

Journal of Law and Policy

Volume 2 | Issue 1

Article 8

1994

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Recommended Citation

David Pincus, *Lawyers in Lust: Does New York's New Rule Addressing Attorney-Client Sexual Relations Do Enough?*, 2 J. L. & Pol'y (1994).
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol2/iss1/8>

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LAWYERS IN LUST: DOES NEW YORK'S NEW RULE ADDRESSING ATTORNEY-CLIENT SEXUAL RELATIONS DO ENOUGH?

*David H. Pincus**

I. INTRODUCTION

Recently, the issue of how to regulate attorney-client sexual relations has confronted bar associations, state legislatures, and state agencies. Such behavior was once accepted as the legal profession's "dirty little secret."¹ However, now it is no longer tolerable.² The legal community's response to the issue of how to regulate lawyer-client sex has been mixed. There are some legal ethics critics who support a *per se* prohibition on the commencement of attorney-client sex during the course of representing clients.³ Others, like David Isbell, chairman of the A.B.A.'s Committee on Ethics and Professional Responsibility, oppose an outright ban because "[t]here are too many circumstances where two consenting adults are involved and it does not impair the ability of the lawyer to render professional services."⁴ Isbell also contends that rules banning attorney-client sexual relations are unnecessary because current ethical practices already condemn such

* BLS Class of 1995.

¹ *In re Marriage of Kantar*, 581 N.E.2d 6 (Ill. App. 1991), *appeal denied*, 587 N.E.2d 1016 (Ill. 1992).

² John M. O'Connell, Note, *Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule*, 92 COLUM. L. REV. 887 n.4 (1992) (discussing lawyers who view sex with clients as a job perk).

³ *Id.* at 921. *See also In re Lewis*, 415 S.E.2d 173, 175 (Ga. 1992).

⁴ Stephen Labaton, *Are Divorce Lawyers Really the Sleaziest?*, N.Y. TIMES, Sept. 5, 1993, §4, at 5.

behavior.⁵ Still others argue that a ban on sex should only be enforced in areas of practice in which clients are most vulnerable, including domestic relations law.⁶ Lastly, some commentators advocate a rule that addresses the potential abuses brought on by lawyers' sexual relations with their clients, but does not necessarily proscribe such behavior. For example, ethicists may employ a rule that creates a presumption that attorneys who have sex with their clients have provided inadequate representation because such conduct induces a conflict of interest or breaches the fiduciary duty the lawyer owes to the client. Thus, once a client offers proof of an attorney-client sexual relationship, the burden shifts to the attorney to rebut the presumption by proving that he did not exploit his client because the representation provided was competent, despite the sexual relationship.⁷

While this debate continues on the national front, New York has recently asserted its position on attorney-client sexual interaction. On August 16, 1993, New York State's Chief Judge Judith S. Kaye of the New York Court of Appeals announced stringent new ethical rules that will be applied to domestic relations lawyers.⁸ These rules combine some of the most demanding standards found in the ethical codes of other states, including a ban

⁵ *Id.*

⁶ Yael Levy, Note, *Attorneys, Clients and Sex; Conflicting Interests in the California Rule*, 5 GEO. J. LEGAL. ETHICS 649 (1992).

⁷ See, e.g., Linda M. Jorgenson & Pamela K. Sutherland, *Lawyers' Sex with Clients: Proposal for a Uniform Standard*, 12 No. 11 FAIRSHARE 11, (1992); Symposium, *Loose Cannons, a National Survey of Attorney-Client Sexual Involvement: Are there Ethical Concerns?*, 23 MEM. ST. U. L. REV. 483 (1993) [hereinafter *Symposium*]

Throughout this note, references will be made to clients in the feminine and attorneys in the masculine, in recognition of the fact that most of the complainants are female while most of the respondents are male. See The Committee to Examine Lawyer Conduct in Matrimonial Actions, Report, May 4, 1993, at 30 [hereinafter *the Report*].

⁸ Edward A. Adams, *Divorce Law Reforms Unveiled*, N.Y. L.J., Aug. 17, 1993, at 1.

on sexual relations between attorney and client during the course of representation.⁹ Judge Kaye implemented these measures to “counteract public criticism and cynicism about the legal profession and the courts.”¹⁰ Recognizing that such problems also occur outside the matrimonial practice, Judge Kaye announced the formation of a committee to determine if similar rules should be applied to other areas of practice.¹¹ However, the final rules announced by the court limit the ban on attorney-client sex to those attorneys involved in domestic relations matters.¹²

This Note examines New York State's new rules to determine whether they adequately address the dangers of attorney-client sexual relations. It also explores how New York should modify its regulation of attorney-client sexual relations to encompass other areas of the legal profession. The first section discusses the purposes behind New York's adoption of the ban on attorney-client sexual relations in domestic relations matters. It also discusses the ban in the context of the other relevant matrimonial representation reforms promulgated by Judge Kaye. The second section addresses the factors which justify regulating sex between attorneys and clients.¹³ The third section discusses the

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Edward A. Adams, *Divorce Lawyers' Rules Modified a Bit*, N.Y. L.J., Nov. 2, 1993, at 1.

¹³ This Note will not employ a misconduct analysis to justify regulation of attorney-client sexual relations. Although misconduct has often been used as a ground for addressing attorneys' sexual conduct, the proponents of New York's rule did not consider it as a factor for justifying their rule. Misconduct rules prohibit attorneys from engaging in criminal activities, as well as professional and nonprofessional activities which either adversely affect attorneys' ability to practice law or are prejudicial to the administration of justice. The Report, *supra* note 7, at 30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1983). However, applying misconduct rules to instances of attorney-client sexual involvements is problematic because the rules' “lack of specificity leads to their inconsistent

inadequacies of New York's rule. The fourth section examines proposed alternatives to New York's rule.

This Note concludes that New York should expand its regulation of sexual relations between attorneys and clients to other areas of practice because many of the abuses that New York's matrimonial law reform targeted also pose dangers to clients seeking representation in other substantive areas of law. This Note proposes that regulation applied to areas of practice outside of matrimonial law, like the new matrimonial rules, must go beyond mere restrictions of conduct. These new measures must address situations in which clients' vulnerability to sexual exploitation are increased, including clients' lack of knowledge about their rights in the attorney-client relationship. Likewise, these measures should remove or limit many of the coercive conditions which may have the effect of forcing a client's consent to sex within the context of a lawyer-client relationship.

II. NEW YORK'S EFFORTS: DEFINING THE PROBLEM AND PROVIDING A SOLUTION

A. *The Problem as Defined by the Reform Committee*

On July 16, 1992, the Administrative Board of the Courts ("the Administrative Board") formed the Committee to Examine Lawyer Conduct in Matrimonial Actions ("the Committee") in order to examine the role of attorneys in matrimonial actions in the New York courts.¹⁴ This action was largely inspired by increased criticism of the substantive laws and legal procedures particular to matrimonial practice.¹⁵ Justice Leo Milonas of the Appellate Division, First Department, chaired the Committee and its members

application." See O'Connell, *supra* note 2, at 904-10. Likewise, the lack of specificity in the rules fails to give adequate notice as to whether certain activities are prohibited. *Id.*

¹⁴ The Report, *supra* note 7, at app. A.

¹⁵ *Id.*

included four justices representing each of New York's Appellate Divisions, Judge Judith Kaye of the Court of Appeals, and six distinguished members of the bar chosen by then Chief Judge Sol Wachler.¹⁶ On May 4, 1993, the Committee issued a report ("the Report") recommending nine specific reforms. Among these reforms was a prohibition of sexual relationships between attorneys and clients during the course of matrimonial representation.¹⁷ Although the Report explicitly states that the purpose of this regulation is to proscribe the practice of attorney-client sexual relations in the context of matrimonial law, many of the Committee's justifications for such a ban persist in other areas of practice. In its discussion of client vulnerability, the Report compares the role of the matrimonial attorney to that of the therapist, arguing that "the necessary intensity of the . . . relationship may tend to activate sexual and other needs and fantasies on part of both the [attorney] and [client], while weakening the objectivity necessary for control."¹⁸ The Report cites a recent American Bar Association formal opinion which held that sex between the attorney and the client potentially breaches an attorney's fiduciary obligations to his client, inhibits an attorney's independent judgment, and creates a conflict of interest between the attorney and client.¹⁹ The Report also argues that a sexual relationship during the course of any type of representation may jeopardize an attorney's ability to render effective counsel.²⁰ Furthermore, the Report states that although current ethical rules may provide a framework in which to analyze the issues of attorney-client sex, they "are inadequate to address the

¹⁶ *Id.* (A complete list of the Committee members and their credentials is provided in the Report, *supra* note 7, at app. B).

¹⁷ *Id.* at 30.

¹⁸ THE PRINCIPLES OF MEDICAL ETHICS, § 2 (1986), *reprinted in* the Report, *supra* note 7, at app. P.

¹⁹ American Bar Association Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992) [hereinafter *the A.B.A. Opinion*].

²⁰ The Report, *supra* note 7, at 30.

more subtle aspects necessarily involved.”²¹ The Report challenges the notion that addressing the issues of sexual exploitation in attorney-client relationships is sufficient to combat the problems it creates.²² It concludes that an absolute prohibition of attorney-client sexual relations during the pendency of the representation is the only way to eliminate the potential dangers to both parties.²³ Thus, the drafters focus on three factors to justify the ban on attorney-client sexual relations during the pendency of domestic relations matters: client vulnerability, conflict of interest, and breach of fiduciary duty.

B. *The New York Rules*

The reforms recommended by the Committee focus on three general areas. First, the reforms substantially increase clients' knowledge about their rights in the attorney-client relationship. Second, they limit the coercive aspects of the relationship that attorneys have used to exploit clients. Third, they prohibit specific behavior: attorney-client sexual relations during the pendency of domestic relations matters. The Administrative Board generally followed the Committee's recommendations in its official version of the rules, which took effect on November 30, 1993.²⁴

The reforms enhance clients' knowledge about their rights in the attorney-client relationship by requiring that attorneys provide their clients with statements of clients' rights and responsibilities and written retainer agreements. The Committee notes that although a divorce will seriously affect the lives of the parties and their children, most divorce clients know little about their rights

²¹ *Id.* at 31.

²² *Id.* at 30. *See also* CAL. RULES OF PROFESSIONAL CONDUCT § 3-120.

²³ The Report, *supra* note 7, at 31.

²⁴ Adams, *supra* note 12, at 1. (There are several differences between the proposed rules and the final version of the rules. Those differences which are relevant to this Note will be discussed *infra*).

and responsibilities as clients in the attorney-client relationship.²⁵ When such ignorance is present at the inception of the attorney-client relationship, “[the] relationship begins with an inherent imbalance that may become exacerbated as the action progresses.”²⁶ The Committee concludes that a statement of rights will allow clients to become informed consumers who can “participate more knowledgeably and efficiently in the process and have more realistic expectations of counsel.”²⁷ Although the final version of the statement of rights rectifies clients' lack of knowledge, it is not as complete as the version initially proposed by the Committee. Specifically, it does not mention that clients have the right to file disciplinary complaints against their attorneys.²⁸

The requirement of written retainer agreements was also designed to further enhance clients' knowledge of their rights and responsibilities as parties to the attorney-client relationship. Many clients have voiced dissatisfaction with the high cost of fees, the way in which they were billed for legal services, and their lack of information about various aspects of their litigation including the duration and status of cases.²⁹ The Committee notes that written retainers “will foster communication between counsel and client,

²⁵ The Report, *supra* note 7, at 6.

²⁶ *Id.* at 6.

²⁷ *Id.* at 9.

²⁸ Adams, *supra* note 12, at 1. The Administrative Board deleted this provision in response to the local bar associations' heated opposition to it. The bar associations feared that such statements would interfere with the sense of trust between attorneys and clients. *Id.* Evidently, the Administrative Board found that this trust, based on incomplete knowledge, is more important than the clients' right to be informed, despite the Committee's contention that the goal of informing the public via a clients bill of rights is paramount. The Report, at 10. *See also* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1400.2, 1200.10 (1993). This concession also seems inconsistent with one of the motivating factors behind these reforms: clients and the public have shown increased cynicism toward lawyers. *See generally* the Report, *supra* note 7.

²⁹ The Report, *supra* note 7, at 11.

educate the client, and prepare him or her for the anticipated developments, delays, and costs of the action."³⁰ Thus, the written retainer agreement required by the new rules provides additional assurances that domestic relations clients will have the knowledge necessary to protect them from unsavory attorneys.

The rules also reduce many of the coercive forces that unscrupulous attorneys may use to manipulate their clients. The new rules prohibit non-refundable retainer fees because these fees often act as penalties against those clients who wish to discharge their attorneys.³¹ Such fees were banned because they interfere with "a client's unqualified right to discharge counsel, even without cause," and are therefore "repugnant to public policy."³² The rules also restrict attorneys' abilities to obtain security interests to secure their fees. Non-monied clients in matrimonial matters (usually the wives) are "often forced to accede to the levy of a security interest upon a marital asset in order to ensure that not only will the litigation continue but that counsel will not abandon [the client]."³³ The new rule requires that attorneys who apply such levies must provide for the liens in their retainer agreements, give notice of such applications to the other spouse, and that the applications must survive scrutiny by the court.³⁴ The new rule also prevents an attorney from foreclosing on a mortgage placed on the marital residence as long as it is the primary residence of the spouse who consents to the mortgage and that this spouse is the title holder.³⁵ These changes will increase the knowledge of the

³⁰ *Id.* at 12. See also N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.3 (1993).

³¹ The Report, *supra* note 7, at 16-18. See also N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.4 (1993).

³² The Report, *supra* note 7, at 18.

³³ *Id.* at 19.

³⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.5 (1993).

³⁵ *Id.*

parties, reducing surprise over fees. They will also prevent spouses subject to such security interests from acceding to demands of unscrupulous lawyers simply because their clients can not afford not to comply. Similarly, the new rules help relieve some of the tension that may arise over contested fees by providing fee arbitration to clients that is binding on both the attorney and the client.³⁶ When viewed in the context of curtailing attorney-client sex, the above rules regarding the financial aspects of the attorney-client relationship mitigate some of the forces which attorneys may use to coerce their clients into consenting to sexual interactions.³⁷

The prohibition against attorney-client sexual interactions in domestic relations matters has been included in New York's disciplinary rules for lawyer conduct as a modification. Prior to this modification, New York had no direct measure for regulating sexual conduct of attorneys other than by determining whether such actions violate present ethical standards: general misconduct, conflict of interest, and breach of fiduciary duty. Now, however, the amended rule declares that it is misconduct for attorneys in domestic relations matters to begin sexual relationships with clients during the course of the representation.³⁸ The rule does not define some of its terms, including "domestic relations matters" and "begin a sexual relationship."³⁹ Likewise, the rule fails to define how a client may prove such misconduct or how an attorney may

³⁶ N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.7 (1993).

³⁷ These coercive forces will be discussed *infra*.

³⁸ N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.3 (7) (B) (1993), which reads as follows: "In domestic relations matters, [it is misconduct for a lawyer to] . . . begin a sexual relationship with a client during the course of the lawyer's representation of the client."

The classification of this rule as misconduct is somewhat ironic because the Committee did not offer a misconduct analysis when it explained its justifications for the rule. The Report, *supra* note 7, at 30, 31.

³⁹ These undefined terms will be discussed at greater length *infra*.

rebut such accusations.⁴⁰ These undefined terms aside, the rule's approach is clear: domestic relations lawyers should not make sexual advances toward clients or submit to sexual advances from clients during the course of their representation of these clients.

III. THREE FACTORS WHICH JUSTIFY REGULATING SEX BETWEEN ATTORNEYS AND CLIENTS

A. *Client Vulnerability*

Sexual relationships between attorneys and clients pose problems because attorneys have the capacity to occupy positions of power over their clients.⁴¹ This power imbalance stems partially from the fiduciary relationship between clients and attorneys. It also stems from the emotional effects of the attorney-client relationship on clients. Initially, clients place their trust and confidence in attorneys because they need attorneys to represent their concerns within the legal system. The clients' reliance on attorneys in the ensuing relationship places the attorney in a position of influence over the client.⁴²

Likewise, attorneys often occupy a position of superiority over their clients because they possess two forms of knowledge that their clients lack. First, attorneys' knowledge of the law and the legal system is what brings clients to them at the outset.⁴³ Many clients are not aware of their specific rights in an attorney-client relationship.⁴⁴ Similarly, they may be unaware of the ethical

⁴⁰ See the Report, *supra* note 7, at 30, 31.

⁴¹ Jorgenson, *supra* note 7.

⁴² *Id.*

⁴³ The A.B.A. Opinion, *supra* note 19.

⁴⁴ The Report, *supra* note 7, at 6.

rules to which lawyers must adhere.⁴⁵ Second, knowledge about clients' unique circumstances fosters an unequal balance of power. Clients often must provide their attorneys with intimate information that may reveal their particular vulnerabilities. Clients may reveal economic or psychological weakness or fears, which attorneys may exploit.⁴⁶ Such information may also include financial data and tax returns. Furthermore, it may include clients' behavioral and sexual habits if they are seeking the divorce on grounds of adultery, abandonment, constructive abandonment, or cruel and inhuman treatment because such information is necessary to assert these causes of action.⁴⁷ Such knowledge may enhance attorneys' potential to manipulate their clients' consent to engage in sexual interactions. For example, an attorney who has specific knowledge of a client's poor financial condition may bargain to reduce or eliminate fees in exchange for sex.⁴⁸

In addition, an attorney may engage in sexual relations with a client simply because he may know she is emotionally vulnerable or susceptible to coercion.⁴⁹ Such vulnerability may be enhanced by a psychological dependency known as transference, in which clients' emotional needs may manifest themselves as a desire or willingness to be accepted which may, in turn, result in a perceived

⁴⁵ See *In re Matter of Rudnick*, 177 A.D.2d 121 (N.Y. App. Div. 1992) (attorney's failure to notify his client that his personal interest in her as a sexual partner conflicted with his professional responsibility as her attorney); see also *Bourdon's Case*, 565 A.2d 1052, 1057 (N.H. 1989) (discussing attorneys duty to warn client when the representation may be materially affected by the attorney's personal relationship with his client).

⁴⁶ *Disciplinary Counsel v. Ressing*, 559 N.E.2d 1359 (Ohio 1990) (attorney had sex with his client and did not charge her for his legal services).

⁴⁷ See N.Y. DOM. REL. LAW art. 10 (Consol. 1992).

⁴⁸ See *Jane Doe v. John Roe*, 756 F. Supp. 353, 354 (N.D. Ill. 1991), *aff'd*, 958 F.2d 763 (7th Cir. 1992).

⁴⁹ *Drucker's Case*, 577 A.2d 1198, 1202-03 (N.H. 1990) (attorney had sex with a client despite knowing of her psychological condition); *In re Bowen*, 150 A.D.2d 905 (N.Y. App. Div. 1989), *appeal denied*, 545 N.E.2d 868 (N.Y. 1989).

consent to sexual relations.⁵⁰ In such cases, attorneys can easily manipulate a client's emotional vulnerabilities into consent to engage in sexual activity. Thus, when attorneys are privy to specific knowledge that may allow them to coerce their clients into sexual relations, the lawyer's defense that a client consented to the involvement is inherently suspect.

Clients may be vulnerable for a variety of reasons, including loss of companionship or loss of child custody, financial loss, and damaged reputation.⁵¹ In such cases it becomes questionable whether clients are emotionally capable of truly consenting to sex with their attorneys. Often such fears stem from clients' general ignorance of their rights as clients, including their right to terminate representation. For example, a client who knows that she can fire her attorney may be less likely to stay with an attorney who seeks sex in exchange for an implied or overt promise to perform his duties.⁵² Likewise, a client who knows that her time, money

⁵⁰ Jeffrey A. Barker, Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate means of Enforcing Professional Responsibility*, 40 UCLA L. REV. 1277, at 1303 n.106, 1308 (1993).

Courts have wrestled with the idea of holding attorneys to the same fiduciary standards as psychotherapists who improperly handle transference by engaging in sexual activity with their patients. Transference occurs when a patient undergoing therapy transfers her feelings about a particular subject toward her therapist. Courts have ruled that it is malpractice for a trained therapist to mishandle transference. *Suppressed v. Suppressed*, 565 N.E.2d 101, 105 n.2 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 156 (1991). However, the court in *Suppressed* distinguishes the lawyer from the therapist by noting that lawyers' fiduciary duties differ because their underlying duties differ: attorneys must provide competent legal representation while therapists engage in conduct calculated to benefit their patients' emotional well being. *Id.* at 105. Instead of focusing on the fact that therapists are trained to recognize transference while attorneys are not, the court points out that attorneys have a duty to exercise reasonable care. Imposing this duty recognizes the attendant frailties of attorneys and clients. *Id.* In other words, the court recognizes that an attorney may mistakenly believe he is exercising reasonable care even though his actions may harm his client.

⁵¹ The A.B.A. Opinion, *supra* note 19.

⁵² *See Suppressed v. Suppressed*, 565 N.E.2d 101.

and emotional energy will not be wasted if she seeks new counsel will be more likely to do so.⁵³

Although New York's new rules regulating attorney conduct address many of these fears, they quell only those in the domestic relations matrimonial sphere. The rules specifically attack clients' lack of knowledge about their legal rights and obligations by requiring that clients receive a written statement of their rights and responsibilities as clients upon the commencement of the attorney-client relationship and written retainer agreements.⁵⁴ Likewise, the reforms prohibiting non-refundable retainers, limitations on security interests, limitations on charging liens, and the right to fee arbitration restrict potential coercive forces which have been used against clients in the past.⁵⁵

B. *Ethical Considerations*

The drafters of New York's rule suggest that ethical considerations also provide grounds for banning attorney-client sex. Sexual relations with clients may create conflicts of interest. The conflict of interest standard is premised on the understanding that attorneys must maintain a degree of detachment and objectivity when representing clients.⁵⁶ An attorney must exercise profession-

⁵³ See *Drucker's Case*, 577 A.2d 1198, 1200 (N.H. 1990); *Jane Doe v. John Roe*, 756 F. Supp. 353, 354 (N.D. Ill. 1991), *aff'd*, 958 F.2d 763 (7th Cir. 1992); see also the Report, *supra* note 7, at 6-19, 24-25.

⁵⁴ See the Report, *supra* note 7, at 6-18.

⁵⁵ See the Report, at 16-24. The final version of the rule eliminates the requirement that dismissed attorneys provide clients with their case files 30 days after termination regardless of whether the fee has been paid. Adams, *supra* note 12, at 1.

Jane Doe v. John Roe, 756 F. Supp. 353 (attorney used a settlement agreement to obtain a lien on his client's home without informing her that he had done so and then used his client's financial insecurity to pressure her into continuing a sexual relationship with him).

⁵⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1980); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1981).

al judgment that is not compromised by any personal interest of the attorney which might detrimentally affect the client.⁵⁷ Sexual relationships between attorneys and clients during representation create numerous potential conflicts of interest. They may impair an attorney's objectivity because the outcome of the case may affect the attorney's personal interests. An attorney's actions may be tempered by his desire to shield the client from unpleasant facts, or to establish, maintain, or terminate a sexual relationship, or even to punish the client for non-compliance with his sexual desires.⁵⁸ Moreover, the involvements of a sexual relationship may distract the attorney from the attorney's primary duty: to zealously pursue the client's legal interests using independent professional judgment.⁵⁹ Consequently, courts addressing attorney-client sex in conflict-of-interest actions have focused primarily on whether the attorney in question has capably executed independent professional judgment regarding his clients' interests.⁶⁰

Similarly, attorney-client sexual relations may breach attorneys' fiduciary duties to their clients.⁶¹ As fiduciaries, attorneys are duty bound to subordinate their own personal interests to those of their clients.⁶² The fiduciary duty to which lawyers are bound prohibits lawyers from gaining benefits at their clients'

⁵⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1991).

⁵⁸ Symposium, *supra* note 7, at 495.

⁵⁹ *Id.*

⁶⁰ O'Connell, *supra* note 2, at 888, 889 (1992).

⁶¹ See the A.B.A. Opinion, *supra* note 19, which states: "A lawyer is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence, . . . it is his duty to exercise and maintain the utmost good faith, honesty, integrity, fairness and fidelity." See also Symposium, *supra* note 7, at 498.

⁶² BLACK'S LAW DICTIONARY 625 (6th ed. 1990); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1983) (a fiduciary should not permit his interests to dilute his loyalty to his client).

expense. When attorneys receive gifts or proprietary interests from clients, or enter into business transactions with clients, attorneys must then prove that they have not taken advantage of their clients, and that their clients provided informed consent.⁶³ Nevertheless, generating a clear fiduciary duty rule has been problematic in the context of attorney-client sexual relations.

Courts have taken divergent approaches to the fiduciary duty in this context. An Illinois woman sued her divorce attorney, claiming misconduct due to her attorney's sexual involvement with her.⁶⁴ She alleged that she submitted to sexual relations with the attorney on three occasions because she feared that the attorney "would not advocate for her and her children."⁶⁵ The court, although sympathetic to the plaintiff, refused to find a cause of action because plaintiff failed to state a specific injury related to the attorney's representation.⁶⁶ In that case, the client could have stated a cause of action only if she could have shown that the attorney pursued his own interests above or at the expense of hers. However, in another case, the court held that the attorney may have violated his fiduciary duty because he misrepresented himself to the client by claiming that he was sterile.⁶⁷ Such misrepresentation may have rendered the client's consent to sexual involvement voidable.⁶⁸ Consequently, the court remanded the case to the lower court with instructions that if the plaintiff proves a confidential relationship existed, the attorney must then rebut the presumption of undue influence by proving that the client's consent was

⁶³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5, 5-7, DR 5-104 (1983).

⁶⁴ *Suppressed v. Suppressed*, 565 N.E.2d 101 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 156 (Ill. 1991).

⁶⁵ *Id.* at 103.

⁶⁶ *Id.* at 106.

⁶⁷ *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 431 (Cal. Ct. App. 1983).

⁶⁸ *Id.* at 431, 432.

informed and uncoerced.⁶⁹ Thus, the courts generally require at least one of two elements to be present in order to find a breach of fiduciary duty: measurable injury related to the lawyer's representation and a lack of informed consent by the client. However, both these opinions predate the A.B.A.'s recent opinion on sexual relations with clients which offers a dramatically different perspective.⁷⁰ The A.B.A. opinion states that lawyers who take advantage of clients' vulnerabilities in order to engage in sexual relations with these clients violate ethical standards because their acts are "inconsistent with the fiduciary obligation reflected in both the Model Rules and the Model Code."⁷¹

The drafters of New York's rule have relied heavily on both the A.B.A.'s opinion and the standards promulgated by the American Academy of Matrimonial Lawyers to define its justifications for the rule prohibiting attorney-client sex from a fiduciary duty perspective.⁷² The A.B.A. opinion maintains that these ethical standards require that when clients' vulnerabilities interfere with their abilities to make reasonable judgments about themselves or their situations, attorneys' fiduciary obligations to these clients rise to a much higher level.⁷³ Similarly, the standards promulgated by the American Academy of Matrimonial Lawyers prohibit sexual relations between attorneys and clients.⁷⁴ Therefore, attorneys who exploit their dominant position and influence to gain their clients'

⁶⁹ *Id.* at 432.

⁷⁰ The A.B.A. Opinion, *supra* note 19.

⁷¹ *Id.*

⁷² The Report, *supra* note 7, at 30, 31.

⁷³ The A.B.A. Opinion, *supra* note 19; see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1983).

⁷⁴ The Report, *supra* note 7, at 31.

consent to sexual favors have breached their fiduciary duty.⁷⁵ Such abuses of the clients' trust violates attorneys' ethical obligation not to use this trust to their clients' detriment.⁷⁶ Ultimately, the fiduciary duty analysis employed by the drafters focuses on whether an attorney has abused his client's trust to his own sexual benefit.⁷⁷

IV. WHY NEW YORK'S RULE IS INSUFFICIENT

A. *New York's Rule Leaves Key Terms Undefined*

The new New York rule fails to define key terms. This may complicate its application. First, the rule is vague in that it fails to adequately indicate the class of individuals covered by the rule. It merely identifies the class covered as attorneys in "domestic relations matters."⁷⁸ This ambiguity may be clarified by inferring the legislative intent of the drafters. Likewise, the question of class may be inferred from the other matrimonial reform rule promulgated simultaneously with the ban as part of the matrimonial rule reform package. The other related reforms define the scope of domestic relations to include actions relating to divorce, separation, annulment, custody, visitation, maintenance, child support or alimony.⁷⁹ However, the ambiguity surrounding the phrase "begin

⁷⁵ The A.B.A. Opinion, *supra* note 19, citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1983) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1991).

⁷⁶ The Report, *supra* note 7, citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-3, DRs 7-101 (A) (3), 4-101 (B) (2), 5-101 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(b), 1.8(a) (1991).

⁷⁷ *Id.*

⁷⁸ N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.3(7) (1993).

⁷⁹ N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.1 (1993) (defining the class as "all attorneys who, on or after November 30, 1993, undertake to represent a client in a claim, action or proceeding, in either Supreme Court or Family Court, for divorce, separation, annulment, custody, visitation, maintenance, child

a sexual relationship," is more difficult to reconcile. Defining this phrase is necessary to challenge objections regarding the vagueness of the rule and to prevent potential abuses such as over-applying the rule.⁸⁰ The first ambiguity in this phrase involves the concept of beginning a sexual relationship. For example, it is unclear whether an attorney may violate this rule by flirting with or propositioning a client, or whether the attorney must actually engage in sexual conduct with a client. In other words, the rule does not lend any guidance on determining the point at which a sexual relationship commences. Likewise, it raises a concern that any behavior which may be perceived as an attempt to solicit or entice a sexual relationship would be scrutinized. This, in turn, could cause a chilling effect on non-sexual attorney-client relationships because attorneys would want to avoid even the hint of such improprieties.⁸¹ Additionally, it is questionable whether the rule speaks to situations where the client initiates the conduct. Similarly, individuals' conceptions of what constitutes a sexual relationship may vary from intercourse to touching.⁸² Finally, that the New York rule lacks a well defined burden of proof standard may lead to frivolous claims and inconsistent results, particularly when the vague burden of proof standard is coupled with the aforementioned ambiguities. Therefore, the rule should be modified to include a definition section which rectifies these potential problems.

support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings.").

⁸⁰ O'Connell, *supra* note 2, at 917.

⁸¹ *Suppressed v. Suppressed*, 565 N.E.2d 101, 106 n.3 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 156 (Ill. 1991).

⁸² O'Connell, *supra* note 2, at 917.

B. *New York's Ban on the Commencement of Attorney-Client Sexual Relations During the Pendency of Domestic Relations Matters Ignores Other Areas of Practice where Similar Dangers Exist*

This Note does not question the merits of applying theories of vulnerability, conflict of interest, and breach of fiduciary duty to regulate attorney-client sexual relations. Rather, it proposes that if New York accepts these factors as justifications for its limited ban on sexual relations between attorneys and clients, it should apply them to other areas of practice in order to determine whether the dangers of attorney-client sex exist in those areas as well.

New York's rule prohibiting domestic relations attorneys from engaging in attorney-client sexual relations is underinclusive because it fails to address other areas of practice where similar dangers of client vulnerability, conflicts of interest and breaches of fiduciary duties exist. While the A.B.A. highlights the fact that dangers and abuses of attorney-client sex exist in domestic relations matters, it in no way expresses that these dangers are exclusive to the practice of domestic relations law. Rather, the A.B.A. states that clients' legal situations often enhance their vulnerabilities because they often retain attorneys during times of crisis. Thus, where domestic relations clients may be facing the termination of an interpersonal relationship due to an impending divorce or custody battle, criminal clients may face the potential loss of liberty, immigration clients may face deportation, and probate clients may grieve the loss of loved ones and often face a future of uncertain finances.⁸³ Additionally, case law provides evidence that the power imbalances inherent in the attorney-client relationship, which can place attorneys in positions of dominance over their clients, exist outside of the domestic relations arena.⁸⁴ For example, one attorney manipulated his personal injury client's ignorance of the law by deceiving her into permitting him to touch and

⁸³ The A.B.A. Opinion, *supra* note 19.

⁸⁴ See O'Connell, *supra* note 2, at 890-92.

photograph her in a partially disrobed state.⁸⁵ Similarly, in one criminal action, another attorney, knowing his client could not afford his fee, bargained to reduce his fee in exchange for oral sex and nude pictures of his client and her niece.⁸⁶ Likewise, one attorney manipulated his criminal client's desire to restore her parole status and his knowledge of her alcoholism to gain sexual favors.⁸⁷ These abuses and many others mirror many of those which have occurred in the domestic relations practice, proving that the problem is not unique to the domestic relations field.

Several commentators support the idea of extending the rule beyond the field of matrimonial law. One argues that attorneys should be banned from commencing attorney-client sexual relations during the course of representation because such relations are fraught with potential conflicts of interest and breaches of fiduciary duty.⁸⁸ Another argues that sexual relations with clients may preclude attorneys from making objective decisions, particularly in practice areas where clients are highly vulnerable, including divorce, child custody, criminal, and *pro bono* cases.⁸⁹ This theory would extend a rule regulating attorney-client sex to include any area where the subject matter impairs attorneys' ability to render independent professional judgment because of conflicts of interest or emotional involvements.⁹⁰ Likewise, it applies to situations where clients are unable to exercise their own independent

⁸⁵ Florida Bar v. Samaha, 557 So. 2d 1349 (Fla. 1990) (per curiam) (attorney deceived his client into believing that she was obligated to partially disrobe and permit him to touch and photograph her in order to prepare an adequate case).

⁸⁶ In re Wood, 489 N.E.2d 1189 (Ind. 1986) (per curiam).

⁸⁷ In re Ridgeway, 462 N.W.2d 671 (Wis. 1990)(per curiam). See also People v. Gibbons, 685 P.2d 168 (Colo. 1984)(En banc)(where a criminal defendant, at the suggestion of her attorney, engaged in sexual relations with him. The grievance committee found that the attorney placed the client "in a position in which she was unduly dependent on the Respondent [attorney] and in which she may have not been able to exercise free choice.").

⁸⁸ See O'Connell, *supra* note 2, at 909-14.

⁸⁹ See Levy, *supra* note 6, at 657-62.

⁹⁰ *Id.*

judgment, provide meaningful consent, or exhibit an unusual dependence on their attorney.⁹¹

V. PROPOSED ALTERNATIVES

A. *Extending the Ban Practice-Wide*

The drafters of New York's rule believe that the only way the potential risks of both parties can be eliminated is by banning sexual relations between attorneys and the clients they represent during the pendency of domestic relations actions.⁹² The rule does have some favorable attributes: it addresses the issue, it is somewhat specific, and the policies behind it are clear. However, it does have its drawbacks. As noted above, it is underinclusive because it ignores similar situations where the dangers and potential injuries are identical or nearly identical to those faced by domestic relations clients.⁹³ However, expanding the ban to other practice areas would be problematic on several fronts. A rule that automatically bans attorney-sexual relations is functionally paternalistic because it assumes that clients -- most often women-- are automatically incapable of giving informed consent.⁹⁴ Such a rule also raises serious constitutional issues.

A ban affecting sexual relations conflicts with the Constitution on several grounds. First, it may sweep too broadly and infringe upon constitutionally protected freedoms, including the

⁹¹ *Id.* Levy's vulnerability-centered model is also followed in Symposium, *supra* note 7, at 504.

⁹² The Report, *supra* note 7, at 30.

⁹³ See the A.B.A. Opinion, *supra* note 19; O'Connell, *supra* note 2, at 890-92; see also Florida Bar v. Samaha, 557 So. 2d 1349 (Fla. 1990)(per curiam); *In re Wood*, 489 N.E.2d 1189 (Ind. 1986)(per curiam).

⁹⁴ Barker, *supra* note 50, at 1322-23; see also *Edwards v. Edwards*, 165 A..2d 362 (N.Y. App. Div. 1991).

freedom to choose a sexual partner.⁹⁵ Although states may regulate professional activities, states must satisfy a two-pronged strict scrutiny test when their means impair citizens' fundamental rights. First, the state must have a legitimate interest at stake. Second, the measure chosen must be narrowly drawn to further that interest.⁹⁶ Since the Supreme Court has repeatedly held that choices regarding sexual partners are within the fundamental zones of privacy protected by the Fourteenth Amendment, proponents of a ban would have to prove that no less restrictive measures could accomplish their goal.⁹⁷ A ban would impair the rights of both attorneys and clients because it would interfere with the rights of both to choose their sexual partners. Therefore, the state would have to show the dangers inherent in such relations and then prove that such a ban is the *only* effective means of preventing such dangers. However, since there is compelling evidence that other methods may be employed which are less invasive, a *per se* ban would most likely fail strict scrutiny.⁹⁸ For example, most of the documented abuses have involved clients who were exploited by their attorneys because these clients were unaware of their rights in the attorney-client relationship.⁹⁹ In such situations, a less

⁹⁵ Barker, *supra* note 50, at 1328 (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).

⁹⁶ Roe v. Wade, 410 U.S. 113, 155 (1973).

⁹⁷ See Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Palko v. Connecticut, 302 U.S. 319, 325-326 (1937). Cf. Bowers v. Hardwick, 478 U.S. 186 (1986) (limiting Constitutional protection to heterosexual interactions in jurisdictions which have anti-sodomy laws).

⁹⁸ California has recently adopted a rule that addresses the problem without expressly banning all attorney client sexual relations. CALIFORNIA BUS. & PROFESSIONAL CODE § 6106.9 (1993).

⁹⁹ See Jorgenson, *supra* note 7; the A.B.A. Opinion, *supra* note 19; the Report, *supra* note 7, at 6; see also *In re Matter of Rudnick*, 177 A.D.2d 121 (N.Y. App. Div. 1992); Bourdon's Case, 565 A.2d 1052, 1057 (N.H. 1989); Disciplinary Counsel v. Rassing, 559 N.E.2d 1359 (Ohio 1990); Jane Doe v. John Roe, 756 F. Supp. 353, 354 (N.D. Ill. 1991), *aff'd*, 958 F.2d 763 (7th Cir. 1992); Drucker's Case, 577 A.2d 1198, 1202-03 (N.H. 1990); *In re Bowen*, 150

invasive alternative would be to simply advise clients of their rights through a statement of clients rights and privileges. This would not preclude states from regulating such relationships in other cases, where clients' emotional involvements with their cases or their emotional frailties would render them susceptible to coercion, despite knowing their rights. However, strict scrutiny demands that the state make efforts to define this class. One commentator argues that a ban on the commencement of sexual relations during the pendency of the representation limits only the clients whom attorneys may represent, not the individuals with whom these attorney may engage in sexual relations. However, such a ban would fail as well because it is an indirect limitation of procreational rights and such limitations by the government are inherently suspect.¹⁰⁰

Nevertheless, a ban on sexual relations is not necessarily untenable. A rule may survive scrutiny if it is narrowly drawn.¹⁰¹ A rule that limits the ban to areas or situations where the client may be vulnerable may satisfy compelling state interest requirements while limiting the chilling effects and limitations of a *per se* ban.¹⁰² Banning the commencement of sexual relationships during the pendency of the representation of vulnerable clients or during potentially dangerous situations may be drawn narrowly enough to satisfy strict scrutiny. However, the clients and situations to which such a ban would apply would probably have to be clearly defined for the rule to survive.

B. *Employing a Rebuttable Presumption Rule*

Some commentators advocate a rebuttable presumption rule which would operate on the notion that attorneys who have had sex

A.D.2d 905 (N.Y. App. Div. 1989), *appeal denied*, 545 N.E.2d 868 (N.Y. 1989).

¹⁰⁰ *Carey v. Population Services International*, 431 U.S. 678, 688 (1977).

¹⁰¹ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

¹⁰² *Barker*, *supra* note 50, at 1332 n.243, 1334.

with their clients have performed incompetently.¹⁰³ Such rules would allow clients who offer proof of an attorney-client sexual relationship to shift the burden to their attorneys to prove that they did not exploit their clients because the representation was competent, despite their sexual relationship.¹⁰⁴ Although a rebuttable presumption rule would be less invasive to privacy rights than a *per se* ban, it may suffer from being overinclusive because it could have a chilling effect on attorneys' ability to socialize with clients.¹⁰⁵ It would also be underinclusive because it would allow attorneys who take advantage of their clients' vulnerabilities to survive unscathed if they could prove they represented their clients adequately.¹⁰⁶ Attorneys who know they will merely be punished if they perform their legal duties inadequately would not be deterred by such a rule. Similarly, clients whose vulnerabilities have been abused would not be able to allege an injury unless their attorneys were actually incompetent. Therefore, a rebuttable presumption rule needs to be more narrowly drawn in order to have any deterrence value.

¹⁰³ See CAL. RULES OF PROFESSIONAL CONDUCT § 3-120 (B)(3), (E) (Discussion Draft 1991). On August 13, 1992, the Supreme Court of California adopted Rule 3-120 as it was proposed, but deleted proposed subparagraph E, which reads as follows:

(E) A member who engages in sexual relations with his or her client will be presumed to violate rule 3-120, paragraph (B)(3). This presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606.

See also Jorgenson, *supra* note 7.

¹⁰⁴ *Id.*

¹⁰⁵ Levy, *supra* note 6, at 662.

¹⁰⁶ *Id.*

VI. A PROPOSED RULE

The problems of both the *per se* ban and rebuttable presumption may be avoided by combining them into one multi-tiered rule. The new rule should be incorporated into the existing ethical structure. This can be achieved by declaring that sexual relations constitute a *per se* breach of fiduciary duty in dangerous situations or with vulnerable clients, instead of instituting a *per se* ban on attorney-client sex in all areas of practice.¹⁰⁷ Similarly, this proposed rule would deem the sexual interests of attorneys who have had sex with their clients as interests which may conflict with their clients' interests.¹⁰⁸ Consequently, the proposed rule would identify areas and circumstances where clients are particularly vulnerable to becoming involved in sexual relations with their attorneys.¹⁰⁹ The first prong of the rule should define the nature of the prohibited conduct in addition to defining the focus and scope of the rule.

Most of the ambiguities in New York's rule center around the question of which types of behavior fit within the definition of the phrase "begin a sexual relationship." This Note proposes the following definition of the behavior which should be prohibited: initiating or allowing the initiation of sexual intercourse, any touching or coerced contact of the sexual organs, or other intimate areas for the purpose of either party's sexual arousal, gratification or abuse.¹¹⁰ This aspect of the rule would prevent unscrupulous

¹⁰⁷ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(3), DR 4-101 (B)(2), DR 5-101 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1991).

¹⁰⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5, 5-7, DR 5-104 (1983).

¹⁰⁹ See Levy, *supra* note 6, at 657-62.

¹¹⁰ O'Connell, *supra* note 2, at 916. See also CAL. RULES OF PROFESSIONAL CONDUCT § 3-120(A)(1993) which states: "'sexual relations' means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse."

attorneys from using their position of power to initiate or inspire sexual relations. Likewise, it would prevent attorneys from abusing clients who initiate such actions motivated by fear or transference.

The scope of the rule should be defined by three particular areas of vulnerability. The first area should include domestic relations matters, probate matters, criminal matters and immigration matters. Clients in these areas may become vulnerable because they are facing the potential termination of familial rights and obligations, coping with the loss of a loved one, or facing imprisonment or deportation. The second area should include clients whose decisionmaking abilities are impaired by psychological or emotional conditions. By virtue of ethical considerations, such clients must be considered extremely vulnerable.¹¹¹ The third area should include *pro bono* clients because their financial situations often render them dependent on their attorneys as the only means of available representation.

In other areas where the dangers are not as pronounced, the rule should employ a rebuttable presumption that attorneys who engage in sexual relations with their clients have breached their fiduciary duty.¹¹² This rule would be applied in areas where the attorney may have abused his legal knowledge or his personal knowledge of the client's vulnerabilities to gain his client's consent to an apparent sexual act. It would also apply to cases where the relationship affects the attorney's ability to render independent professional judgment.

However, a rule limiting certain conduct does not prevent unscrupulous attorneys from taking advantage of unknowing clients. Therefore, there should be an informational component to the rule. Attorneys should be required to advise their clients of their rights and obligations in the relationship. A universal clients' bill of rights can address this problem, but it can only do so if it clearly defines the scope of acceptable attorney behavior. Such a rule should, unlike New York's matrimonial rule, also inform

¹¹¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1983).

¹¹² See CAL. RULES OF PROFESSIONAL CONDUCT, 3-120 (B)(3), (E) (Discussion Draft 1991).

clients of their rights in terms of the measures available to them so that they can respond to attorneys who conduct themselves inappropriately.¹¹³

VII. CONCLUSION

The new rules promulgated by Judge Kaye do not go far enough. Furthermore, they will need a radical alteration in order to be applied throughout the field. A *per se* ban on sexual relations must be narrowly constructed to survive Constitutional scrutiny. Such construction can be achieved by limiting the rule to address only those sexual relationships commenced during the course of situations in which clients may be vulnerable. However, such a limited ban would leave other areas of danger unaddressed. Therefore, the rule should employ a second tier such as a narrowly defined rebuttable presumption that would address other areas of lesser vulnerability. The new rule must also address several areas including clients' general ignorance of their rights. Therefore, a clients' bill of rights and responsibilities is a necessary step in that direction. However, the clients' bill of rights provided by the New York rule does not go far enough because it does not fully apprise clients of their rights. Thus, in order for New York to more effectively reduce the dangers of attorney-client sexual relations, it must revise and more adequately define the scope of its rule regulating such conduct and provide the public with the knowledge necessary to avoid being exploited.

¹¹³ See Adams *supra* note 12.

