or particular path of ethics. One may question whether the ABA's interpretation of ethics is the correct interpretation.

16. CANONS OF PROFESSIONAL ETHICS, *supra* note 13, at 231.

17. *Id.* (emphasis added). The focus of this quotation is the public's impression of the legal system and the idea that such an impression should be of integrity and impartiality. Note also that the word "Justice" is capitalized, giving it special emphasis within the sentence. The public's impression, not of lawyers, but of "Justice," should be one of integrity and impartiality. "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity." Erwin M. Jennings Co., Inc. v. Di Genova, 141 A. 866, 868 (Conn. 1928).

2. *Canon 6: Adverse Influences and Conflicting Interests*

Canon 6 of the ABA Canons, entitled "Adverse Influences and Conflicting Interests,"[18] addresses the disclosure of any and all aspects of an attorney's relations with his client that may influence the client when selecting counsel.[19] Furthermore, Canon 6 expresses the idea that consent after full disclosure removes the conflict of interest.[20] Canon 6 states generally that it is unprofessional to represent conflicting interests and provides a mechanism to remove such a conflict.[21] This Canon addresses conflicts of interest generally because its purpose is to guide an attorney facing a similar situation.[22]

B. *ABA Model Code of Professional Responsibility*

1. *Historical Aspects*

The ABA adopted the Model Code of Professional Responsibility (Model Code) in 1969, superseding the ABA Canons of Professional Ethics.[23] There is no legislative history available regarding the Model Code, as the ABA intentionally avoided compiling a record.[24] The ABA believed that the

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18. CANONS OF PROFESSIONAL ETHICS, Canon 6, *supra* note 13, at 231. This provision states:

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Id.

19. *Id.* at 233.

20. *Id.*

21. *Id.*

22. *Id.* at 231.

23. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION xi, xi (1990) [hereinafter MODEL CODE].

24. *Id.*

compilation of a record would greatly inhibit discussion.[25] After three drafts, the Model Code arrived at its final form, to which there have been numerous amendments.[26]

The primary principle underlying the Model Code is that the practice of law is a noble profession because lawyers ultimately contribute to the preservation of society.[27] Consequently, because of this role, lawyers are obligated to maintain the highest standards of ethical conduct.[28]

2. *Scheme and Purpose of the Model Code*

The Model Code is comprised of three interrelated parts: Canons, Ethical Considerations (EC), and Disciplinary Rules (DR).[29] Canons express standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession.[30] Ethical Considerations and Disciplinary Rules are derived from these general standards embodied in the Canons.[31] Ethical Considerations characterize objectives or goals toward which lawyers should strive, while Disciplinary Rules are mandatory in nature.[32] The minimum level of acceptable conduct below which no lawyer may fall without being subject to corrective, disciplinary action is set forth in the Disciplinary Rules.[33] The Code does not prescribe the procedures or penalties for violation of a Disciplinary Rule.[34] The Model Code is ordered in this manner to promote its purpose and to establish a comprehensive guide for ethical conduct by combining and integrating general standards, goals, and a minimum level of acceptable conduct.[35]

The purpose of the Model Code, like that of its predecessor, the Canons of Professional Ethics, is guidance.[36] The preliminary statement of the Model Code declares that the Code "is designed to be adopted . . . both as an inspirational

25. *Id.*
26. *Id.*
27. *Id.* at 1.
28. *Id.*
29. *Id.* at 3.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 3.
34. *Id.* at 4.
35. *See generally supra* text accompanying notes 28-34.
36. MODEL CODE, *supra* note 23, at 2.

guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules."[37] Lawyers are expected to embrace the goals of the Model Code stated in the Canons, refer to the Ethical Considerations when they are placed in certain situations described in those Ethical Considerations, and be aware of the minimum standards set forth in the Disciplinary Rules.[38] The Model Code offers guidance to members of the profession through these principles.[39] To encourage the interaction of a lawyer's own morals and ethics with those espoused in the Model Code, which represent the morals and ethics of the legal profession as a whole, the Model Code offers only guidance.[40]

3. *Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety*

Canon 9 and its interrelated Ethical Considerations and Disciplinary Rules support the concept that an appearance of impropriety diminishes public confidence and respect for the legal profession, the legal system, and the justice it represents.[41] This idea is expressly delineated in EC 9-6, which states in relevant part, "[e]very lawyer owes a solemn duty to uphold the integrity and honor of his profession to encourage respect for the law and for the courts and the judges thereof . . . and to strive to avoid not only professional impropriety but also the appearance of impropriety."[42]

Disciplinary Rule 9-101,[43] entitled "Avoiding Even the Appearance of Impropriety," which accompanies Canon 9,

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37. *Id.*

38. *Id.* at 2-3.

39. *Id.* at 2.

40. *Id.* Further evidence of this concept is found in the Model Code: "Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards." *Id.* at 2.

41. *See generally id.* at 96-99.

42. *Id.* at 97. Further support is found in EC 9-1 and EC 9-2, respectively. "A lawyer should promote public confidence in our system and in the legal profession." *Id.* at 96. "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." *Id.*

43. MODEL CODE, DR 9-101, *supra* note 23, at 2.

specifically identifies three circumstances in which there is an appearance of impropriety.[44] These situations include private employment where a lawyer has acted in a judicial capacity, private employment regarding a subject where a lawyer has been a public employee, and instances where a lawyer represents that he or she can improperly influence any court, legislature, or public official.[45] Although these three situations refer to possible conflicts of interest, the area of personal dating conflict of interest is conspicuously absent.

C. *ABA Model Rules of Professional Conduct*

1. *Historical Aspects*

The ABA adopted the Model Rules of Professional Conduct (Model Rules) in 1983, over ten years after the Model Code of Professional Responsibility was adopted.[46] The Model Rules are intended to further define the professional role of a lawyer by providing a framework for the ethical component of the legal profession.[47] As with the ABA Canons and the Model Code, the basic purpose of the Model Rules is guidance.[48] If "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living," then such guidance as provided by the Model Rules is necessary to accomplish the primary objective of promoting the public's respect for the legal system and all it represents.[49]

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Id.

44. *See id.*

45. *Id.* at 97-98.

46. MODEL RULES OF PROFESSIONAL CONDUCT, *in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 112, 116 (1990) [hereinafter MODEL RULES].

47. *Id.* at 116.

48. *Id.* at 115.

49. *Id.* at 114. *See also generally infra* note 101.

2. *Rule 1.7 Conflict of Interest: General Rule*

Rule 1.7 generally refers to conflicts of interest.[50] It specifically mentions conflicts "directly adverse"[51] to other clients and representation limited by a "lawyer's own interests."[52] In addition, the comments following Rule 1.7 mention that the possibility of conflict does not itself preclude representation by that lawyer, but that other factors should also be considered.[53]

3. *Rule 1.8 Conflict of Interest: Prohibited Transactions*

Rule 1.8(i) specifically relates to conflicts of interest created by blood or marriage between lawyers of different firms.[54] Other rules are applicable to familial and marital relationships between lawyers who work in the same firm.[55]

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50. MODEL RULES, *supra* note 46, Rule 1.7.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or 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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

51. *Id.* at 134.

52. *Id.*

53. *Id.* at 135. Relevant factors such as the potential of actual conflict and material interference with the lawyer's independent professional judgment must be considered. *Id.* Other critical factors include the duration and intimacy of the attorney-client relationship and the functions performed by the lawyer in the situation in question. *Id.* at 137.

54. MODEL RULES, *supra* note 46, Rule 1.8(i).

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

Id.

55. Rules 1.7, 1.9, and 1.10 of the ABA Model Rules of Professional Conduct apply to conflicts of interest between related lawyers in the same firm. *See* SHEPPARD, *supra* note 6, at 171.

The motivation behind Rule 1.8(i) is that closely related lawyers have a greater opportunity to inadvertently reveal confidential information pertaining to their adverse clients.[56] The intense nature of intimate or familial relationships, although a common characteristic of all personal relationships, can be particularly troubling when the relationship is between two related lawyers because it may result in emotional interference with the detached professionalism required of lawyers.[57]

The comment following Rule 1.8(i) states that the disqualification contained in paragraph (i) is "personal and is not imputed to members of other firms with whom the lawyers are associated."[58] This concept flows from the reason for the Rule, since the possibility of divulged or leaked confidential information or unprofessional competition is diminished.[59] By its precise terms, Rule 1.8(i) does not apply to personal dating conflicts of interest.[60] Personal dating relationships do not involve the blood or marriage bond required by Rule 1.8(i).[61]

D. *Selected California Case Law Before Rule 3-320*

There is no case law applying Rule 3-320 at this time. Four prior cases illustrate situations analogous to those falling within the scope of Rule 3-320 and personal dating conflicts of interest. These cases demonstrate how courts dealt with such conflicts prior to Rule 3-320's adaptation.

1. *Third-Person Conflicts of Interest*

In *Cooke v. Superior Court*,[62] the parties to the case were separated and entering a dissolution proceeding when the family butler overheard conversations between the husband and his attorneys and obtained copies of several of the husband's documents.[63] The butler proceeded to transmit this

56. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 283 (1991). Revelation of confidential information may occur through notes written on scraps of paper lying on a countertop or through messages left on a home answering machine.

57. *Id.*

58. *See* SHEPPARD, *supra* note 6, at 171.

59. 1 HAZARD & HODES, *supra* note 56, at 284.

60. *See generally supra* note 54.

61. *See generally supra* notes 1, 54.

62. 147 Cal. Rptr. 915 (Ct. App. 1978).

63. *Id.* at 917.

information to the wife, who in turn gave the confidential information to her attorneys.[64] The husband's attorneys moved to disqualify the wife's attorneys, but the trial court refused to do so.[65] On appeal, the court denied the petition for a writ of mandate ordering the disqualification of the wife's attorneys.[66] The court stated that in order for an attorney to be disqualified for representing an adverse client and disclosing and using confidential information during representation, there must be an attorney-client relationship between the complaining party and the attorney during which confidential information was imparted.[67] This rule prevents the recipient of confidential information from representing an adverse client.[68] Here, the husband did not have an attorney-client relationship with his wife's attorneys, since the wife's attorneys never represented the husband in any matter.[69] In addition, the *Cooke* court refused to extend the "rule" stated above to include circumstances where a third party outside the attorney-client relationship communicates the confidential information.[70] In this case, the butler was considered a third party entirely outside the attorney-client relationship.[71]

2. *Social Contact and Personal Dating Conflicts of Interest*

In the case of *Pepper v. Superior Court of Los Angeles,*[72] an attorney was representing a former member of a country club in an action against the same country club.[73] The attorney was currently a member of the defendant country club.[74] The country club claimed that a conflict of interest existed, because the attorney represented a client who was suing a

64. *Id.*
65. *Id.*
66. *Id.* at 921.
67. Cooke v. Superior Court, 147 Cal. Rptr. 915, 921 (Ct. App. 1978).
68. *Id.*
69. *Id.*
70. *Id.* at 920. *See also* Maruman Integrated Circuits v. Consortium, 212 Cal. Rptr. 497 (Ct. App. 1985) (discussing situation where a third party, former employee of the plaintiff, disclosed confidential information regarding the plaintiff to the law firm representing the defendant, her present employer).
71. Cooke v. Superior Court, 147 Cal. Rptr. 915, 917 (Ct. App. 1978).
72. 142 Cal. Rptr. 759 (Ct. App. 1977).
73. *Id.* at 761.
74. *Id.*

group of which he was a member.[75] The court refused to uphold the disqualification of the attorney because the attorney had not accepted employment adverse to a client or a former client, and the attorney's client, Mr. Pepper, was aware of his attorney's membership at the country club.[76] Furthermore, the court stated that a social relationship alone does not support the disqualification of an attorney from professional employment adverse to that interest.[77] The court balanced the potential disruption of the purely social relationships of the country club against the client's right to counsel of his choice and found the client's interest more substantial.[78]

In *People v. Jackson,*[79] a criminal defendant's lawyer was dating the prosecutor at the time of the trial, and the lawyer failed to inform his client of this relationship.[80] The relationship began approximately eight months prior to the time the defendant was charged with assault with intent to commit rape, and the dating continued regularly throughout the trial.[81] Defense counsel and the prosecutor were never married, never engaged, and never lived together.[82] The court held that lawyers involved in circumstances similar to this case may not proceed as counsel without fully disclosing the relationship, thereby giving their clients the opportunity to obtain different counsel if the clients so desire.[83] The dating included movies and dinners.[84] The court reasoned that "subtle influences [of] sharing a strong emotional or romantic bond"[85] with an individual in an ongoing dating relationship may unacceptably deprive a client, especially a criminal defendant, of undivided loyalty and effective counsel.[86] More-

75. *Id.* at 762.

76. *Id.* at 765.

77. Pepper v. Superior Court, 142 Cal. Rptr. 759, 765 (Ct. App. 1977). *See also* Cohen v. Rosenfeld, 733 F.2d 625, 631 (9th Cir.), *cert denied,* 469 U.S. 932 (1984) (declining to disqualify a law firm because the adverse party's relationship with a member of the firm consisted of "incidental social contacts and a completely unrelated business transaction").

78. *Pepper,* 142 Cal. Rptr. at 765.

79. 213 Cal. Rptr. 521 (Ct. App. 1985).

80. *Id.* at 522.

81. *Id.* at 521-22.

82. *Id.*

83. People v. Jackson, 213 Cal. Rptr. 521, 523 (Ct. App. 1985).

84. *Id.* at 522.

85. *Id.*

86. *Id.* at 522-23. Because the Sixth Amendment of the U.S. Constitution is interpreted to include the right to *effective* counsel, the government is not per-

over, the court mentioned that an appearance of impropriety[87] was demonstrated by the potential, if not actual, conflict created by the defense counsel's lack of disclosure.[88] Relying on *People v. Rhodes*,[89] the court stated that public officials must avoid the appearance of impropriety and properly discharge their duties and responsibilities.[90]

Gregori v. Bank of America[91] involved a civil action in which the plaintiff's attorney, Foley, was dating Doe, the secretary for the law firm representing the defendant.[92] Foley met Doe after work, and he knew she was the secretary for the defendant's law firm.[93] Doe was in charge of the administration of the defendant's case, had access to all confidential documents and information pertaining to that case, and was "intimately familiar with virtually every aspect of the case."[94] The dating relationship included drinks after work, dinner, non-work-related telephone conversations, and flowers.[95] Although Doe's employer testified otherwise, Foley and Doe both declared that no confidential information ever passed between them and that no aspect of the lawsuit was discussed by them, except for the personalities of those persons

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mitted to interfere with such representation "either through the manner of appointment or through the imposition of restrictions upon appointed or retained counsel that would impede his ability to provide a defense." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1361-63 (Johnny H. Killian & Leland E. Beck eds., 1987). *See also* Powell v. Alabama, 287 U.S. 45, 71-72 (1932); Glasser v. United States, 315 U.S. 60, 69-70 (1942). Additionally, a defendant's right to effective counsel as guaranteed by the Sixth Amendment would be meaningless if such defendant's attorney must choose between his own interests and those of his client. Charles P. Kindregan, *Conflicts of Interest and the Lawyer in Civil Practice*, in PROF. RESP. & LIABILITY L. NOTES 8, 8 (1979).

87. *See supra* text accompanying notes 41-45; *see also* Victor H. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243 (1980); Regina Zelonkel, *Appearance of Impropriety as the Sole Ground for Disqualification*, 31 U. MIAMI L. REV. 1516 (1977).

88. People v. Jackson, 213 Cal. Rptr. 521, 523 (Ct. App. 1985).

89. 524 P.2d 363 (Cal. 1974) (where a public prosecutor was appointed by a court to represent a criminal defendant).

90. *Jackson*, 213 Cal. Rptr. at 523.

91. 254 Cal. Rptr. 853 (Ct. App. 1989), *criticized in* Complex Asbestos Litig. v. Owens Corning Fiberglass Corp., 283 Cal. Rptr. 743 (Ct. App. 1991).

92. *Id.* at 856.

93. *Id.* at 857.

94. *Id.* at 856.

95. *Id.*

involved in the action.[96] After Doe's employer learned of this dating relationship, Foley and Doe acknowledged their relationship with one another.[97] The defendant's law firm moved to have Foley disqualified because of the conflict of interest.[98] The court stated that disqualification was proper when a reasonable probability exists that counsel obtained information likely to be used advantageously against an adverse party during the course of litigation.[99] Here, the court declined to disqualify the attorney, because the attorney's relationship with the secretary of opposing counsel's firm, albeit somewhat secret, did not establish such a probability.[100] Furthermore, the court did not accept the argument that integrity of the justice system[101] would be undermined because the dating relationship between Foley and Doe created an appearance of impropriety.[102] The court stated that no attorney had been disqualified in any California case on the basis of an appearance of impropriety alone.[103]

E. *Legislative History of Rule 3-320*

Before the adoption of Rule 3-320,[104] California courts were forced to rely on case law and the ABA Model Code and Rules[105] when faced with social contact or personal dating

96. Gregori v. Bank of America, 254 Cal. Rptr. 853, 856-57 (Ct. App. 1989) *criticized in* Complex Asbestos Litig. v. Owens Corning Fiberglass Corp., 283 Cal. Rptr. 743 (Ct. App. 1991).

97. *Id.* at 856.

98. *Id.* at 855.

99. *Id.* at 865.

100. *Id.*

101. Our justice system is adversarial in nature and will not function smoothly if a client has any reason to doubt his or her attorney's total loyalty. LEGAL-MEDICAL STUDIES, INC., PRACTICAL ISSUES OF PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF LAW 175 (1984) [hereinafter LEGAL-MEDICAL STUDIES]. An attorney's duty of loyalty to his or her client is so great that an attorney needs to avoid conflicts between the interests of his or her client and those of others to fulfill his or her duty to the client and to help the system function. *Id.*

102. Gregori v. Bank of America, 254 Cal. Rptr. 853, 865 (Ct. App. 1989) *criticized in* Complex Asbestos Litig. v. Owens Corning Fiberglass Corp., 283 Cal. Rptr. 743 (Ct. App. 1991). *See also supra* text accompanying notes 41-45; Kramer, *supra* note 87, at 243; Zelonkel, *supra* note 87, at 1516.

103. *Gregori*, 254 Cal. Rptr. at 862.

104. *See supra* note 6 for the full text of Rule 3-320.

105. *See supra* note 11. While the Canons provide some ethical guidance on the subject of appearance of injustice and wrongdoing, this guidance lacks influence because (1) the guidance offered by the Canons is general and nonspecific, and (2) the Canons are no longer in force. Professor Alan Scheflin, Professional

conflicts of interest. Rule 3-320 was presented to the California Supreme Court for approval in December 1987.[106] Adapted from ABA Model Rule 1.8(i),[107] the new Rule was deemed necessary because of the potential for abuse[108] and because close relationships between individuals employed in different and opposing firms are increasingly common.[109] The relationships addressed by the Rule were believed to result in harm to the client only rarely; consequently, the Rule requires only that the attorney inform his or her client of the

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Responsibility Lectures at Santa Clara University School of Law, Fall 1993. The Model Code provides ethical guidance in the area of conflicts of interest, but remains good law in only a minority of states. *Id.* By contrast, more states have adopted some version of the Model Rules, including: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming. *See* SELECTED SIGNIFICANT STATE MODIFICATIONS TO THE ABA MODEL RULES, *in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 138, 231-32 (1993).

106. Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation Office of Professional Standards, State Bar of California 35-36 (1987) [hereinafter Office of Professional Standards]. The Board of Governors for the State Bar of California formulates and enforces rules of professional conduct for all members of the State Bar with the approval of the California Supreme Court. CAL. BUS. & PROF. CODE § 6076 (Deering 1988). When adopting or amending rules of professional conduct, the Board of Governors is required to first publish a preliminary draft and to distribute that draft with a notice of the hearing to be held on that draft. CAL. R. CT. Art. 6 (Deering 1988). The Board is then required to hold at least two public hearings, one in northern California and one in southern California, where all interested persons may present oral or written testimony regarding the proposed rules. *Id. See also generally* COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at i-ii (discussing the history and procedure of the most recent amendment to the California Rules of Professional Conduct).

107. COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, *supra* note 6. *See also supra* note 54 for the full text of Rule 1.8(i).

108. The potential for abuse is one of the main reasons for having rules governing conflicts of interest. *See* Kindregan, *supra* 86, at 16. It may be difficult for an attorney to maintain the confidences of a client in several situations, including personal relationships. *Id.* at 16-17. An attorney's sense of duty to his or her client and to the legal profession should prompt him or her to avoid conflicts of interest or to withdraw when such situations develop. *Id.* at 18. By doing this, an attorney lessens the possibility that he or she will be forced to choose between the client's interests and his or her own interests. *See* LEGAL-MEDICAL STUDIES, *supra* note 101, at 177. The temptation to prefer one's own interests, however, is very great. *Id.* at 176.

109. *See* Office of Professional Standards, *supra* note 106.

relationship.[110] The Commission included the phrase "an intimate personal relationship" because such a relationship is believed to be more disturbing to a client than the other relationships addressed by the Rule.[111]

III. ANALYSIS

A. *Scope of Rule 3-320*

Rule 3-320 applies only to relationships between a member of the bar and the other party's lawyer.[112] Employees such as secretaries, clerks, and paralegals working for the "other party's lawyer," however, have the same access to confidential information. These "case-related" employees may also have relationships that fall within the "intimate personal relationship" provision of Rule 3-320 as often as do lawyers representing the "other party." A Rule that is too broad runs the risk of offering limited guidance because it includes almost everything and excludes almost nothing. Yet, the inclusion of case-related employees in Rule 3-320 would not make the Rule overly broad. In fact, by including case-related employees, the policies of limiting the potential for abuse[113] and creating respect for the legal system are furthered, because case-related employees as well as lawyers may abuse client confidences and create situations that diminish the public's respect for the system. Rule 3-320 requires only that the attorney inform his or her client in writing of a relationship that falls within the parameters of the

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110. *See id.*

111. *See* COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 26.

Rule as Proposed in Discussion Draft dated August, 1986:

Rule 5-107. Adverse Party Represented By Member's Relation.

A member shall not represent a client in a matter as to which an adverse party's attorney is a spouse, parent, child, sibling, part of that member's household, is a client of the member, or has an intimate personal relationship with member, unless the member first advises the client of the relationship in writing.

Discussion:

Rule 5-107 is not intended to encompass circumstances in which a member fails to advise the client of a relationship with another member who is merely a partner or associate in the same firm as the adverse party's counsel.

Id. at 30. *Compare* the final rule, *supra* note 6.

112. *See supra* note 6.

113. *See supra* note 108.

Rule.[114] To include case-related employees along with the other party's lawyer does not place an excessive burden on the attorney. Therefore, case-related employees should be included in Rule 3-320.

B. *"Intimate Personal Relationship" Provision of Rule 3-320*

With the adoption of Rule 3-320 into the California Rules of Professional Conduct, there is now an appropriate rule that addresses certain personal dating conflicts of interest. Rule 3-320 states that "[a] member shall not represent a client in a matter in which another party's lawyer . . . has an *intimate personal relationship* with the member."[115] "Intimate personal relationship," however, is not further defined in the California Rules of Professional Conduct.[116] Reference, albeit brief, is made to the language "intimate personal relationship" in the legislative history of Rule 3-320 of the Rules of Professional Conduct.[117] In addition to the consideration that the existence of intimate personal relationships would be more disturbing to a client, the Commission said that this language is not applicable to casual[118] friendships.[119] Rule 3-320 has no precedent in the California Rules of Professional Conduct, and there is no case law applying this new rule of conduct.

1. *Comparison of ABA Model Rule 1.8(i) and Rule 3-320*

One possible source of guidance regarding the interpretation of intimate personal relationship is ABA Model Rule 1.8(i)[120] from which the California Rule was adopted.[121]

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114. *See supra* note 6.

115. COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 26 (emphasis added).

116. *See* Office of Professional Standards, *supra* note 106, at 35-36.

117. COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 26.

118. The word "casual" has a variety of definitions, several of which include "happening by chance, not planned or expected, accidental"; "without plan or method"; "informal in manner, offhand"; and "occasional or irregular." 1 WORLD BOOK DICTIONARY 316 (1990). In comparison, the word "intimate" is defined as "very familiar, known very well, closely acquainted"; "involving or resulting from close familiarity"; and "very personal, most private." *Id.* at 1106.

119. *See* Office of Professional Standards, *supra* 106, at 36.

120. *See supra* note 54 for the full text of Model Rule 1.8(i).

Model Rule 1.8(i) relates specifically to conflicts of interest created by blood or marriage between lawyers of different firms, while Rule 3-320 includes both familial relationships, marital relationships, and intimate personal relationships. A primary consideration of Model Rule 1.8(i) is the great opportunity of closely related attorneys to unwittingly reveal confidential material.[122] Intimate relationships, by their definition, contain a certain closeness that provides opportunity for disclosure of confidential and privileged information.[123] Therefore, the same consideration should be applied to intimate relationships. "Intimate" should encompass relationships where individuals are able to disclose confidential information unconsciously or unintentionally.

Familial and marital relationships are often of an intense nature and may result in emotional interference with professional judgment.[124] The same may be said of intimate relationships because of the closeness and privacy associated with such relationships. This intense nature and emotional bond should also be included in the interpretation of "intimate" as addressed by Rule 3-320.

2. *Definition of Such Language*

Another source of interpretation is the definition of the phrase "intimate personal relationship." "Intimate" is generally defined as having a close acquaintance with an individual[125] wherein there is a sense of familiarity between the persons. "Personal" refers to the private affairs of an individual,[126] denoting a connection.[127] The combination of terms creates a basic meaning of intimate personal relationship—a connection of familiarity[128] or close acquaintance in

121. *See* Office of Professional Standards, *supra* note 106, at 56.
122. *See* 1 HAZARD & HODES, *supra* note 56, at 283.
123. *See supra* note 118 for definition of "intimate."
124. *See supra* text accompanying notes 56-57.
125. *See supra* note 118.
126. 2 WORLD BOOK DICTIONARY 1555 (1990).
127. *Id.* at 1764. Other meanings of "relationship" include "the condition of belonging to the same family" and "the state or condition that exists between people or groups that deal with one another." *Id.*
128. Familiarity was once shown by using a person's given name or nickname instead of the person's surname or family name. Social norms have changed this, and no longer do only relatives and extremely close friends of an individual use that person's given name. Today the use of someone's given name may represent a purely social, impersonal relationship.

the private affairs of an individual. This acquaintance is in direct contrast with relationships of a purely social nature, which normally lack the familiarity or closeness required to be intimate. Purely social relationships, however, may constitute a connection and may be among the private affairs of an individual. Therefore, a great number of social contacts fall outside the scope of Rule 3-320 because of lack of intimacy.

B. *Interpretation as Applied to Personal Dating Relationships*

Although the language "intimate personal relationship" may appear to include almost all personal dating relationships, when the term is clarified by analyzing factors such as the nature of dating, a reasonable probability of obtaining confidential information, the presence of both social and professional relationships, and the nature of the action, a number of personal dating relationships fall outside the parameters of the "intimate personal relationship" language.[129]

1. *Definition of Dating*

Dating may be conducted on several different levels. There is casual dating, which might include one social meeting or the dating of several people at the same time. Conversely, serious dating may represent an exclusive relationship between two persons where the individuals date only each other, or a continuous long-term dating that may last months or years. Dating may also lie somewhere in between the casual and more serious levels. Given the different types of dating, the nature of the dating relationship must be taken into account not only when deciding to apply Rule 3-320 to a

129. Without further clarification of the intimate personal relationship provision contained in Rule 3-320, Mr. Andrew J. Guilford of Sheppard, Mullin, Richter & Hampton mentioned that Rule 3-320 "discourages large law firms from hiring a lawyer having 'an intimate personal relationship' with a lawyer in another large firm." *See* COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 183. Because of the greater number of attorneys employed in a large firm, there is a greater possibility of a large firm employing an attorney who has a dating or intimate relationship with a member of another firm (large or otherwise). Obviously, it would be in the best interest of the large firm to avoid any conflict-of-interest situations that fall within the intimate personal relationship provision. To do so would decrease the likelihood that the firm would lose clients because their attorney, a member of such firm, may have a conflict of interest.

dating relationship, but must also be included in the Rule itself and not only in the legislative history of the Rule.

To include casual dating under the intimate personal relationship language of Rule 3-320 would be to include every possible dating relationship within the scope of the Rule. This would greatly inhibit any unmarried[130] attorney from taking employment before completely disclosing every person he or she has ever dated to the client because of the possibility that one of the attorney's dating relationships would fall within the scope of the Rule. Another consequence of including casual dating under the Rule would be that a lawyer may decline employment because he or she may not want to disclose these aspects of his or her personal life. It is unrealistic to think that an attorney, when applying this rule, would err on the side of safety by disclosing his or her entire personal life to the client. An individual's life outside of work is considered private. A majority of people, including attorneys, desire to keep such information private. Furthermore, the possibility exists that a client, having learned how the attorney conducts his or her personal life, would lose respect for the attorney, other attorneys, and the entire legal system. An attorney's reluctance to disclose his or her personal life to a client could potentially limit a client's exercise of his or her right to counsel of choice because the number of attorneys willing to take the case would be diminished. There are several strong arguments for specifically delineating the nature of the relationships covered in Rule 3-320: dating is not easily classified into select categories, attorneys would be reluctant to disclose all personal information, a client may lose respect for attorneys and the legal system, and clients may be limited in the exercise of their right to counsel of their choice.

2. *Reasonable Probability of Obtaining Confidential Information*

"Reasonable probability" of obtaining confidential information is the second factor that should be considered when applying the "intimate personal relationship" language of Rule 3-320. An inquiry into the "reasonable probability" of obtaining confidential information seeks to discover whether

130. Married lawyers fall directly within the scope of Rule 3-320 by its terms, whereas unmarried lawyers will more likely fall within the intimate personal relationship language.

an attorney would have a reasonable opportunity to obtain information that could be used advantageously. Such a finding would not call into question the personal integrity of the attorney whose relationship was being examined under Rule 3-320. It would not mean that such an attorney would be more likely than another attorney to seek out confidential information that he or she could use to his or her client's advantage. Instead, the focus is on the existence of the opportunity to obtain confidential information. The greater the opportunity for acquiring confidential information, the greater the probability of prejudicial harm on a client. Generally, courts are reluctant to inflict any kind of harm on a client's case and thus attempt to lessen the possibility of harm to a client. When an increased probability of obtaining information exists, as well as the corresponding probability of prejudicial harm, it is more likely that the relationship falls within the scope of the "intimate personal relationship" language of Rule 3-320.

Even though *Gregori*[131] was decided before California adopted Rule 3-320, there is sound basis for a court to continue looking for a "reasonable probability" that confidential information could be acquired before disqualifying an attorney. Disqualification motions have become a strategic tool to harass opposing counsel, to delay litigation, or to force opposing counsel into settlement on unacceptable terms through intimidation.[132] In addition, disqualification places a substantial hardship on the disqualified lawyer's client, who is deprived of his or her choice of counsel and must find another lawyer.[133] Disqualifying an attorney without a reasonable probability would threaten the integrity of the justice system,[134] a system that the disqualification procedure is designed to protect. In addition, disqualification would impose a significant burden on the innocent client of the disqualified attorney. Since the determination of a "reasonable probability" of obtaining confidential information effectively removes prejudicial harm to the client and because disqualification motions have frequently become strategic tools in litigation, a determination of "reasonable probability" should be

131. 254 Cal. Rptr. 853 (Ct. App. 1989).
132. *Id.* at 859.
133. *Id.*
134. *See generally supra* note 101.

included as a factor in the analysis of a relationship under the "intimate personal relationship" language of Rule 3-320.

3. *Social and Professional Relationships*

The existence of a social and professional relationship is a third factor to consider when analyzing a dating relationship to determine whether it is an "intimate personal relationship" within the language of Rule 3-320. In the most general sense, a social relationship includes interaction and communication occurring away from work. It may include parties, sporting events, picnics, and other gatherings where the main purpose is to have fun or to enjoy the company of others rather than to conduct business. A professional relationship is the direct opposite of a social relationship. A professional relationship relates to interaction and communication at the workplace or while conducting business.

By requiring a member to have both a social and professional relationship with the other individual, whether the person be the other party's lawyer or a case-related employee, there is a greater likelihood of a conflict of interest existing and a greater likelihood of a "reasonable probability" that the attorney obtained confidential information. In a purely social relationship, one is less likely to divulge confidential material, because specific information regarding a particular case is less likely to be a topic of casual conversation. Usually, people casually conversing or listening to such a conversation are not interested or do not have the time to discuss specifics of a case so as to pressure another into revealing privileged information. *Pepper* supports the concept of requiring a social and professional relationship, as the court found a purely social relationship insufficient to support a motion to disqualify.[135] In addition, by requiring both a social and professional relationship, a court would avoid the *Cooke* rule stating that disqualification is not warranted where a third party outside the attorney-client relationship communicates confidential information.[136] Otherwise, a case-related employee would be considered outside the attorney-client relationship. The inclusion of a social and professional relationship would also

135. Pepper v. Superior Ct., 142 Cal. Rptr. 759, 765 (Ct. App. 1977).

136. *See supra* text accompanying note 67.

ensure that a potential conflict of interest exists before an attorney is disqualified.

4. *Criminal v. Civil Action*

Additionally, the type of legal action involved should be considered when determining whether a dating relationship falls within the parameters of the "intimate personal relationship" language of Rule 3-320. In a criminal action, there is often more at stake than in a civil action. The more severe consequences associated with criminal actions demand closer scrutiny and a stricter application of Rule 3-320 to avoid any potential prejudice that might adversely affect the defendant's case. Conversely, in a civil action, the court should be more lenient in balancing the factors in a disqualification motion.

IV. PROPOSAL

A. *Amendment to California Rules of Professional Conduct Rule 3-320*

The California State Bar should amend Rule 3-320 to include case-related employees as well as the other party's lawyer. The discussion accompanying Rule 3-320 should also be amended to include further clarification of the language "case-related employee" and further clarification of the "intimate personal relationship" provision.

Such an amendment should read:

> Rule 3-320. Relationship With Other Party's Lawyer.
>
> A member shall not represent a client in a matter in which another party's lawyer or <u>case-related employee of the other party's lawyer</u> is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.[137]
>
> *Discussion*:
>
> Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another member who is merely a partner or associate

137. See SHEPPARD, *supra* note 6 (underlined portions added by the author). The underlining in this proposal denotes the proposed amendment to the original text of Rule 3-320 as stated in the California Rules of Professional Conduct.

in the same firm as the adverse party's counsel, and who has no direct involvement in the matter.[138]

A case-related employee for the purpose of this rule refers to any employee actively participating in a client's case matter. Such an employee may be a secretary, paralegal, or clerk for the other party's lawyer or firm.

An intimate personal relationship for the purpose of this rule consists of more than casual dating. It must be an ongoing, continuous relationship of both a social and professional nature. In addition, there must be a reasonable probability that the member obtained confidential information which could be used advantageously.

B. *Application*

Application of the proposed statute to *Jackson* and *Gregori* is discussed below.[139]

1. People v. Jackson

The defense counsel and the prosecutor in *People v. Jackson*[140] began their relationship approximately eight months before the defendant was charged.[141] Since the defense attorney and the prosecutor were not married and did not reside in the same house,[142] their relationship would be required to meet the criteria required by Rule 3-320 as amended by the proposal. The prosecutor qualifies as the other party's lawyer because the prosecutor is the opposing counsel on these facts. Defense counsel and the prosecutor were not casually dating. The facts state that their dating relationship began some eight months prior to the charging of the defendant and continued during the criminal proceedings. Generally, the longer an individual dates the same person, the more serious the dating and the relationship between those two individuals must be assumed to be. An eight-month relationship such as the relationship in *Jackson* reflects some kind of commit-

138. COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 25 (underlined portions added by the author).

139. The two cases discussed, *Jackson* and *Gregori*, are used primarily in this section for their facts and are used to illustrate the application of Rule 3-320 as amended in the Proposal section of this comment.

140. 213 Cal. Rptr. 521 (Ct. App. 1985). *See also supra* text accompanying notes 79-82 for additional background and facts pertaining to this case.

141. *Id.* at 522.

142. *Id.*

ment and emotional bond between two persons. This commitment and bond may interfere with the loyalty and duty owed to a client. The defense attorney and the prosecutor also appeared as direct adverse counsel, and thus may be said to have both a social and a professional relationship.

From this social and professional relationship, it is plausible to conclude there was a reasonable probability that either attorney may have acquired confidential information from the other regarding the case. Confidential information may have been exchanged during dinner conversation or during "pillow talk." Requiring persons in similar circumstances to refrain from mentioning or discussing any aspect of a common case, especially a case to which both attorneys were devoting their full attention, places a tremendous strain on the relationship and the persons involved. Given these facts, *Jackson* would fall under the intimate personal relationship provision and within the scope of Rule 3-320 as amended by the proposal.

In addition, the defendant in *Jackson* was charged with assault with intent to commit rape and faced a probable prison sentence if convicted.[143] Because the proceeding was criminal, stricter scrutiny of the possible harm inflicted on the defendant by the relationship between his attorney and the prosecutor is required. The defendant's motion for a new trial should have been granted because defense counsel and the prosecutor had an intimate personal relationship during the time of defendant's trial that was not disclosed to the defendant.

The application of Rule 3-320 as amended by this proposal and the *Jackson* court reached the same conclusion. The attorney for the defense testified that he thought no conflict of interest was created by his relationship with the prosecutor during this case.[144] If this proposal is enacted, however, an attorney could find suitable guidance in Rule 3-320. The defense attorney could have determined for himself that his relationship with the prosecutor was an intimate personal relationship falling within the parameters of Rule 3-320 because of the nature of their dating, the existence of a social and professional relationship, and the reasonable probability of obtaining confidential information. After making such a

143. *Id.* at 521.
144. *Id.* at 522.

determination, the defense attorney would have disclosed this relationship to his client as required by the Rule, and his client, having been fully informed, could have determined whether he should acquire new counsel or retain his present lawyer.

2. Gregori v. Bank of America

In *Gregori v. Bank of America,*[145] the plaintiff's attorney, Foley, began dating Doe, the secretary for the law firm representing the defendants.[146] The dating relationship between Foley and Doe must first be examined under the proposed Rule to determine whether it satisfies the elements of Rule 3-320 as amended by this proposal and falls within the "intimate personal relationship" provision. Doe qualifies as a case-related employee because she was the secretary for the defendant's law firm and the administrator of the case for which Foley was plaintiff's counsel. She actively worked on the case.[147] The dating relationship of Foley and Doe was more casual than intimate. Their dating began during the case in which both were involved and continued for a couple of weeks.[148] Two weeks is a short time to develop a closeness and emotional attachment more commonly associated with relationships of a much longer duration. Although Foley and Doe had a social relationship, their professional relationship is more attenuated. Foley and Doe were not directly opposing counsel, facing each other in the courtroom or across the negotiation table. On the other hand, their professional relationship is less attenuated given the fact that any professional contact between them would occur primarily in the form of correspondence between Foley as plaintiff's attorney and Doe as the administrator of the lawsuit for the defendants' firm. Doe, however, as the administrator would have no input or direct influence in the case. There was a reasonable probability that either Foley or Doe could have acquired confidential information from the other through dinner conversation or general telephone conversations. This probability follows from the professional positions held by Foley and Doe,

145. 254 Cal. Rptr. 853 (Ct. App. 1989). *See also supra* text accompanying notes 91-99 for additional background and facts pertaining to this case.

146. Gregori, 254 Cal. Rptr. at 856.

147. *Id.*

148. *Id.*

plaintiff's attorney and administrator of the lawsuit for the defendants' law firm, respectively, and from their dating relationship. Given these facts, Foley and Doe do not have an intimate personal relationship, and their relationship falls outside the parameters of Rule 3-320 as amended by the proposal. Also, since this action is a civil one, the possible harm because of error is less threatening and the court's scrutiny need not be as strict. Foley, as plaintiff's counsel, would not be disqualified because of his relationship with Doe, the secretary of the defendant's law firm and administrator of the lawsuit for which Foley is opposing counsel.

The application of Rule 3-320, as amended by the proposal and the *Gregori* court, reached the same conclusion. If Rule 3-320 as amended by the proposal had been adopted and subsequently applied to the facts in this case; however, the court would have had distinct criteria to look for, and this case, as well as future cases of this nature, would have a more uniform result.

V. CONCLUSION

The high current enrollment of women in law school and the expansion of the number of women in the work force increases the probability of personal dating relationships between those in the legal profession. Until the adoption of Rule 3-320, the California Rules of Professional Conduct did not contain language that addressed personal dating conflicts of interest. With the probable increase in these relationships, the time is ripe for a rule that addresses this conflict of interest.

Although Rule 3-320 addresses this subject, it does not include those case-related employees of the other party's lawyer who have the same access to client confidences and the same probability of creating personal dating conflicts of interest. The "intimate personal relationship" provision that specifically speaks to personal dating relationships needs greater clarification. Without more definition, the intimate personal relationship language does not offer the guidance necessary to avoid these conflicts of interest, or limit the disqualification motions and other motions made on the basis of a personal dating relationship and related conflict of interest. Rule 3-320 should be amended to include case-related employees, and to include language stating that an intimate per-

sonal relationship is not casual dating, but rather an ongoing, continuous relationship of both a social and a professional nature, and the existence of a reasonable probability that a member could obtain confidential information because of that relationship. These amendments to Rule 3-320 would further the policy of creating respect for the legal system, and would provide a firm foundation, further clarification, and a specific set of criteria for evaluating the existence of an intimate personal relationship.

Nicole A. Bartow