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LAWYERS, CLIENTS AND SEX: BREAKING THE SILENCE ON THE ETHICAL AND LIABILITY ISSUES

CAROLINE FORELL*

Over against one wall was a black leather couch - not a davenport, not a settee, but simply a battered old leather couch. I was determined that the psychiatrists couldn't hog all the comfort. My waggish Irish lawyer friend Parnell McCarthy occasionally teased me that here is where I tested the virtue of my lady divorce clients.¹

The State Bar said it will not file charges that (Marvin) Mitchelson sexually assaulted former clients Patricia French and Kristin Barrett-Whitney. The bar concluded that the women, who complained about the alleged rapes more than three years ago, had given insufficient evidence of misconduct.

....

Each woman claims she was raped by Mitchelson in his private bathroom which is connected to his office. The bathroom is styled like a master bath in a home, with a whirlpool-size tub, wall-to-wall carpeting and the infamous wallpaper: a tapestry of hundreds of Rubenesque nudes.

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1. ROBERT TRAVER, ANATOMY OF A MURDER 5-6 (1958).

The Los Angeles County District Attorney's Office decided in early 1987 not to prosecute the rape charges, citing a lack of evidence. French then sued Mitchelson for sexual assault and lost in Los Angeles Superior Court; Barrett-Whitney sued but has not brought her case to trial.

However, a state victim's compensation board awarded \$46,000 to Barrett-Whitney and \$10,000 to French to pay for medical and psychiatric treatment, putting pressure on the State Bar investigation. A Los Angeles County grand juror fueled the controversy when he resigned over the district attorney's handling of the case.

Meanwhile, another woman sued Mitchelson for malpractice and claimed that he used her for sex. She won the case but received no damages.²

I. INTRODUCTION

More than a few divorce lawyers have sex with their clients.³ They aren't the only ones. Caselaw reveals that attorneys in other specialties do too.⁴ The overwhelming number of cases where a lawyer's sexual relations with a client reach the attention of the public involve male attorneys and their female clients.⁵ These cases do not involve violation of ethical rules

2. L.A. Daily J., May 2, 1990, at 11, col. 3.

3. See, e.g., *Suppressed v. Suppressed*, 206 Ill. App. 3d 918, 565 N.E.2d 101 (1990); *Drucker's Case*, 577 A.2d 1198 (N.H. 1990); *In re Frick*, 694 S.W. 2d 473 (Mo. 1985).

4. See, e.g., *In re Ofelt*, 1 D.B. Rptr. 22 (Or. 1985); *In re Gibson*, 124 Wis. 2d 466, 369 N.W.2d 695 (1985); *In re Littleton*, 719 S.W.2d 772 (Mo. 1986); *In re Wolf*, 312 Or. 655, ___ P.2d ___ (1992).

5. P. RUTTER, *SEX IN THE FORBIDDEN ZONE* 22 (1989) "96% ... of sexual exploitation by professionals occurs between a man in power and a woman in his care...." See also Lyon, *Sexual Exploitation of Divorce Clients: The Lawyer Prerogative?*, 10 HARV. WOMEN'S L.J. 159, 168 (1987). See also D. MARSTON, *MALICE AFORETHOUGHT: HOW LAWYERS USE OUR SECRET RULES TO GET RICH, GET SEX, GET EVEN ... AND GET AWAY WITH IT* 142 (1991).

In other areas involving sex with professionals the numbers are the same. "The overwhelming number of lawsuits alleging psychiatric malpractice because of sexual involvement [are] brought by women." LeBoeuf, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOMEN'S L.J. 83, 84 (1988). LeBoeuf also points out that women are almost always the victims. *Id.* (citing Belote, *Sexual Intimacy Between Female Clients and Male Psychotherapists: Masochistic Sabotage*, in 38 DISSERTATION ABSTRACTS INT'L 887-B (1978); Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *Sexual Intimacy Between Psychotherapists and Patients*, 14 PROF. PSYCHOLOGY: RES. & PRAC. 185 (1983)).

specifically addressed to attorney-client sexual relationships because there are no such rules in any American jurisdiction.

This paper examines the existing caselaw concerning attorney-client sexual relationships and the current ethical rules which may be implicated. Because of the inadequacies in the present system, and the serious harm caused to both women clients and the Bar by these inadequacies, I propose changes in how lawyers regulate themselves and how others are compensated for lawyer's sexual misconduct.

Some situations where a client complains about her attorney's sexual misconduct are so egregious that the Bar and courts have no choice but to act. For example, when Jack R. Wood came before the Indiana Supreme Court for the second time because he demanded his client perform oral sex in return for legal services (known as "quid pro quo" sexual misconduct), the court concluded that the previous one-year suspension⁶ meted out ten years earlier was not severe enough discipline; it disbarred him.⁷ (This time, he had also required his 16-year-old criminal client to perform in pornographic films in exchange for representation.)⁸ One shudders to think what other sexual misconduct Wood had practiced unpunished during the years between his reinstatement and the bringing of the new charges.

Cases like that of Jack Wood, however, are the easy ones.

Hard cases involve a well-respected lawyer and his client who either did not verbally object to having sex at the time or who, although she protested at first, eventually succumbed without physical coercion.⁹ These are the cases where lawyers

6. *In re Wood*, 265 Ind. 616, 358 N.E.2d 128 (1976).

7. *In re Wood*, 489 N.E.2d 1189, 1191 (Ind. 1986). See also D. MARSTON, *supra* note 3, at 141-42.

8. *In re Wood*, 489 N.E.2d 1189 (Ind. 1986).

On December 15, 1983, the niece left 'Naked City' when she became frightened by the increasingly violent nature of the movies. Respondent called the niece into his office and requested to see the pictures taken at 'Naked City'. Respondent asked the niece to make a payment toward the legal fees owed from her earnings and then offered to reduce his fee in exchange for oral sex. The niece performed oral sex with the Respondent in his office.

Id. at 1190.

9. See, e.g., *Suppressed v. Suppressed*, 206 Ill. App. 3d 918, 565 N.E.2d 101 (1990); *Drucker's Case*, 577 A.2d 1198 (N.H. 1990).

demand that their "right of privacy" and "freedom of association" be honored,¹⁰ because, after all, "she consented."

These cases also raise the specter of "he said/she said." Americans have great difficulty believing a woman's charge of rape or sexual battery when a more socially powerful male denies it, claiming that it didn't happen, that she initiated it, or she consented to it. Our post-Anita Hill/Clarence Thomas society remains uncertain about the appropriate response to these claims of rights and freedoms among "consenting" adults.

The right of privacy is often a double-edged sword for women. Much of the harm women suffer at the hands of men, including domestic violence, marital rape, and sexual harassment in the workplace, occurs in the private spheres of home or private sector employment. Behind closed doors men have been exerting their physical and sexual power over women since time immemorial. Sex with a client will almost always occur behind such a closed door.

The right to privacy is an especially suspect defense where one of the parties is an officer of the court with a fiduciary obligation to protect the other party's interests.¹¹ Similarly, freedom of association has limits where sex is involved. The United States Supreme Court held in *Bowers v. Hardwick*¹² that even consensual sexual relations between adult lovers in their home can be prosecuted as criminal conduct. It therefore follows that neither a state or federal court should find that a prohibition of sexual conduct between a fiduciary and his beneficiary violates the fiduciary's constitutional right to freely associate. Certainly none of the numerous prohibitions on sex with clients in other professions where a fiduciary relationship is recognized, such as social workers, psychologists and psychiatrists, have raised constitutional concerns.¹³

10. See, e.g., Memorandum to Cal. Board B. Governors, Sex-with-Client Subcomm., Cal. Board B. Governors 5-10 (Apr.10, 1991) [hereinafter B. Governors Memorandum].

11. The right to privacy argument was rejected in *Barbara A v. John G*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422, 430 (1983). But see B. Governors Memorandum, *supra* note 8 (voicing serious concern with this issue).

12. 478 U.S. 186 (1986). (Homosexual sodomy is not protected by the U.S. Constitution. I find the holding in *Bowers* outrageous; nevertheless, it is the law of the land.)

13. See, e.g., WIS. STAT. ANN. § 940.22.2 (West 1988) (therapist-patient sex a felony); MINN. STAT. § 148A.02 (1988) (tort liability for therapist-client sex).

II. HOW I SELECTED THIS TOPIC

The questions of whether it is unethical for an attorney to have sex with his client and whether tort liability should be imposed when attorney-client sexual relations injure the client have only recently come to the attention of the public and the Bar. When I attended law school in the mid-seventies, my Professional Responsibility class did not cover this issue. Nor is it addressed in many of the legal ethics textbooks.¹⁴

However, my first-year Torts students hear about this issue within their first few weeks of law school. In keeping with tradition, I begin the course with intentional torts. One of the cases my students read on this topic is the California case of *Barbara A. v. John G.*¹⁵ I use this case to demonstrate how a battery can occur even when a person has consented to physical contact, if the basis for the consent was misrepresentation or deceit.

Barbara A. is a very disturbing case that brings first-year law students face to face with both the responsibilities and the power attorneys have, as well as the pure chutzpah of some of our less ethical brethren. John is a family law attorney and Barbara is his former client. John, notably, is the plaintiff in the case. John sues Barbara for fees he alleges she owes to him for his representation of her in a post-divorce child and spousal support matter. According to Barbara's cross-complaint, John and Barbara had sexual intercourse twice during the time John represented her. Prior to their first sexual encounter, Barbara demanded that John use a condom, but he told her not to worry, saying: "I can't possibly get anyone pregnant." She understood this to mean he was sterile and proceeded to engage in unprotected sex with him. As a result, she suffered an ectopic pregnancy and required surgery to save her life.

Although my main purpose in using the case is to demonstrate that consent will be invalidated if its scope is exceeded or if it was fraudulently induced,¹⁶ my students also examine the ethical issue Barbara raises by alleging that she believed John's assurances because "[t]he attorney-client relationship

14. See, e.g., T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS & MATERIALS (5th ed. 1991).

15. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

16. *Id.* at 373, 193 Cal. Rptr. at 426.

produced in [her] a sense of trust in [John], and she justifiably relied on his representations."¹⁷

The *Barbara A.* court examines the issue of whether the attorney-client fiduciary duty applies to sexual relations between an attorney and his client. It concludes that the fiduciary duty can be breached where physical injury is alleged to have resulted from its breach.¹⁸ However, contrary to the ordinary rule of fiduciary duty, which presumes undue influence if a breach of a fiduciary duty is alleged,¹⁹ the court holds that where the injury results from attorney-client sex, the client has the burden of proving that her attorney's conduct was wrongful.²⁰

Since the California court notes that Oregon is the only state bar to have directly addressed the ethical considerations attorney-client sex presents (via an advisory ethical opinion)²¹, a discussion of this matter is particularly appropriate for Oregon law students. I inform my students that presently no state bar has an ethical rule specifically regulating attorneys' sexual relations with clients, and ask whether this is appropriate.

The *Barbara A.* case has bothered me for years. My areas of legal expertise include the interrelationship of statutes and tort law and legal issues affecting women. While on sabbatical in Australia last year, I received an invitation from Golden Gate University School of Law asking me to submit a proposal for a paper concerning women and the practice of law. My concerns about whether attorney-client sexual relationships violate ethical rules and the possibility for these rules to be the basis for civil liability led me to propose my present paper. Because I was in Australia at the time I made my proposal, I was unaware that these issues had moved to the front burner in three states: California, Oregon and Illinois. As my dean responded when I recently described my research: "Cutting edge!"

17. *Id.*

18. *Id.* at 379, 193 Cal. Rptr. at 432.

19. *Id.*

20. *Id.* The court explains: "To hold otherwise would have a chilling and far-reaching effect on any personal relations between an attorney and his clients. The possibility of a factual determination of a confidential relationship should be sufficient warning to monitor the profession in personal or social relations with clients." *Id.* at 379-80; 193 Cal. Rptr. at 432-33.

21. Or. Board of Governors, Legal Ethics Op. 475 (1982) [hereinafter Op. 475].

III. CUTTING EDGE

This paper is a tale of three states. The problems that attorney-client sexual relationships present exist in every jurisdiction, yet California, Illinois and Oregon are the only states where there has been strong interest in the issue.²² The Oregon bar is the only one to address these issues without public prodding. In contrast, the California bar has been forced to consider these issues by legislative mandate²³ and the Illinois bar has been forced to consider these issues after widely publicized litigation by clients against their attorneys who had sex with them.²⁴

The publicity about the legislation, proposed ethical rules, attorney debate and civil litigation in California, Illinois and Oregon has gone national. The New York Times²⁵ and the ABA Journal²⁶ have both published articles on the topic. However, according to the February 1992 issue of the ABA Journal, the issue may already be a dead letter. Pointing to the defeat of a rule in Oregon in October 1991, the California Supreme Court's failure to adopt a rule despite a legislative command to do so and the Illinois Supreme Court's failure to act on this issue despite a legislative resolution, the ABA says the movement to restrict attorney-client sex has "stumbled" and "slowed."²⁷ *This issue must not fade from view.* The harm to

22. See also Ala. B. Ass'n Comm. on Ethics Op. 88-1 (1988) cited in Report by Subcomm. on Attorney-Client Sexual Misconduct, Chicago B. Ass'n Comm. on Professional Responsibility 28 (Oct. 18, 1991) [hereinafter Chicago B. Ass'n Report] (The Alaska opinion concluded that:

- (1) the lawyer initiates the relationship and the client's ability to make a free choice is impaired;
- (2) the lawyer performs legal services in exchange for sex;
- (3) the sexual involvement inhibits the lawyer's ability to protect the client's interest;
- (4) the sexual relationship may adversely affect the client's emotional stability; or
- (5) the sexual conduct is illegal.)

23. CAL. BUS. & PROF. CODE § 6106.8 (West 1989).

24. See, e.g., Grady, Crawford & Obrien, *Lawyers Exposing "Dirty Little Secret"*, Chicago Tribune, Jan. 21, 1992; Wesniewski, *Sex with Clients an Unfair Affair*, Chicago Daily Law Bull. 1989, at 1; Warden, *Secret Suits*, Chicago Lawyer, Apr. 18, 1989, at 1; Gill & Holt, *Lawyers Debate Attorney-Client Sex Rule*, Chicago Lawyer, Sept. 1991, at 1.

25. N.Y. Times, Mar. 15, 1991, Law Section.

26. *Attorney Discipline: Do we need an ethical rule restricting sexual relations with clients?*, A.B.A. J., Jan. 1992, at 34-5; *California Restricts Attorney-Client Sex*, A.B.A. J., July 1992, at 26.

27. *Sex-With-Client Ban Fails*, A.B.A. J., Feb. 1992, at 24.

the clients and to the Bar in the absence of a rule expressly condemning exploitative sexual relations between attorneys and clients is simply too great to ignore.

Until the 1980's, virtually nothing had been written about the ethics of professionals having sex with their clients, whether the professionals were psychotherapists, clergy, teachers,²⁸ doctors or lawyers.²⁹ Since then a few articles have addressed the problems created when divorce attorneys have sex with their clients.³⁰

The caselaw is equally scanty. Only three cases have addressed the issue of whether an attorney can be held civilly liable for injuries resulting from sexual intercourse with his client: *Barbara A. v. John G.*³¹ in 1983; *Suppressed v.*

28. When I mentioned my views on the topic of attorney-client sex to one of my former students who now practices law, he immediately asked me whether I believed the same prohibitions should apply to law professor-student sex. My answer is a resounding "yes." The same power dynamics exist in the teacher-student relationship as well as the same potential for severe psychological harm. Furthermore, the teacher-student relationship has the added negative effect on other students in the class. I advocate a rule like the one in effect at the University of Iowa which says:

No faculty member shall have an amorous relationship (consensual or otherwise) with a student who is enrolled in a course being taught by the faculty member or whose academic work (including work as a teaching assistant) is being supervised by the faculty member.

Faculty members exercise power over students, whether in giving them praise or criticism, evaluating them, making recommendations for their further studies or their future employment, or conferring any other benefits on them. Amorous relationships between faculty members and students are wrong when the faculty member has professional responsibility for the student. Such situations greatly increase the chances that the faculty member will abuse his or her power and sexually exploit the student. Voluntary consent by the student in such a relationship is suspect, given the fundamentally asymmetric nature of the relationship.

P. RUTTER, *supra* note 5, at 188.

29. P. RUTTER, *supra* note 5 at 36. In recent years a number of articles have been written concerning various professions. See, e.g., LeBoeuf, *supra* note 5 (psychiatrist-patient sex); Cruz, *When the Shepard Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U.L. REV. 499 (1991) (clergy-parishioner sex). See generally Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex*, 53 ALB. L. REV. 95 (1988).

30. See Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585 (1988); Lyon, *supra* note 5. See also Angel, *Sexual Harassment by Judges*, 45 MIAMI L. REV. 817 (1991).

31. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983). See also *McDaniel v. Gile*, 230 Cal. App. 3d 363, 281 Cal. Rptr. 242 (1991) (Intentional infliction of emotional distress and attorney malpractice allowed where attorney failed to effectively represent his divorce client because she refused his sexual advances.).

*Suppressed*³² in 1990; and *Doe v. Roe*³³ in 1991. The latter two cases were brought by two different female clients against the same well-known Chicago divorce lawyer, who remains nameless by court order.³⁴ This attorney successfully enjoined at least one of these women from mentioning his or his firm's name and had the records sealed from public view.³⁵ The circumstances surrounding the two Chicago cases are compelling evidence of a conspiracy to silence the voices of women who claim their lawyers sexually exploited them. As one judge has described it, it is the Illinois bar's "dirty little secret."³⁶

Another reason why this topic is compelling is the mounting evidence of the psychological damage to clients caused by sexual relations between male professionals and their female clients, including male lawyers and their female clients. Psychiatrist Peter Rutter's book *Sex in the Forbidden Zone*,³⁷ explains, through the use of numerous case studies, the causes and effects of male professionals' sexual relations with their female clients. Rutter's book shows both why the temptation to engage in such conduct is so great for a powerful professional male and why a vulnerable female client is not in a position to resist.³⁸ Rutter also describes the magnitude of the psychological damage such relationships cause. Because this book is so illuminating, I agree with Carol Nadelson, M.D., Past President of the American Psychiatric Association, who says that Rutter's book is "[a] landmark book [which] should be read

32. 206 Ill. App. 3d 918, 565 N.E.2d 101 (1990).

33. 756 F. Supp. 353 (N.D. Ill. 1991).

34. *Doe*, 756 F. Supp. 353, 360 n.13.

35. See Warden, *supra* note 24, at 1, 9. The suppression order stated, among other things:

(1) The record on appeal and trial record is suppressed and impounded and, when filed, will be maintained in the office of Gilbert Marchman, Clerk of the Appellate Court, by a single clerk designated by him as custodian of the file.

(2) During the period of this order, the said file and record shall remain suppressed and impounded and plaintiff, defendants, their agents and attorneys are ordered to refrain from disclosing or publishing its contents and particularly the names of the parties and their families, if any, during the period of this order.

Suppressed v. Suppressed, Suppression Order No.89-2950 (Ill. Ct. App. 1st Dist. 1989).

36. *In re Marriage of Kantar*, 581 N.E.2d 6, 12 (Ill. Ct. App. 1st Dist. 1991) (Greiman, J., specially concurring).

37. P. RUTTER, *supra* note 5.

38. See also D. MARSTEN, *supra* note 5 (providing a vivid account of the prevalence of sexual exploitation of women clients by their attorneys).

by physicians, therapists, teachers, clergy and lawyers.³⁹ If I were teaching a class in Professional Responsibility, it would be required reading.

In the space remaining I will first explain why attorney-client sex is a women's issue. I will then discuss why the failure to expressly prohibit attorney-client sexual relations is detrimental to the legal profession. I will briefly examine the treatment of the issue in Oregon and California. Then, I will present and discuss the ethical rule that I propose for adoption by state bar associations. Next, I will analyze the possible avenues for civil liability against lawyers who sexually exploit their clients under both the current ethical rules and advisory opinions and under more specific rules if they were adopted. I will argue for the legislative enactment of statutory liability should the courts refuse to allow a civil remedy. I will conclude with the chilling story of the judicial protection of attorney-client sex in a series of Illinois cases.

IV. SEX WITH CLIENTS: A WOMEN'S ISSUE

When sex between an attorney and his client occurs, there is usually a convergence of two power relationships: attorney-client and man-woman. Since the overwhelming majority of cases involve male attorneys and their female clients, it should be acknowledged that this, like sexual harassment, is a women's issue.⁴⁰ It is also important to recognize that the harm a woman client may suffer from sexual involvement with her attorney will be both different and frequently more severe than the harm a male client might suffer.

Gender is still a hierarchy in our patriarchal society and the power a attorney has over his client is enhanced by the power

39. P. RUTTER, *supra* note 5, at 1.

40. I am treating this as a woman's issue despite the fact that, like sexual harassment and domestic violence, occasionally the injured party will be male. *Cf.* Gill & Holt, *Lawyers Debate Attorney-Client Sex Rule*, CHICAGO LAWYER, Sept. 1991, at 10 (where California legislator Lucille Roybal-Allard, who introduced legislation in California which mandates that the bar adopt a rule regulating attorney-client sexual relations, stated:

When we talk about this issue, we usually talk about it in terms of men taking advantage of women But we had calls from male clients saying they had experiences with female attorneys. We also had calls from gays who had that experience with male attorneys, so it isn't just a women's issue).

he holds over her as a male. This is particularly true when the relationship changes from strictly business to personal and sexual. Research has shown that men and women view sexual approaches in business settings very differently. In a recent hostile work environment sexual harassment case, *Robinson v. Jacksonville Shipyards, Inc.*,⁴¹ Dr. Susan Fiske, Professor of Psychology at the University of Massachusetts, testified that:

Men and women respond to sex issues in the workplace to a degree that exceeds the normal differences in other perceptual reactions between them. For example, research reveals a near flip-flop of attitudes when both men and women are asked what their response would be to being sexually approached in the workplace. Approximately two-thirds of men said they would be flattered; only fifteen percent would feel insulted. For women the proportions are reversed.⁴²

It seems logical to assume that men and women's reactions to sexual solicitations by professionals such as their attorneys is similar to their reactions to sexual solicitations in the workplace.

Of course, the attorney is not always the initiator of a sexual relationship. Nevertheless, because of the power the attorney possesses and the client's vulnerability, dependency and trust in her attorney, it remains the attorney's responsibility to prevent a sexual relationship from developing. *I maintain that true consent to sexual intercourse during an attorney-client relationship will rarely occur.* I believe that there are women clients who are capable of such consent, and that there are attorneys who are capable of retaining the necessary objectivity to ethically and effectively represent their client's interests while engaging in a sexual relationship. However, I also believe that it is the extraordinary situation where neither the client's interests nor the attorney's professional conduct are adversely affected by their sexual relationship. As a result, far more often than not, attorneys who have sex with their clients are guilty of, at a minimum, sexual exploitation. Their clients are indeed victims.

41. 760 F. Supp. 1486 (M.D. Fla. 1991).

42. *Id.* at 1505. See also P. RUTTER, *supra* note 5, at 64-5 (concerning the different ways in which men and women view sexualizing of their professional relationship).

For women who have previously been the victims of male abuse of power, particularly sexual power, the sexualization of the attorney-client relationship is, as psychiatrist Peter Rutter describes it: "the destruction of hope itself."⁴³ For women who are battered wives or incest or rape victims, the sexualization of the attorney-client relationship can be nothing less than emotionally devastating.

It is not surprising that most of the cases that have reached the public's attention have involved divorce attorneys. Usually the reason a woman consults a divorce attorney is that she believes that a man (her soon-to-be ex-husband) has wronged her. She will often be emotionally distraught, and will be seeking someone who will listen and understand not only her legal but her personal problems.⁴⁴ Her attorney will play the roles of both legal problem solver and counselor.

Unfortunately, attorneys are not trained counselors and may be unaware of or unwilling to acknowledge the intoxicating effect that role can have on both the counselor and client. As one psychiatrist has noted:

Due to the psychological tendency on the part of the client to invest the counselor with all sorts of power, authority, and a nearly magical belief in their helpfulness, there will ... be a powerful tendency to bestow affection. These feelings largely are unrelated to truly personal involvement, and are mostly a function of the relationship itself. Therefore, for a lawyer to take advantage of them, would be quite as unethical as making personal use of the client's money or property which has been entrusted to him in the course of carrying out the professional role.⁴⁵

The effect just described has a technical name: transference. Psychiatrist Peter Rutter describes this phenomenon as follows:

Transference is a term used in psychotherapy for the powerful feeling that patients develop toward their therapists. Transference feelings are in some ways a reexperi-

43. P. RUTTER, *supra* note 5, at 62.

44. See D. MARSTON, *supra* note 5 at 142-5 for a male perspective of what happens in this situation.

45. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 16 (1965). (Andrew S. Watson was an Associate Professor of Psychiatry of Michigan Medical School and an Associate Professor of Law at the University of Michigan Law School.)

encing of past emotional dynamics within the family, but in other ways they look to future possibilities for developing new and healthier emotional dynamics. For example, a patient trying to seduce a therapist may be repeating past injuries but is also most likely searching for a response that will discourage this repetition. The therapist draws these feelings out of clients because of the power he has either to reinjure his patients or to relate to them in a way that will free them from the wounds of the past. ...⁴⁶

Rutter asserts that "similar transference dynamics take place in *all ... lawyer-client relationships*."⁴⁷

A number of courts consider themselves to be transference experts. For example, the Illinois Supreme Court has found that unregistered psychologists' and social workers' relationships with their clients involve transference.⁴⁸ It has therefore held that when these professionals engage in sex with their clients, they breach their fiduciary duty and are subject to civil tort liability for malpractice. In *Corgan v. Meuhling*, the supreme court quoted with approval an earlier lower appellate court case which said:

The "transference phenomenon" ... has been defined in psychiatric practice as "a phenomenon ... by which the patient transfers feeling toward everyone else to the doctor, who then must react with a proper response, the countertransference, in order to avoid emotional involvement and assist the patient in overcoming problems."... The mishandling of this phenomenon, which generally results in sexual relations or involvement between the psychiatrist or therapist and the patient, has uniformly been considered as malpractice or gross negligence in other jurisdictions ...⁴⁹

46. P. RUTTER, *supra* note 5, at 50 (emphasis added).

47. *Id.* See also A. STONE, LAW, PSYCHIATRY, AND MORALITY 199 (1984).

48. See *Horak v. Biris*, 130 Ill. App. 3d 140, 474 N.E.2d 13 (Ill. App. 1985) (social worker); *Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602 (1991).

49. *Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602, 607 (1991).

In contrast, an Illinois appellate court has determined that a divorce attorney who engages in a sexual relationship with his female client does not breach his fiduciary obligation to her. The court concluded that an attorney's relationship with his client is distinguishable from that of a psychotherapist's because no transference takes place in an attorney-client relationship.⁵⁰

Not all lawyers agree that transference does not occur in the attorney-client relationship. Errol Zavett, a member of the American Academy of Matrimonial Lawyers,⁵¹ says regarding attorney-client relationships: "There is considerable danger ... of transference ... In a way, it is like psychiatrists whose patients are in a vulnerable state."⁵²

Contrary to what the Illinois appellate courts may believe, it is self-evident that in at least some attorney-client relationships transference will occur. I remember a conversation I had with a successful local divorce attorney, during which he told me that his secret to success was his total management of every aspect of his female clients' lives. He said that they want him to take control, so he does. What he described is a situation where transference is very likely to occur.

Since, unlike psychiatrists, attorneys are not trained to deal with transference, it is all the more likely that they will mishandle it by engaging in sexual relationships with their clients. This lack of training is a strong reason for a clear rule against attorneys having sex with their clients.⁵³

50. *Suppressed v. Suppressed*, 206 Ill. App. 3d 918, 565 N.E.2d 101 (1990), *review denied*, 571 N.E.2d 156 (1991). *Accord* *Simmons v. United States*, 805 F.2d 1363, 1366 (9th Cir. 1986) (where the court stated:

The crucial factor in the therapist-patient relationship which leads to imposition of legal liability for conduct which arguably is no more exploitative of a patient than sexual involvement of a lawyer with a client, a priest or minister with a parishioner, or a gynecologist with a patient is that lawyers, ministers and gynecologists do not offer a course of treatment and counseling predicated upon handling the transference phenomenon.).

In other words, since this isn't in their job description, when it happens they aren't responsible for it!

51. Errol Zavett served on a committee of the American Academy of Matrimonial Lawyers which produced a document called "Bounds of Advocacy - Standards of Conduct in Matrimonial Litigation." This publication is the source of a specific rule prohibiting sexual relationships between divorce lawyers and their clients. Rule 216 provides: An attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation. This rule has no disciplinary effect and is aspirational only. Chicago B. Ass'n Report, *supra* note 22, at 10.

52. *Wesniewski*, *supra* note 24, at 12. *See also* *Lyon*, *supra* note 5 at 162-6.

53. Emotional damage is only one harm that a woman client may suffer from having sex with her attorney. She also runs the risk of getting pregnant, as occurred

A woman's harm differs from that of a man who has sex with his attorney because of our culture's double standard concerning sex outside of marriage. As Professor Susan Estrich notes, "Men with active sex lives are normal, desirable, successful. Women are loose, easy, unworthy. Men are 'Don Juans'. Women are whores."⁵⁴ This perception affects how the woman client views herself, how her attorney views her and, if their relationship comes to light, how society views her. It injures her.

In certain contexts the harm a woman can suffer from attorney-client sex can be immeasurable. In the context of divorce, a woman who has an affair with her divorce attorney may lose custody of her children. This almost happened to the woman in *Lehr and Lehr*.⁵⁵ In that case, custody of their young daughter was shifted to the father when the trial judge learned that the mother was living with her lawyer.⁵⁶ The father had not sought custody but rather had approached the court about his duty to pay child support. The father acknowledged in his brief that after his wife left him, he moved to a religious center where he was paid wages of \$5.00 per week.⁵⁷ He conceded he had had alcohol problems during their marriage, and that he was asked to leave the religious center after five months for "not cooperating".⁵⁸ At the time of this appeal, he was earning \$6.00 per month and was doing volunteer work for the Joys of Ministry, so that the child was placed with a babysitter every day but Sunday and even

in *Barbara A*, contracting a venereal disease or even AIDS. Women are much more likely to contract AIDS from a male sexual partner than vice versa. Heterosexual men infected with AIDS are at least 17.5 times more likely to transmit the disease to women through sex than the other way around. *Ms.*, Jan/Feb., 1992, at 76; the Eugene Register-Guard, Sept. 25, 1991, at 6a.

If a woman has the extreme misfortune to hire a male attorney who is a sexual predator, her risk of contracting venereal disease and AIDS are especially high. See P. RUTTER, *supra* note 5, at 41 (noting "that most men who violate the forbidden zone are so-called repeaters who serially exploit woman after woman."). One of the harms that the woman in *Doe v. Roe* alleged she suffered from her sexual relationship with her divorce attorney was the exposure to such risks. She alleged that "Roe engaged in sexual relations with numerous sexual partners, including at 'swinger' parties, and that posed an 'unusual risk' of life-threatening sexually transmitted infection." She also alleged that it was Roe's "regular practice to attempt to persuade female divorce clients that he found attractive to submit to his sexual demands." 756 F.Supp. 353, 356 (N.D. Ill. 1991).

54. Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 849 (1991). See D. MARSTON, *supra* note 3, at 138-9 for a lurid account of an attorney who viewed his female client as a whore.

55. 36 Or. App. 23, 583 P.2d 1157 (1978).

56. *Id.*

57. Appellant's Brief, *Lehr v. Lehr*, 36 Or. App. 23, 583 P.2d 1157 (1978).

58. *Id.*

occasionally overnight.⁵⁹ Despite these facts, the trial judge's outrage over the mother's decision to "live in sin" with her lawyer led the judge to find that it was in the three year old daughter's best interests to live with the father.⁶⁰

This case highlights the serious risks which attorney-client sex poses to a client's interests in the divorce context. As noted in the discussion section to Oregon Legal Ethics Opinion No. 475 concerning the question of whether it is unethical for a divorce lawyer to have sex with his client:

The lawyer representing one spouse in a dissolution proceeding cannot know with certainty whether a reconciliation is possible or is in the best interest of the client, or how the possibility of reconciliation might be affected by an affair between the lawyer and the client. Nor can the lawyer know with certainty what reaction the client's spouse would have to learning that the lawyer is having an affair during the dissolution proceedings, or how such knowledge might affect the negotiation of property rights and, if children are involved, the right to custody. ... The potential for prejudice to the client is immense.⁶¹

Another example of the risks attorney-client sex poses in the divorce court is set out in *Doe v. Roe*.⁶² Here the woman client's husband decided not to pay his wife's attorney fees once he discovered she was having sex with her lawyer. The financial risks for women clients will often be substantially greater than those of men clients since most women are significantly poorer than their soon-to-be ex-husbands. This also makes them easy prey for a lawyer who views sex for services as an appropriate quid pro quo.

I spoke with Jeanne Metzger, the woman who brought the *Suppressed v. Suppressed* suit against her divorce attorney for the harm she suffered from her sexual encounters with him. In

59. *Id.*

60. The trial court's decision was reversed on appeal. *Lehr v. Lehr*, 36 Or. App. 23, 583 P.2d 1157 (1978).

61. Op. 475, *supra* note 21. See also Comm. on Professional Responsibility and Conduct, State B. Cal., Formal Op. 1987-92, cited in Nat'l Rptr. on Legal Ethics 35 n.8 (1988) [hereinafter Op. 1987-92]; P. RUTTER, *supra* note 5, at 32-3.

62. 756 F. Supp. 353, 355 (N.D. Ill. 1991).

a written statement she describes what happened to her as follows:

I had seen the Hansen [pseudonym] firm featured on Phil Donahue Show, and also featured in the local newspapers. They had a reputation for representing women in divorce cases, so I selected that firm precisely because I felt vulnerable and fearful and wanted a lawyer I could depend on. Mr. Hansen seemed to be a forceful and powerful attorney.

The first sexual encounter [occurred when] Mr. Hansen instructed me to come to his office on a Saturday. When I arrived, there were file folders on all the chairs, leaving only one place for me to sit: a couch. Mr. Hansen said, 'Just have a seat,' so I sat down on the couch.

The events of the next few moments happened quickly. First Mr. Hansen braced a chair against the door, under the knob. I couldn't believe my eyes. I was shocked and speechless. He sat down next to me on the couch, unzipped his pants, and forced my head down into his lap, compelling me to perform oral sex. He said, 'You don't have to do this if you don't want to' — hardly an accurate statement since I was no match for him physically and was unable to free myself from his grasp. After he released his hold on me, I sat up. I was in a state of shock and disbelief. I felt confused, humiliated and degraded. ... He couldn't have had a more powerful effect on me if he had held a gun to my head.⁶³

During our phone conversation Metzger told me that she retained a new attorney after their third sexual encounter because, while "some women barter that way" she wasn't one of them.⁶⁴ She also said the power she felt her attorney had over

63. Statement of Jeanne Metzger (1989).

64. Telephone interview with Jeanne Metzger (Jan. 28, 1992).

her because of the prospect of losing her children made her feel like she was "going out before a firing squad."⁶⁵

Similarly, a woman interviewed in Peter Rutter's book described "the helplessness leading to psychic numbing that she felt at the moment her attorney told her he would abandon a lawsuit for her house unless she agreed to have sex."⁶⁶ She said:

There is no way to control anything. When this happens, there is no boundary to the self. There is no self. Anybody can do anything he wants to you. You have no power, no control, no choice. You can't say yes or no.⁶⁷

What must it feel like to undergo such an ordeal? The betrayal of trust, fear of reprisal, the guilt and the shame are injuries that I believe the law should recognize and compensate. These experiences are women's experiences. What happened to these women simply does not happen to men.⁶⁸

The only two cases I know of that involve a sexual relationship between a female attorney and a male client only serve to further illustrate the difference in how society views men and women's sexual conduct. The only reported case I have located in which a woman attorney was disciplined for sexualization of an attorney-client relationship involved a criminal defense attorney and her client. In *Committee on Professional Ethics v. Durham*,⁶⁹ Leona Durham appealed her

65. *Id.*

66. P. RUTTER, *supra* note 5, at 153.

67. *Id.* See also *Disciplinary Proceedings Against Gibson*, 124 Wis. 2d 466, 469, 369 N.W.2d 695, 697 (1985) (When client Slane visited her attorney's office to discuss obtaining a restraining order against her abusive husband her attorney "turned the office lights off, knelt beside Mrs. Slane's chair, began kissing her, put his hands inside her blouse and fondled her breasts, and moved his hands over her pelvic area outside her clothing. In order to stop him, Mrs. Slane told him she was visualizing being beaten and was frightened.").

68. These women are being treated "as women." See MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J. OF LAW & FEMINISM 13, 15 (1991).

69. 279 N.W.2d 280 (Iowa 1979). When I first heard about the *Durham* case I wondered why she was treated so harshly relative to the treatment of other lawyers who are charged with much more serious sexual misconduct. When I looked at the actual case there was a shock of recognition. Leona Durham was the editor of the University of Iowa's student newspaper, *The Daily Iowan*, when I was there as an undergraduate in the late 1960's and early 1970's. I remember her as a very outspoken person who was willing to take controversial stands. In my view her treatment by the Iowa State Bar Association has something of a bad odor to it.

one-year suspension from the practice of law to the Iowa Supreme Court. The ethics committee had recommended her suspension because she was seen kissing and embracing her client during her visits with him at the state penitentiary. There was no allegation that sexual intercourse took place and the disciplinary proceedings were not initiated because of dissatisfaction by Durham's client with her professional services. The supreme court determined by "a clear preponderance of evidence" that Durham and her client "engaged in kissing and embracing during the visits in question, as well as at least occasionally caressing or fondling each other."⁷⁰ (However, the court failed to similarly find that Durham had "exposed a breast for [her client's] view.")⁷¹ In light of these findings, the Iowa Supreme Court determined that a one year suspension was not merited; instead it publicly reprimanded Durham for her conduct.

Durham's treatment by Iowa's ethics committee, a case which involved no client complaint, stands in sharp contrast to the treatment of male attorneys in California and Illinois. Neither the California bar's handling of the complaints against Marvin Mitchelson nor the Illinois bar's handling of the complaints against the unnameable attorney sued by two different women in *Suppressed* and *Doe* has led to any discipline of these men for their alleged sexual exploitation of numerous female clients.⁷² Two reasons for this come to mind. First, Durham's conduct was public, while Mitchelson and Mr. Unnameable's conduct took place behind closed doors. Second, Durham's conduct was unladylike. The concept of a woman attorney publicly expressing her physical attraction to a convicted criminal is disturbing. As the *Durham* court responded, "Sexual contact with a client in a professional context ... is well outside that which could be termed temperate and dignified."⁷³

Accordingly, the court held that Durham violated the ethical consideration calling upon a lawyer to be "temperate and

70. *Id.* at 282.

71. *Id.*

72. The Iowa Supreme Court suspended a male attorney for six months for requesting sex in lieu of fees from a divorce client in *Iowa State Bar v. Hill*, No. 23-99-1695 (Iowa, Nov. 22, 1989). Quid pro quo would appear to be much more serious than failing to act in a dignified manner. See also *Disciplinary Proceedings Against Gibson*, 124 Wis.2d 446, 473-4, 369 N.W.2d 695, 698-9 (1985) (court suspended attorney for ninety days for sexually assaulting client and refused to consider testimony of four former clients whom he had similarly sexually exploited).

73. 279 N.W.2d at 284.

dignified.” It also found that her behavior violated a disciplinary rule regarding conduct “that adversely reflects on his [or her] fitness to practice law.”⁷⁴

The openness of Durham’s conduct was clearly an important factor:

We are faced not with a question of private sexual conduct by an attorney, but with conduct by an attorney who was at least appearing to function in her professional capacity. We are thus unable to accept [Durham’s] argument that the incidents in question were solely of a private nature between consenting adults.⁷⁵

Notably, the Iowa Supreme Court specifically distinguishes the first *In re Wood*⁷⁶ case on the grounds that the conduct in *Wood* was “private.”⁷⁷ (*Wood* was the attorney who received a one year suspension for his first proven offense of bartering sex for services, and who was later disbarred for his second proven offense involving similar conduct, this time with a minor whom he forced to act as a pornographic model).⁷⁸

Intriguingly, the only other case I have found where a woman attorney’s personal relationship with her client caused a public outcry involved facts quite similar to those in *Durham*. Oregon attorney Karen Steele was assigned to represent criminal defendant Frank Gable (who has since been convicted of murdering Oregon Corrections Director Michael Francke). Ms. Steele fell in love with Gable, and during her visits to him in jail was witnessed “cuddling, laughing and holding hands” with him. This made front page news in the *Portland Oregonian* newspaper.⁷⁹ When her conduct reached the public’s attention, her firm withdrew from its representation of Gable. Steele resigned from the firm and married Gable. Here, no one charged Steele with unethical conduct. However, her behavior was viewed as being sufficiently scandalous to merit extensive news coverage.

74. *Id.* at 285.

75. *Id.*

76. 358 N.E.2d 128, 133 (Ind. 1976).

77. 279 N.W.2d at 285.

78. See *supra* note 8, and accompanying text.

79. *Portland Oregonian*, July 11, 1991.

The double standards of society and of the Bar were hard at work in these two cases. Compared with the conduct of male attorneys who have sexualized their relationships with their clients, the conduct of Durham and Steele is trivial, and not even particularly newsworthy.

The persistent discounting by the judiciary and the Bar of women clients' allegations of injury by the sexualization of the attorney-client relationship are consistent with the male myth of the "demon woman" seeking vengeance by destroying a man's career. This myth emerges wherever there are allegations and denials of sexual misconduct. As Professor Susan Estrich points out in her book *Real Rape*: "Three centuries ago the English Lord Chief Justice Matthew Hale warned that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."⁸⁰

The myth is that the woman, despite her demure appearance, actually desires the man to force her to have sex with him. Presumably, after she has allowed herself to be seduced, her feelings of guilt cause her to cry "rape" or, in this context, "breach of fiduciary duty". According to the myth the male is an innocent victim of these female wiles and neuroses.⁸¹

The truth, documented by numerous studies, is that the number of false allegations by women of sexual injuries is incredibly small. A recent newspaper article on rapes in

80. S. ESTRICH, *REAL RAPE* 5 (1987) (citing SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN*, I (1971)).

81. Men's fear of being falsely accused of sexual misconduct by obsessive and vindictive women permeates our culture. See, e.g., 3 WIGMORE ON EVIDENCE 459, 460 (3d ed. 1924):

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by a diseased derangement or abnormal instincts, partly by bad social environment, partly by temporary physical or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex - incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps give easy credit to such a plausible tale.

See also S. Freud, Lecture 33, *Femininity*, cited in J. STRACHEY, *THE COMPLETE INTRODUCTORY LECTURES ON PSYCHOANALYSIS*, 576 (1966).

Portland, Oregon said: "Portland police think the number of false reports [of rape] they receive is very small ... [I]n 1990 of the 431 rape and attempted rape reports made to the Portland police, 1.6% were determined to be unfounded. By comparison, 2.6% of the stolen vehicle reports were false or unfounded."⁸²

Similarly, Peter Rutter asserts that "[w]hile there do exist destructive women who try to coerce men into having sex or who falsely accuse men of sexual exploitation, this is still a miniscule problem compared to the actual abuse by men of forbidden-zone relationships."⁸³

Nevertheless, the legal system is obsessed with the perceived danger of the false accusation. In *Suppressed v. Suppressed*⁸⁴ one reason given for refusing to allow an action against a divorce attorney by his client for the emotional harm she claimed resulted from her sexual relationship with him was that "[t]he potential for abuse would be too great."⁸⁵ The judges were concerned that imposing liability for such conduct would chill the attorney-client relationship because of the "grave potential" for such a suit "to be used for blackmail by unscrupulous persons seeking unjust enrichment."⁸⁶ These "unscrupulous persons" are, of course, those vindictive and conniving women the myth describes.

A similar concern was raised by the dissenting opinion in a case in which a majority of the Illinois Supreme Court allowed a malpractice action to go forward against an unlicensed psychologist for having sex with his client. The dissent in *Corgan v. Mueling*⁸⁷ protested that "[t]o hold the defendant legally liable under such conditions is to countenance a legal form of extortion or blackmail." He concluded his opinion:

82. Sunday Oregonian, Jan. 5, 1992, at A-11, cols. 1, 2.

83. P. RUTTER, *supra* note 5, at 164.

84. 206 Ill. App. 3d 918, 565 N.E.2d 101 (1990).

85. *Id.* at 923, 565 N.E.2d at 106.

86. *Id.* at 923 n.3, 565 N.E.2d at 106 n.3. What do courts fear when they suggest that liability for injuries arising out of attorney-client sex may "chill" the attorney-client relationship? Are they concerned that an attorney will be deterred from counseling clients? From holding their hands? The court in *Barbara A.* was also worried about this issue: "To hold otherwise would have a chilling and far reaching effect on any personal relationship between an attorney and his or her clients." 145 Cal. App. 3d 369, 379, 193 Cal. Rptr., 422, 432-3 (1983) (denying the usual presumption of undue influence because the case involved the attorney-client relationship). Why don't most courts have the same concern about the chilling effect of liability for psychotherapist-patient sex?

87. 574 N.E.2d 602, 611 (Ill. 1991).

"The plaintiff, having willingly engaged in a frolic, now seeks to use the legal system as a tool for a shakedown."⁸⁸

Joseph DuCanto, who practices family law and also teaches at law schools in Chicago, opposes a rule barring attorney-client sex because such a rule "makes male lawyers extremely, extremely vulnerable to ugly kinds of charges that have little or no substance." He adds, "That's not to say every woman who complains her lawyer put his hand on her breast is to be disbelieved. But believe me, there are a lot of wackos out there who will do anything to save a few bucks."⁸⁹ But why *should* we believe him, when the facts tell us the opposite? And why *do* so many people, both male and female, continue to believe that women who allege that they were sexually exploited behind closed doors are either liars or psychopaths?⁹⁰

Further evidence that the law views sex with one's client from a male perspective can be derived from those cases against psychotherapists who engage in sexual relations with their clients, where the person seeking recovery for injuries is not the woman client who had sex with her therapist but is instead her husband. The courts find that injuries to these *husbands* are very real indeed. Breach of fiduciary obligations and/or professional malpractice are found if the husband was also a client of the therapist.⁹¹ And even if the husband was not a client, he can still claim intentional infliction of emotional distress.⁹²

Two nearly identical cases in Illinois suggest that the wrong the courts are willing to redress can be defined as

88. *Id.* at 612.

89. Gill & Holt, *supra* note 22, at 60.

90. See Littleton, *Feminist Jurisprudence: The Difference Method Makes*, (Book Review), 41 STAN. L. REV. 751 (1989) (analyzing Catherine MacKinnon's feminist method that is based on "believing women's accounts of sexual use and abuse by men." C. MACKINNON, *FEMINISM UNMODIFIED* 5 (1987)). As Professor Littleton points out, the concept of believing women's accounts about sexual abuse is a radical idea. The recent Hill/Thomas hearings and Smith (Kennedy) rape trial highlight the reality that women who allege that a powerful man sexually exploited her in private will rarely be believed.

91. See, e.g., *Richard H. v. Larry D.*, 198 Cal. App. 3d 591, 243 Cal. Rptr. 807 (1988); *Figueiredo-Torres v. Nickel*, 585 A.2d 69 (Md. Ct. App. 1991); *Anclote Manor Foundation v. Wilkinson*, 263 So.2d 256 (Fla. Ct. App. 1972); *Andrews v. United States*, 732 F.2d 366 (4th Cir. 1984).

92. *Spieß v. Johnson*, 89 Or. App. 289, 294, *aff'd mem. by an equally divided court*, 307 Or. 242, 765 P.2d 811 (1988).

meddling with another man's property. In *Horak v. Biris*⁹³ a husband sued a social worker for engaging in sexual relations with his wife during marital counseling. The Illinois appellate court found that the social worker breached his fiduciary duty, and that "any malpractice committed by the defendant in the treatment of plaintiff's wife [who was not a party to the suit] would clearly have an impact upon plaintiff as well."⁹⁴ The court allowed the cuckolded husband to recover damages for his emotional distress and even for loss of consortium. In contrast, an Illinois appellate court just three years earlier held that a woman could not recover for the emotional harm *she* suffered from her husband having sexual relations with *his* social worker during marital counseling. In *her* case, no breach of fiduciary duty was found. The *Horak* court acknowledged that the facts of *Martino v. Family Service Agency of Adams County*⁹⁵ were virtually indistinguishable from those of *Horak*. The only distinction the *Horak* court found was that the plaintiff in *Martino* had not alleged "mishandling of transference" in her complaint.⁹⁶ The judges in *Horak* failed to mention the more obvious difference between the cases: *Horak* involved a man's proprietary interest in his wife's sexuality while *Martino* did not.

V. WOMEN ATTORNEYS WHO SUPPORT THE STATUS QUO

While many women attorneys support the adoption of a rule banning attorney-clients, there are also many women attorneys who oppose such a rule. When the Oregon Board of Bar Governors brought a no-sex-with-clients rule to the membership for a vote in October of 1991, some of the most outspoken opponents of the rule were women. For example, one woman said:

I oppose this motion. I think it invades our right to privacy. The existing disciplinary rules and opinions take care of this. This new proposal is stricter than the [proposed] California rule, and it's totally unnecessary. Let's preserve our right to privacy. Our

93. 130 Ill. App. 3d 140, 474 N.E.2d 13 (1985).

94. *Id.* at 145, 474 N.E.2d at 18.

95. 112 Ill. App. 3d 593, 445 N.E.2d 6 (1982). At least as of 1988, *Martino* was the only appellate case involving a female psychotherapist and her sexual relationship with a male client. See LeBoeuf, *supra* note 3, at 84 n.7.

96. 130 Ill. App. 3d at 145, 474 N.E.2d at 19.

current rules are sufficient. Let's leave it that way.⁹⁷

One of the California Board of Bar Governors who opposed an outright ban on attorney/client sex was Catherine Sprinkles who was concerned that the bar's ethical rules not be "a mechanism for the State Bar to impose moral views on the public."⁹⁸ A female member of California Young Lawyers Association who commented on the proposed California rule was reported to have said that "many single lawyers would have to revert to celibacy if they couldn't consort with their clients, as long as it didn't affect their legal representation."⁹⁹

What I hear these women say concerning attorney-client sex is that we need to protect the personal rights and needs of attorneys. What I don't hear them expressing is concern for the rights and interests of their clients.

Considering the strong evidence that most people who suffer serious injury from sex with their attorneys are women, why are so many women attorneys unwilling to endorse a rule to prevent their brother attorneys from harming other women? I would hope the reason is unawareness of the magnitude and extent of the harm caused by attorney-client sex. I fear, however, that also operating is a desire to protect their membership in the "club."

97. Transcript of 1991 Annual Business Meeting, Or. State B. Ass'n, Oct. 4, 1991, at 140 [hereinafter Transcript].

Another woman attorney also spoke out against the rule. She said:

I think it is an inappropriate recommendation. It's an intrusion into consenting adults doing something that is legal. It is not the same as a prohibition of taking your clients' property. ... It reminds me a little bit of the theology some years ago. Is this DR now the mortal sin, and we're going to put (inaudible) in the ethical considerations because it's not covered in it. I mean, look at the kind of intrusion we are making into private lives. I come from a fairly conservative theological history, but to me this is a throwback to Salem and the witch hunts and the puritan stock. And it is unacceptable to interfere in people's private lives.

Id. at 154.

98. *The Recorder*, Jan. 29, 1991, at 3. Another woman attorney member of the California Board of Bar Governors, Claudia Carver, said, "any rule would be intrusive and would pose constitutional questions." *Id.*

99. *L.A. Times*, Aug. 28, 1991, § A, at 3, col. 2. She was also quoted as saying: "I work 12 hours a day, and I only meet lawyers and clients. And I wouldn't have sex with another lawyer, that's for sure." (*She wouldn't have sex with other lawyers but it's fine for the clients to have sex with them?*)

Catherine MacKinnon wrote a scathing attack titled "On Collaboration" against the women attorneys who opposed the ordinance proposed by her and Andrea Dworkin to make the sale of pornography actionable as sex discrimination. She made the following comment, which I find also applicable to the attorney-client sex issue: "It's even more frustrating to have women lawyers, feminists, say or act as though it doesn't happen - or if it does, that it is not as important as the pleasure to be gotten from it."¹⁰⁰ MacKinnon also said:

To be a lawyer orients you to power, probably sexually as well as in every other way. The law has a historical hostility to new ideas, hurt women, and social change. But more than that, we were let into the profession on the implicit condition what we would enforce the real rules: women kept out and down, sexual access to women enforced ... It keeps the value of the most exceptional women high to keep other women out and down on their backs with their legs spread ... What law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience.¹⁰¹

MacKinnon's message is controversial, but also very powerful. Women attorneys should keep her message in mind as they consider their position on the issue of attorney-client sexual relationships.¹⁰²

100. C. MACKINNON, *FEMINISM UNMODIFIED* 202 (1987). "On Collaboration" was based on a speech that was part of a debate at the National Conference of Women and the Law in New York, Mar. 24, 1985.

101. *Id.* at 205. MacKinnon concluded: "I want you to stop claiming your liberalism, with its elitism, and your Freudianism, with its sexualized misogyny, has anything in common with feminism." *Id.*

102. Opposition to an attorney-client ethical rule actually goes against the interests of many women attorneys. Young women associates in large firms are not infrequently propositioned by their male business clients. The power in these situations is actually wielded by the clients. The women associates are vulnerable because their firms do not want to alienate valuable clients. An ethical rule against attorney-client sex would be one reason these women could give their clients for refusing their sexual advances.

This dilemma for women associates was discussed at a sexual harassment workshop which was part of a conference on Feminist Jurisprudence held at Lewis & Clark Law School, Portland, Oregon on April 19, 1991. Many of the women participating described problems with their business clients sexually pressuring them and

VI. WHY A RULE BANNING ATTORNEY-CLIENT SEX WOULD BENEFIT LAWYERS.

Lawyers have a bad public image. A Gallup poll ranked attorneys just below funeral directors in public esteem.¹⁰³ A national survey by the Consumer Research Center reported that almost half those responding rated lawyers services and fees as poor, one of the study's lowest ratings.¹⁰⁴

Lawyers' public refusal to regulate their personal behavior which may affect their professional behavior does nothing to improve the public's low regard. While conducting research for this paper I found a 1919 Oregon Supreme Court opinion in which Judge Bennett, in his dissent to the majority's failure to find a breach of fiduciary duty by an attorney (not involving sexual conduct), spoke to both the issue of attorneys' obligations to the public and the low public esteem in which attorneys are held. The following, which Judge Bennett wrote in response to the majority's strong language about an attorney's obligations to his client, is perhaps even more on point today:

These are brave, strong words, and with every syllable of them I entirely concur. They fix the duty of an attorney toward his client at a high standard - but not too high, when we consider the peculiarly confidential relation which an attorney enjoys; and the fact, that those with whom he deals ... are generally ignorant of the law, and of their legal rights; and practically at the mercy of the lawyer who represents them. Such a declaration of the principles which govern attorneys, will be an inspiration to the lawyer who cares deeply for his profession and for its honor. When it becomes generally known, that this is the standard which governs the conduct of attorneys - and that the courts unflinchingly carry the principles so declared into execution - there will be

the lack of support from their law firms for their predicament. Conversation with Professor Mary Wood, February 11, 1992 and telephone conversation with Professor Kristine Rogers, February 28, 1992.

103. Rymer, *High Road, Low Road: Legal Profession at Crossroads*, Trial Magazine, Oct. 1989, at 79.

104. *Id.*

an end to that unjust belief, unfortunately now so general among laymen, that lawyers are mercenary and unscrupulous grafters; and that the courts, being composed of lawyers promoted, look with complacent tolerance, and winking eye, upon unjust greed and rapacity of their erstwhile associates.¹⁰⁵

Judge Bennett's words reflect my beliefs about how lawyers are perceived and why they are perceived this way. I believe that the public in general and attorneys' clients in particular will view a refusal to adopt a rule on attorney-client sex as purely self-serving and self-protecting.¹⁰⁶ The fact that the California legislature enacted a statute mandating that such a rule be in effect by January of 1991, despite which the California Supreme Court still has not promulgated it, makes the legal profession look bad. Lawyers' protestations about privacy and association freedoms are downright embarrassing. An unidentified speaker in favor of the proposed rule against attorney-client sex at the Oregon Bar Convention said: "I would suggest to you that the arguments being made against this resolution would fool only a lawyer. It will not fool our clients. It will not fool the members of the public. It is fine to take the sex out of the business of providing legal services."¹⁰⁷

The public's view of lawyers is based on actual experience, which I hope is positive, and what they see, read and hear about lawyers. The public watches "L.A. Law"¹⁰⁸ and reads about Marvin Mitchelson. For the public, the conduct of Arnie Becker and Marvin Mitchelson is conduct that the bar association condones. And it is hard to argue that this is not true. Although we do have rules that may be applied to lawyer-client sex when such conduct creates a conflict of interest¹⁰⁹ or threatens competent representation¹¹⁰, these rules are rarely

105. *Kirchoff v. Bertstein*, 92 Or. 378, 413, 181 P. 746 (1919) (Bennett, J., dissenting).

106. As Victor McCarthy, a public member of the California Board of Bar Governors said: "The Bar has a real opportunity to enhance its credibility with the public, and the Bar is sorely in need of that enhancement." *The Recorder*, Jan. 29, 1991, at 3.

107. Transcript, *supra* note 97, at p. 136.

108. "L.A. Law" broadcast a show on the ethics of attorney-client sex. In it Arnie Becker, the randy divorce lawyer, was publicly humiliated when he was pointedly grilled on whether his own behavior with women clients was ethical or not. *L.A. Law* (NBC television broadcast, Jan. 30, 1992).

109. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310.

110. *Id.*

enforced in this setting. And far too many lawyers think the whole idea of restricting attorney-client sex is simply a joke.¹¹¹ Al Martinez' article in the Los Angeles Times on March 28, 1991 described a conversation between two lawyers which he overheard in a courthouse elevator: "One of them was saying it was nobody's business who, as he put it, his "sexual co-habitant" was. ... Lawyer No. 2 replied that it wasn't so much whether they should have sex with clients, but whether they should charge them for the time it takes to achieve satisfaction."¹¹²

Possibly this anecdote would be amusing if the writer's message did not contain an unpleasant truth about the way some lawyers think. The truth is, some lawyers not only have sex with their clients, but charge them sizeable fees for these "professional" services. The word for this practice is prostitution.¹¹³ John of *Barbara A. v. John G.* fame may have been guilty of this. So may have Albert Brooks Friedman, if what his former client, Sherry Kantar, alleges in *In re Marriage of Kantar*¹¹⁴ is true. Ms. Kantar appealed the summary judgment in favor of Friedman's firm for \$16,392.17 in attorneys' fees arising from Friedman's representation of her in her divorce proceedings. She objected to paying this sum partly because

111. Melvin Belli claims attorney-client sex is the "lawyer's prerogative." *State Bar Struggles With Ethics of Lawyer-Client Sex*, S.F. Examiner, Aug. 4, 1986 at A-4, col. 1.

112. Martinez, *Sex and Law*, L.A. Times, Mar. 28, 1991, § B, at 2, col. 5. Martinez also described other attorney's reactions:

An attorney I spoke with named Max winked and said any client who had sex with him would emerge not only with vastly increased trust and reliance but also with awesome respect.

....

A woman attorney, Beverly, suggests that lawyers be furnished with a card they could hand a client before the sex act takes place. Such a card would contain wording similar to that in the Miranda Rule, which advises suspects of their right to remain silent, etc., In this case, it would be the right not to have sex with one's lawyer and warn of the potential for problems thereafter.

Actually, Beverly's flippant suggestion is basically the rule in Oregon for divorce lawyers. See Or. Board of Governors, Formal Op. 1991-99, *infra* note 133 and accompanying text.

113. An attorney was disciplined when he was on the receiving end of prostitution in exchange for his legal services in *In re Howard*, 297 Or. 174 (1984). His client had been arrested for prostitution. Howard received a public reprimand because "[i]n payment for Howard's legal fee he and the woman engaged in sexual conduct." *Id.* at 177.

114. 581 N.E.2d 6 (Ill. Ct. App. 1st Dist. 1991). See also *McDaniel v. Gile*, 230 Cal. App. 3d 363, 281 Cal. Rptr. 242 (1991) (client cross-complained for sexual harassment after her attorney sued for his fees).

“she and Friedman engaged in sexual relations at least 20 times prior to the entry of the judgment of dissolution [and] legal fees were billed for time during which [Kantar] and Friedman engaged in sexual relations and for personal telephone calls to her....”¹¹⁵ The Illinois appellate court reversed the summary judgment, but dodged the attorney-client sex issue.¹¹⁶

It is an embarrassment to the legal profession that an attorney would charge a client for his sexual services and go unpunished. It is downright mortifying that the Illinois Supreme Court appointed Friedman to the committee on character and fitness of the State Board of Law Examiners *after* this suit had been filed.¹¹⁷ The Attorney General of Oregon, Charles Crookham, speaking about the proposed rule against attorney-client sex at the Oregon State Bar Convention (prior to being appointed attorney general), mentioned the suit against Friedman and his appointment by the Illinois Supreme Court as an example of our present sad state of affairs. This example was not enough to persuade the attorney voters who nonetheless rejected the rule. However, it did evoke laughter from the attorney audience.¹¹⁸

Some attorneys argue that we already have too many rules. However, a rule against attorney-client sex will not cause a flood of complaints or baseless charges of ethical violations.¹¹⁹ As discussed earlier, false reports of sexual injuries are extremely rare.¹²⁰ Virtually the only people likely to raise these matters with the bar are women clients who actually were sexually exploited by their attorneys. And moreover, these claims will meet with the great difficulty of proving sexual relations occurred at all, if, as is likely, the attorney does not admit this.¹²¹ In California the standard the Bar must meet to

115. *Id.* at 9.

116. The court concluded: “The issue whether the alleged sexual relationship breached the attorney’s fiduciary duty also is not reached because the alleged attorney fees’ impropriety alone would be a sufficient reason, if proven, to vacate the judgment.” *Id.* at 11. *But see* the concurrence discussed *infra* note 254.

117. Gill & Holt, *supra* note 24, at 10.

118. Transcript, *supra* note 97, at 141.

119. Some critics will respond that this is just their point. The problem is not a serious one and can be adequately dealt with under the present rules. My response is that the bar’s refusal to specifically acknowledge that this is a problem is wrong both morally and from a public perception perspective. The Bar should take a public stand on this issue because it’s the right thing to do. The present more general rules do not adequately do this.

120. *See supra* notes 80, 81 and accompanying text.

121. Chicago B. Ass’n Report, *supra* note 22, at 8, 14.

prove a sexual relationship existed is clear and convincing evidence of reasonable certainty.¹²² If the woman client can meet this heavy burden of proof, attorneys should be concerned about her claim. Proven sexual predators should not be allowed to practice law.

Another argument against a rule prohibiting attorney/client sex is that it will not be effective against the sexual predator. While it is true to a certain extent (it may not deter his sexual conduct), he will be stopped from preying on his clients if he is disbarred from practice. Most importantly, a bright line rule will provide notice to attorneys who are not sexual predators but simply lack judgment or awareness of the harm that sex with their clients can cause. The rule will also provide an attorney who feels he is being seduced with a sound reason to refuse his client's advances.¹²³

When I told a professor friend of mine from another discipline that I was writing about the ethics of attorney/client sex, her response was to say that everything lawyers do is unethical. When I mentioned this topic to one of my students, he responded that as an undergraduate he took a course in political science where half the semester was spent reaching the conclusion that the sole purpose of the American Bar Association Rules is public relations. That intelligent people hold these views about about lawyers deeply troubles me. But lawyers' refusal to even *try* to improve their public image bothers me more. A number of attorneys in Oregon are angry with the Board of Bar Governors for proposing a rule against attorney-client sex, complaining that when the rule was voted down, attorneys were made to look bad. As one person speaking out against the rule said, it placed attorneys "in a damned if we do and damned if we don't position ... by the fact that the resolution has been submitted for our consideration."¹²⁴ The question remains: how would ethical lawyers have been damned by the public if they did adopt such a rule?

122. The Recorder, Apr. 23, 1991, at 1. The Oregon Bar's burden of proof is similarly onerous. As the Oregon Supreme Court noted in *In re Wolf*, 312 Or. 655, 657 (1992). "The Bar has the burden of establishing ethical misconduct by clear and convincing evidence."

123. This could prove particularly useful for women attorneys as a means of fending off amorous clients. See, e.g., Gill & Holt, *supra* note 22, at 59 (for examples of other techniques used by women attorneys). See also *supra* note 100.

124. Transcript, *supra* note 89, at 149.

Many lawyers just don't "get it." This issue is not about *their* rights. It is about the rights and interests of their clients.¹²⁵

In the end we return to what Judge Bennett said about lawyers and the public in 1919. If attorneys do adopt a rule prohibiting attorney-client sex, "[w]hen it becomes generally known, that this is the standard that governs the conduct of attorneys - and that the courts unflinchingly carry the principles so declared into execution - there will be an end of the unjust belief, ... that lawyers are mercenary and unscrupulous grafters."¹²⁶

VI. THE OREGON AND CALIFORNIA EXPERIENCES

A. OREGON

I will now briefly summarize the Oregon and California bars' treatment of the sex-with-clients controversy over the past few years. Oregon is especially interesting because it is the only state to ever attempt to voluntarily to restrict its members' conduct. Oregon continues to be the most progressive state on this issue, despite the defeat of a rule making attorney-client sex per se unethical in October 1991.

Oregon's first attempt to specifically regulate attorney-client sex was partly a reaction to the 1978 decision, *Lehr and Lehr*¹²⁷, discussed earlier. The Board of Governors addressed the problem of attorney-client sex in the divorce context by issuing Legal Ethics Opinion No. 429 in 1979. In this opinion, the Board concluded it was per se unethical for an attorney to be sexually involved with a client if he was representing her in a divorce proceeding except "where there are no children and [there is] an amicable settlement, or a default proceeding."¹²⁸ The basis for finding the conduct unethical was DR 5-101(A) which requires that an attorney not represent a client if the exercise of his professional judgment might be

125. When California State Bar President Charles B. Vogel said in the L.A. Times (L.A. Times, Jan. 21, 1991, Section A, at 3, col. 5) "I have not had one single lawyer call or write me about this issue—and if this were really an important problem, I think we'd have had a lot of communications," I say to myself: he doesn't get it.

126. *Kirschhoff v. Bernstein*, 92 Or. 378, 413, 181 P. 746 (1919).

127. 36 Or. App. 23, 583 P.2d 1157 (1978) (discussed *supra* notes 53-8 and accompanying text).

128. Or. Board of Governors, Legal Ethics Op., 429, at 446 (withdrawn June, 1982).

affected by his personal interest, unless the client consents after full disclosure.¹²⁹

This opinion was quite radical for its time. However, the exception it granted to the per se rule caused a public outcry. For example, the National Law Journal commented, "The Oregon Bar Association has been taking a lot of heat for its ... ethics opinion that says it's OK for a lawyer to have sex with a client in certain instances."¹³⁰

Public pressure led the Board of Governors to withdraw No. 429 and issue ethics opinion No. 475 on this issue in 1982. This opinion declared attorney-client sex in the divorce context to be a per se unethical in all cases. This remains the strongest position any bar association has taken on attorney-client sex. The opinion contains some very sensible language:

The attorney-client relationship is a fiduciary relationship, one of trust. The nature of that fiduciary relationship tends to make the client intellectually and, in many cases, emotionally dependent upon the attorney. If the client becomes involved in a love affair with the attorney, that dependency would only be increased. It would appear impossible for the lawyer to carry on such an affair with the client and maintain an independent judgment about whether the affair might harm the client's interests. ... Even if the attorney were able to predict the consequences of the affair and explain them to the client, it is doubtful that the client's consent to the attorney's continued representation *could ever be deemed truly informed and voluntary* (emphasis added).¹³¹

This opinion recognizes and comes to terms with the problem of transference, at least in a divorce setting. It remains the national high water mark for restricting attorney-client sexual relations.¹³²

129. P. JARVIS, S. MOORE, J. SAPIRO, OREGON RULES OF PROFESSIONAL RESPONSIBILITY ANNOTATED 75 (O.L.I. 1988).

130. *In Flux*, Nat'l L. J., Aug. 2, 1982.

131. Op. 475, *supra* note 21, at 510.

132. I know of no Oregon case presented to the ethics committee that specifically would be covered by this advisory opinion. The only opinion concerning attorney-client

After Oregon Legal Ethics Opinion No. 475 was issued, public concern about attorney-client sex died down in Oregon as well as nationally. Only in the 1990's did the issue return to the forefront of national attention because of publicity about attorney sexual misconduct in Illinois and California. Ironically, in the process of reviewing its older ethical opinions, the Oregon Board of Governors replaced No. 475 with Formal Opinion No. 1991-99, which is somewhat weaker. The new opinion provides that an attorney may have sex with his client during divorce proceedings as long as the disclosure and consent requirements of DR 5-101(A) are satisfied. This is close to a *per se* rule because full disclosure for DR 5-101 purposes requires both that the attorney recommend that the client "seek independent legal advice to determine if consent should be given" and that "[f]ull disclosure shall be contemporaneously confirmed in writing."¹³³ The effect such disclosure would have would likely be to deter most sexual relationships.

sex published during the period this opinion was in effect was *In re Ofelt*, 1 D.B. Rptr 22 (1985) in which the Oregon Supreme Court ordered Ofelt to be suspended from practice for 60 days because of a conflict of interest with one of his business clients, a married couple, as a result of his having an affair with the wife. Ofelt admitted that his sexual relationship with the wife client affected his professional judgment. However in his answer to the complaint he claimed he was the one who was harmed:

The accused concedes that his judgment may have been impaired by his affair with Sally Johnson, but denies that the Johnsons were harmed by his actions. His efforts were undertaken to improve the Johnsons' business, at a time when they were struggling, and were done with their consent and encouragement. The affair placed a great amount of stress on the accused, but it did not cause him to do anything in connection with the business which was detrimental to the Johnsons' interest. If anything, the accused was influenced to enter into a business under terms that were unfavorable to himself. As a result the accused lost money, got sued, and has had to undergo counseling with a psychiatrist.

Id. at 40-41.

The only other published opinion concerning attorney-client sex in Oregon was decided very recently and again did not involve a divorce attorney. See *In re Wolf*, 312 Or. 655 (1992) (male personal injuries attorney had sexual intercourse with his 16-year old female client).

133. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 10-101(B) (1980). It would be entertaining to try to draft the written consent form that would be necessary for ethical attorney-client sex.

DR 10-101(B) was modified slightly at the Oregon State Bar Convention on October 4, 1991. It now says:

(B) (1) "Full disclosure" means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent.
(2) As used in DR 5-101 ... "full disclosure" shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing.

The change from No. 475 to No. 1991-99 was based on the advice of Portland attorney Peter Jarvis, an expert on legal ethics.¹³⁴ Some members of the Board of Governors wanted to retain an absolute per se opinion, but Jarvis advised them that Oregon's ethical rules in their present form would not support such an interpretation. A rule specifically restricting attorney-client sex would be necessary to support an opinion like No. 475.¹³⁵

In response to Jarvis' advice, the Board of Governors formed a subcommittee to examine the possibility of drafting a rule specifically addressing attorney-client sex. The Board unanimously endorsed a rule making all attorney-client sex a per se ethical violation except where the client was a spouse, a partner in a preexisting sexual relationship, or a peripheral employee of a business-entity client.¹³⁶ This proposed rule was debated

A personal injuries attorney was recently found to have violated former DR 5-101(A) where he had sexual intercourse with his 16-year old client. In *In re Wolf*, 312 Or. 655, 661 (1992), the Oregon Supreme Court held that even though sexual intercourse did not occur until after a settlement agreement had been reached, an attorney-client relationship continued because "the proceeds of the settlement had not been distributed." (After the case was settled for \$200,000, the attorney and his client rode around town in a limousine, and had sexual intercourse in the back seat.) The court found that the attorney had a personal interest in the case, noting that "before the settlement had been approved by the court, [the attorney] realized he had developed a strong sexual interest in the girl, and she in him." *Id.* The court also found that the exercise of the attorney's "professional judgment on his client's behalf reasonably might have been affected by his personal interest." Therefore, informed consent was required, and the court concluded that the client's consent to sexual intercourse "does not amount to informed consent to . . . continuing representation." *Id.*

134. Telephone interview with Peter Jarvis, Jan. 31, 1992.

135. *Id.*

136. Proposed rule DR 5-110 provided:

(A) A lawyer shall not have sexual relations with a current client or representative of a current client.

(B) This rule shall not apply where the sexual relations are between spouses or began prior to the establishment of the lawyer-client relationship and where the lawyer's professional judgment is not or reasonably will not be affected by the sexual relationship.

(C) For purposes of this rule "sexual relations" means:

(1) sexual intercourse; or

(2) any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.

(D) For purposes of this rule "representative of a client" means a principal, an employee, an officer or a director of a client:

(1) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as principal, employee, officer or director and is provided to the lawyer for the purpose of obtaining for the client the legal advice or other legal services of the lawyer; or

and voted on at the Business Meeting of the Oregon State Bar on October 4, 1991. Jeff Sapiro, the Oregon State Bar's disciplinary counsel, noted during the debate over the rule that there were approximately six complaints concerning attorney-client sex currently under investigation by the Bar. He said that the existing rules were adequate in some cases, such as where criminal conduct had occurred. However, he noted that a specific rule was the best mechanism for dealing with attorney-client sex.¹³⁷ Despite his testimony, and the unanimous endorsement of the Board of Governors, the rule was rejected by a margin of 139 to 107 attorney voters.

One reason the rule failed to pass was that a number of attorneys thought it was too complicated and ambiguous. As a result, the present status of attorney-client sex in Oregon is that the general rules may be applied to appropriate cases but only in the divorce setting is there the specific guidance provided by Formal Opinion No. 1991-99, discussed earlier.¹³⁸ The Board of Governors may propose a different specific rule in the future, but no such action has been taken so far.¹³⁹

The proposed rule and its rejection by the membership received widespread publicity. For example, the *Portland Oregonian* reported: "The debate over lawyer-client sex relationships was the sexiest and generated the most bad jokes at the bar convention, but as one lawyer lamented: 'We're doing all kinds of important things here but what gets all the attention is lawyers and sex.'"¹⁴⁰ Possibly that's because the public thinks that the issue of lawyers and sex is important.

B. CALIFORNIA

In contrast to the Oregon bar's self-initiated consideration of the issue of attorney-client sex, the California bar has had the issue imposed upon it by the legislature. In 1989, in reaction to the widely publicized scandal involving divorce

(2) Who as part of such person's relationship with the client as principal, employee, officer or director, seeks, receives or applies legal advice from the client's lawyer.

137. Transcript, *supra* note 97, at 148. One attorney who opposed the proposed rule remarked: "I do represent my wife from time to time. We have a lot of dogs and cats in our bedroom. I'd rather not have Jeff Sapiro there too." *Portland Oregonian*, Oct. 5, 1991, § A, at 14.

138. See *supra* note 133 and accompanying text.

139. *Sex-With-Client Ban Fails*, A.B.A. J. Feb. 1992, at 24.

140. *Lawyer-client sex rule defeated*, *Portland Oregonian*, Oct. 5, 1991, § A, at 14.

Marvin Mitchelson's alleged rapes of some of his clients, state assemblywoman Lucille Roybal-Allard (D-Los Angeles) began her successful campaign for the legislature to enact a statute mandating that the California Bar Association adopt an ethical rule with the approval of the California Supreme Court that would specifically govern attorney-client sexual relations.¹⁴¹ On September 29, 1989, this bill was signed by the Governor¹⁴² and became section 6106.8 of the California Business and Professions Code. It required that the Bar submit a rule to the Supreme Court "no later than January 1, 1991."¹⁴³

Despite this mandate, the Bar did not adopt its proposed rule until April 20, 1991 (by an 18-4 vote).¹⁴⁴ The supreme court sent the rule back to the State Board of Bar Governors in late August of 1991 for the Board to obtain additional comments from attorneys and the public.¹⁴⁵ In a letter dated August 26, 1991 the court ordered the Bar to begin a 90-day public comment period, focusing on the paragraph in the proposed rule creating a presumption of ethical misconduct where attorney-client sex is proven.¹⁴⁶ At the end of the 90-day period the Bar again forwarded their proposed rule to the supreme court along with the comments they received.¹⁴⁷ If the supreme court refuses to approve the rule, the California Legislature has a bill pending which will enact the proposed rule as a statute.¹⁴⁸

Unlike the *per se* rule which Oregon attorneys rejected in October 1991, if an attorney-client sexual relationship is proven, the California rule creates only a rebuttable presumption of incompetent representation.¹⁴⁹ Placing the

141. L.A. Times, Apr. 21, 1991, § A, at 3, col. 1.

142. B. Governors Memorandum, *supra* note 10, at 2.

143. CAL. BUS. & PROF. CODE § 6106.8 (West 1989).

144. L.A. Times, Apr. 21, 1991, § A, at 3, col. 1.

145. L.A. Times, Aug. 28, 1991, § A, at 3, col. 2.

146. *Id.*

147. Presentation by Henry Contreras, Chief Consultant to Assemblywoman Lucille Roybal-Allard, Feb. 8, 1992, Golden Gate University School of Law, San Francisco.

148. The California Assembly has already approved it 73-0. *Id.*

149. Proposed rule 3-120 states:

(A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

burden of proof on the attorney to rebut with a showing that he has competently represented his client is what appears to be bothering the California Supreme Court.¹⁵⁰ Why is this a problem? Does the court think lawyers need greater procedural protection than do psychotherapists when they have sex with their clients?¹⁵¹ It will be interesting to see what the court finally does in reaction to the statutory mandate and Board of Governors' recommended rule.

If nothing further transpires in California on the issue of attorney-client sex, the California bar is left with some limited guidance in the form of the *Barbara A. v. John G.*¹⁵² and *McDaniel v. Gile*¹⁵³ decisions and Formal Ethics Opinion No. 1987-92.

Barbara A., discussed earlier,¹⁵⁴ makes it clear that attorneys' fiduciary duty to their clients is not limited to dealings

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
 (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual lawyer-client sexual relations which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

(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.

150. *Lawyer-Client Sex Ethics Rule Blocked by Court*, L.A. Times, Aug. 28, 1991, § A, at 3, col. 2.

151. See CAL. CIV. CODE, section 726 (West 1988) which says:

The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer which is substantially related to the qualifications, functions, or duties of the occupation for which a license was issued constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division....

152. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

153. 230 Cal. App. 3d 363, 281 Cal. Rptr. 242 (1991).

154. See discussion *supra* note 15 and accompanying text.

with their clients' money. The court held that a breach of the attorney's fiduciary duty could be found where the attorney's sexual misconduct physically injured his client.¹⁵⁵ *McDaniel* makes it clear that an attorney breaches his fiduciary duty to his client when, because of his sexual misconduct, he does not adequately represent his client's interests. In this case, attorney *McDaniel* sued his former client *Gile* for his legal fees. She cross-complained, alleging intentional infliction of emotional distress and legal malpractice caused by *McDaniel*'s unwelcome sexual advances.¹⁵⁶ *Gile* claimed that when she refused to have sex with *McDaniel*, he abandoned her case. She alleged that this caused her to suffer pecuniary harm when she settled her divorce case to her disadvantage.¹⁵⁷ She also alleged she suffered severe emotional distress from *McDaniel*'s conduct.¹⁵⁸ The appellate court reversed the summary judgment in favor of *McDaniel* on *Gile*'s claims for intentional infliction of emotional distress and attorney malpractice.¹⁵⁹ Concerning the emotional distress claim, the court noted that a fiduciary relationship existed between *McDaniel* and *Gile* and that "[a] breach of fiduciary duty by an attorney is actionable whether it involves financial claims or physical damage resulting from the violation."¹⁶⁰ It noted that a special relationship existed and that *McDaniel* was aware that his client "was peculiarly susceptible to emotional distress because of her pending marital dissolution."¹⁶¹ The court described *McDaniel*'s conduct as "sexual harassment in the scope of the attorney-client relationship" and concluded that *Barbara A.* permitted such a claim.¹⁶² It concluded that "the facts of this case are no different than those alleging sexual harassment in the workplace."¹⁶³

155. 145 Cal. App. 3d 369, 383, 193 Cal. Rptr. 422, 436 (1983).

156. 230 Cal. App. 3d 363, 281 Cal. Rptr. 242, 244 (1991). When Patricia *Gile* first met with attorney James *McDaniel* about her pending divorce *McDaniel* had her "fill out a lengthy and intimate self-characterization document, seeking intimate details of [her] personal and sexual life." *Id.* at 366. When he next met with *Gile*, *McDaniel* "continually referred ... back to the more intimate parts of [Gile's] personal life, particularly remarking about the sexual problems [she] had in [her] marriage." *McDaniel* on a different occasion "pinned [Gile] to the wall and kissed [her] on the mouth." *Id.* That same day he said to her: "I bet you are so frustrated right now, if I put you on top I bet you could last for hours." *Id.* *McDaniel* also called *Gile* at home and work and sexually harassed her. *Id.*

157. *Id.* at 367, 281 Cal. Rptr. at 246.

158. *Id.*

159. *Id.* at 365, 281 Cal. Rptr. at 244.

160. *Id.* at 368, 281 Cal. Rptr. at 247.

161. *Id.*

162. *Id.* at 369, 281 Cal. Rptr. at 248.

163. *Id.*

The court also allowed Gile to go forward on her legal malpractice claim based on her allegation that McDaniel abandoned her dissolution action when she refused to have sex with him.¹⁶⁴ The court concluded that McDaniel “not only delayed rendering legal services, but also withheld them and gave substandard services when [Gile] did not grant him sexual favors. This conduct necessarily falls below the standard of care and skill of members of the legal profession.”¹⁶⁵ However, the court refused to address the issue of whether attorney-client sex was a “per se violation of the fiduciary duty.”¹⁶⁶

McDaniel reaffirms the holding of *Barbara A.* concerning fiduciary obligations. It sends a clear message to lawyers who sexually exploit their clients that such conduct may be actionable if it harms their clients’ legal position. However, like *Barbara A.*, *McDaniel* leaves unanswered the question of whether a client can recover against her attorney for breach of fiduciary duty and/or legal malpractice where her attorney’s sexualization of the attorney-client relationship results in purely emotional distress. The ability of a client to recover in that situation is discussed in part VIII of this paper.

Turning to the ethical implications of attorney-client sex, Opinion No. 1987-92 specifically addressed these issues. In a digest of its conclusions the opinion stated:

No California Rule of Professional Conduct expressly prohibits a lawyer from having a sexual relationship with a client. However, such conduct could in some circumstances give rise to a violation of rules 6-101 (now 3-110 Failing to Act Competently) or 5-102 (now 3-310 Avoiding the Representation of Adverse Interests). In addition, such conduct might present a question as to the client’s ability to consent to a sexual relationship and also could detrimentally impact on the client’s ability to render independent judgments in the professional relationship.¹⁶⁷

This advisory opinion concludes by stating that attorney-client sex would not per se violate existing ethical rules:

164. *Id.* at 370, 281 Cal. Rptr. at 249.

165. *Id.*

166. *Id.*

167. Op. 1987-92, *infra* note 55, at 33 n.8.

The Committee seeks to respect the division, however unclear, between the private and professional lives of lawyers. A *per se* ban on any sexual relationship with a client appears overly broad and unnecessary. On the other hand, the opinion reflects ... the many perils of a sexual relationship between lawyer and client.¹⁶⁸

In other words, sometimes attorney-client sex is unethical and other times it is not. It will be difficult to know when that line is crossed except in the most egregious cases.

In summary, California attorneys have been given serious warning signals concerning attorney-client sex by both case law and their own regulatory system. Nevertheless, until liability is imposed in cases where the harm is purely emotional, and a *per se* ethical rule against attorney-client sex is adopted, clients will continue to be sexually exploited to the detriment of those clients, the Bar, and society.

VII. ETHICAL RULE PROPOSAL

I propose that all jurisdictions adopt a clear *per se* ethical rule against most attorney-client sex. Without such a rule, those responsible for enforcement and the attorneys themselves will continue to be uncertain about when attorney-client sex is unethical. A clear rule would give both attorneys and their clients appropriate notice that in most situations sexualization of the attorney-client relationship is unethical. It would also be strong evidence for the public that attorneys take peer regulation seriously. It would show the public that the Bar is willing to regulate attorneys' personal conduct when it affects their professional relationships and discipline those attorneys who seek personal gratification at the expense of their clients' well-being.

The rule I propose is not my own creation. It originated with Portland attorney and ethics expert Peter Jarvis. He was inspired to draft this rule by his experience at the meeting in October 1991 when Oregon lawyers rejected the attorney-client sex rule proposed to them by the Board of Governors. At the Convention he spoke out against the Bar's proposed rule

168. *Id.* at 42.

because he felt the existing ethics opinion adequately covered the issue.¹⁶⁹ However, he was sufficiently impressed by the narrow margin by which the rule failed to pass (139 to 107) to decide that Oregon attorneys would support the adoption of a well-drafted rule against attorney-client sex.¹⁷⁰ His proposed rule would read as follows:

- (A) A lawyer shall not have sexual relations with a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client.
- (B) A lawyer shall not expressly or impliedly condition the performance of legal services for a current or prospective client upon the client's willingness to engage in sexual relations with the lawyer.
- (C) In all other circumstances, a lawyer may have sexual relations with a current client only if (1) the sexual relationship began prior to the attorney-client relationship, (2) the lawyer and client are married or are in an equivalent domestic relationship, or (3) prior to the beginning of the sexual relationship, the client consents after full disclosure.
- (D) "Full disclosure" shall mean an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient that a sexual relationship may cause. Full disclosure shall also include a recommendation that the client seek independent legal advice to determine if consent should be given. Full disclosure shall be contemporaneously confirmed in writing.
- (E) "Sexual relations" shall mean (1) sexual intercourse; or (2) any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.¹⁷¹

169. Transcript, *supra* note 97, at 137-8.

170. Telephone interview with Peter Jarvis (Jan. 31, 1992).

171. Lawyers are creative creatures. This definition would even cover the situation where a lawyer calls his client and masturbates while talking to her. One of my attorney friends told me that another lawyer recently subjected his client to this behavior only a few days prior her hearing on the dissolution of her marriage. Interview with Eugene attorney Suzanne Chanti (Feb. 4, 1992).

- (F) Where the lawyer in a firm has sexual relations with a client, the other lawyers in the firm shall not be subject to discipline solely because of the occurrence of such sexual relations.¹⁷²

This rule is preferable to the proposed Oregon rule because it is clearer and simpler and explicitly sets out the requirements for full disclosure.¹⁷³ It is preferable to the proposed California rule for these same reasons and more.¹⁷⁴

Unlike the California rule, it does not create a rebuttable presumption. The California Board of Governors Sex-with-Client Subcommittee concluded that a *per se* rule "would be struck down as unconstitutional upon judicial challenge" on both right of privacy and freedom of association grounds.¹⁷⁵ If indeed there are any constitutional issues presented by a *per se* rule (which is doubtful), these are alleviated by the permissive nature of the Jarvis rule, which excepts conduct to which the client gives informed written consent.

Another improvement of the Jarvis rule over the California rule is that the situations where sexual relations are completely prohibited by the Jarvis rule also apply to spouses and preexisting sexual relationships. Considering the highly unethical nature of the conduct set out in (A) and (B), no exceptions to the rule's application should be provided as there are in the California rule.¹⁷⁶

172. This is *not* part of Jarvis' draft rule; I borrowed this from the proposed ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.17. The proposed Illinois rule states in full:

- (a) A lawyer shall not, during the representation of a client, engage in sexual relations with the client if:
- (i) The sexual relations is the result of duress, intimidation, or undue influence by the lawyer; or
 - (ii) The lawyer knows or reasonably should know that the client's ability to decide whether to commence sexual relations is impaired by the client's emotional or financial dependency, or some other reason.
- (b) Where a lawyer in a firm has sexual relations with a client, the other lawyers in the firm shall not be subject to discipline solely because of the occurrence of such sexual relations.

Chicago B. Ass'n Report, *supra* note 22, at 45.

173. See proposed DR-510, *supra* note 136.

174. See proposed rule 3-120, *supra* note 149.

175. B. Governors Memorandum, *supra* note 10, at 8, 10.

176. See Paragraph (C), *supra* text at 66, which says that the prohibitions in Paragraph (B) do not apply "to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship." My response to this exception is why should it be ethical for an attorney to coerce or intimidate his wife into having sex with him during the time in which he is acting as her attorney? It reminds me of the marital rape exception to the crime of rape that has only recently begun to be rejected.

My endorsement of the Jarvis rule is tempered by my concerns as to whether there are ever situations where a client who had no preexisting sexual relationship with her attorney can give genuinely informed consent to sexual relations within the professional relationship. According to Psychiatrist Peter Rutter, there are not.¹⁷⁷ An attorney friend of mine agrees, arguing that it is simply not possible for a layperson to sufficiently understand the risks to her interests that sexualization of her attorney-client relationship creates.¹⁷⁸

However, I ultimately favor the informed consent exception because there are some (although very few) clients and attorneys capable of keeping the two relationships separate. Moreover, it will be a very extraordinary case where the attorney will want to have sex with his client badly enough to obtain informed written consent. If such "consent" was obtained, the client would then have written evidence of her attorney's intentions, which could later be evidence proving that sexual relations took place. If the client brought a complaint or lawsuit against her attorney based on their sexual relations, the attorney would have to produce this full disclosure document in order to prove he acted ethically. Under these circumstances, it is likely that most lawyers would opt to refrain from having sex with their clients.

I recommend one final constraint on the Jarvis rule. To empower the victim, I would limit the ability to allege violation of this rule *to the client only* so long as she is a competent adult and the conduct has no financial impact on anyone else.¹⁷⁹ It is not appropriate for the Bar on its own, or, a third party such as the client's cuckolded husband,¹⁸⁰ to have the ability to initiate disciplinary action against the attorney where sexual relations are the basis of the complaint. Considering the personal costs to the client of revealing this information, it should be her choice whether to subject herself to that process.

177. P. RUTTER, *supra* note 5, at 28-9.

178. Interview with Eugene attorney Suzanne Chanti (Feb. 4, 1992).

179. I borrow this idea from Professor Frances Olsen's proposal regarding who should be able to bring a statutory rape complaint. *See Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 408 (1984). She suggests that only underage women themselves should have the power to characterize their "sexual encounter as voluntary intercourse or as rape." *Id.* Similarly, I propose that the client should be the only person with the power to characterize her sexual relationship with her attorney as consensual or unethical.

180. *Cf.* my discussion of husbands who seek to recover for their injuries resulting from sexual relations between their wives and psychotherapists, *supra* note 91 and accompanying text.

VIII. CIVIL LIABILITY FOR ATTORNEY-CLIENT SEX

Whether or not the Bar adopts a new ethical rule concerning attorney-client sex, civil liability for harm to the client that results from sexual relations with her attorney should be allowed. I will examine the potential for civil liability under California law, making reference to other states where useful. I will limit my examination to suits for physical injury resulting from sexual intercourse, and suits for purely emotional and dignitary injuries based upon professional malpractice, breach of fiduciary duty, breach of ethical rules, and intentional infliction of emotional distress.

California is the only state in the nation with case law that expressly allows the recovery of money damages in some situations where injury to a client results from sexual exploitation by her attorney.¹⁸¹ In 1983 the court of appeals decided *Barbara A. v. John G.*¹⁸² *Barbara A.* held that an attorney's client stated causes of action for both battery and deceit where she alleged that, based on her attorney's misrepresentation regarding his ability to impregnate her, she consented to sexual intercourse with him which resulted in an ectopic pregnancy from which she nearly died. In 1991 the court of appeals decided *McDaniel v. Gile*.¹⁸³ *McDaniel* held that an attorney's sexual harassment of his client which led to his abandoning her case when she refused his advances could be the basis for both an action for intentional infliction of emotional distress and attorney malpractice.

Even absent these decisions, if a client could prove that her attorney's sexual conduct physically injured her as a result of an intentional tort such as battery or rape, she could recover against her attorney just as any other party could for such intentional conduct. Importantly, the *Barbara A.* court said that, at least where the client alleges physical injury resulting from a sexual relationship with her attorney, the fact of the attorney-client relationship may aid her in proving her case. The court stated that the "lawyer-client relationship affects the proof of [the client's] cause of action at trial."¹⁸⁴

181. *Suppressed v. Suppressed*, 565 N.E.2d 101, 104 (Ill. Ct. App. 1st Dist. 1990).

182. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983) discussed *supra* notes 11, 15 and accompanying text.

183. 230 Cal. App. 3d 363, 281 Cal. Rptr. 242 (1991) discussed *supra* notes 156-66 and accompanying text.

184. *Barbara A.* at 378, 193 Cal. Rptr. at 431.

The court's reason for allowing the attorney-client relationship to affect the client's burden of proof is that the relationship is a fiduciary one.¹⁸⁵ The court describes a fiduciary relationship as follows:

The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.¹⁸⁶

Ordinarily, where a fiduciary relationship exists there is a presumption that the fiduciary exerted undue influence over his client which he has the burden of rebutting. Apparently this would be true for an attorney if the breach of his fiduciary obligation involved the client's financial or other nonsexual interest.¹⁸⁷

However, the *Barbara A.* court declares that although the fiduciary duty rule applies where physical injury results from attorney-client relationship, undue influence should *not* be presumed as a matter of law where sexual intercourse caused the injury. In this circumstance, to establish undue influence the client must instead prove that a confidential relationship existed. If the client provides sufficient evidence of such a relationship, then the burden of proving that her participation was consensual would shift to her attorney. For example, in *Barbara A.* the court says that if the client establishes the existence of a confidential relationship, her attorney "would then have the burden of proving that consent was informed and freely given in the battery cause of action, or, in the alternative, that her reliance was unjustified in the misrepresentation

185. *Id.* The court says:

We can find no valid reason to restrict these principles (concerning an attorney's fiduciary relationship) to actions involving financial claims of a client and not to apply them to actions with which the client alleges physical injury resulting from a violation of the attorney's fiduciary obligation.

186. *Id.* at 379, 193 Cal. Rptr. at 432.

187. *Id.* Other cases involving breach of an attorney's fiduciary duty to their client do not assert that the existence of the fiduciary duty in itself creates a presumption of undue influence. Instead they examine whether the attorney breached his duty with no mention of this being presumed. *See, e.g.,* *McDaniel v. Gile*, 230 Cal. App. 3d 363, 281 Cal. Rptr. 242, 248 (1991); *David Welch Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339, 341-2 (Cal. Ct. App. 1st Dist. 1988); *Tri-Growth v. Silldorf*, 265 Cal. Rptr. 330, 335-6 (Cal. Ct. App. 4th Dist. 1989).

cause of action."¹⁸⁸ If, however, the client's tort action against her attorney was for a physical injury such as rape, it would seem that her showing of a confidential relationship would create a presumption that sexual intercourse was not consensual. This procedural difference could dramatically affect the client's ability to prove that the sex was non-consensual.¹⁸⁹

The reason the *Barbara A.* court gave for applying a different standard in a case where the attorney physically injured his client through sexual relations was that the parties had a social as well as a professional relationship.¹⁹⁰ The court described what happened to Barbara A. as "unique" since at the time of the alleged sexual encounters Barbara A. consented. It was the attorney's misrepresentation about his inability to impregnate her that converted her cause of action into one for an intentional tort. If she had alleged he forcibly raped her, or, as was alleged in *McDaniel*, he sexually harassed her, the court may not have treated this case as involving both a personal and professional relationship and been willing to presume lack of consent based on the fiduciary relationship without separate proof of a confidential relationship.

In summary, based on *Barbara A.*, it appears that the rule in California is that where physical injury from attorney-client sex is alleged, proof by the client of a confidential relationship will shift the burden to the attorney to prove client consent. Where there was no social relationship between the parties, this requirement of proof of confidential relationship may not apply. Thus, the client in *McDaniel*, who alleged her attorney made unwelcome sexual advances, could assert a presumption of nonconsent and undue influence based on the attorney-client fiduciary relationship.¹⁹¹

Barbara A. also alleged that her attorney breached his ethical obligations by having sex with her.¹⁹² The court declined to decide this issue because the state bar had not yet publicly

188. 145 Cal. App. 3d at 379, 193 Cal. Rptr. at 432.

189. I have difficulty understanding the *Barbara A.* court's assertion that the fiduciary duty covers both financial and physical interests while at the same time it says a confidential relationship has to be proven in order to recover for injuries to physical interests resulting from sexual intercourse. Are fiduciary and confidential being used interchangeably? Or is "the highest fiduciary standard" one that presumes a confidential relationship while just a fiduciary duty does not?

190. 145 Cal. App. 3d at 379, 193 Cal. Rptr. at 432.

191. See *McDaniel*, 281 Cal. Rptr. at 247.

192. *Barbara A.* 145 Cal. App. 3d at 380, 193 Cal. Rptr. at 433.

addressed it. Since then, ethical concerns over attorney-client sex have been discussed in detail in Formal Opinion No. 1987-92. Even without the explicit rule presently being considered by the Bar and the California Supreme Court, Formal Opinion No. 1987-92 changes the legal landscape from that which existed at the time *Barbara A.* was decided. If a suit alleging physical injury from attorney-client sex was brought today, it could be appropriate to allege that rules 3-110 (regarding the ability to act competently)¹⁹³ and 3-310 (regarding conflict of interest)¹⁹⁴ were violated and/or transference occurred that rendered the client unable to meaningfully consent to sexual intercourse.¹⁹⁵ Then, if the plaintiff's allegations were proved, it would be appropriate for the court to use them "to define the duty component of the fiduciary duty which the attorney owes to his or her client."¹⁹⁶

Barbara A. only addressed the situation where, as a result of attorney-client sex, the client suffered physical harm.¹⁹⁷ In most cases where attorney-client sex injures the client the harm will be emotional and dignitary instead. The only case in the nation to specifically address tort liability for purely emotional harm is the 1990 Illinois appellate decision, *Suppressed v. Suppressed*.¹⁹⁸

Suppressed was an appeal from dismissal of the action because the trial court determined the two-year personal

193. Op. No. 1987-92, *supra* note 61, at 34.

194. *Id.* at 37 (5-102 is now 3-310).

195. *Id.* at 40 n.8 (stating:

The possibility that a client may transfer the confidence derived from the professional relationship to the sexual relationship should cause a lawyer to question the client's ability to consent to the sexual relationship. The cause for concern may be greater in those cases where the lawyer has initiated or suggested the idea of having the sexual relationship. If the sexual relationship has been initiated while the professional relationship is on-going, there may be an element of undue influence in obtaining the client's consent. Would the client's consent be truly voluntary, or would it be based on the fear of retaliation that the lawyer may withdraw from the case or may compromise his or her efforts because he or she is angry with the client for refusing?).

196. *David Welch Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339, 342 (Cal. Ct. App. 1st Dist. 1988).

197. The other relevant California case, *McDaniel*, involved emotional distress but the pecuniary harm was also alleged and the basis for the suit was the injuries resulting from the client's *refusal* to have sex with her attorney.

198. 565 N.E.2d 101 (Ill. Ct. App. 1st Dist. 1990). *Doe v. Roe*, 756 F.Supp. 353 (N.D. Ill. 1991) is not a tort action. Instead the client brought a civil RICO action against her attorney (the same attorney as in *Suppressed*).

injuries statute of limitation had run. The plaintiff argued that the five-year statute of limitation applicable to legal malpractice applied. The appellate court specifically addressed the question of whether attorney-client sex that causes purely emotional and dignitary harm is recognizable as legal malpractice. The court held it was not for two reasons: (1) the duty of care allegedly breached by the defendant is not one that arises from the attorney-client relationship, and (2) no actual damages were alleged.¹⁹⁹

Jeanne Metzger, the plaintiff in *Suppressed*, alleged that her attorney "locked his [office] door and then unzipped his pants. He then requested that plaintiff have oral sex with him."²⁰⁰ She complied with his request and on two later occasions complied with his requests to have sexual intercourse with her. She alleges that these sexual encounters were the result of psychological coercion and breached her attorney's fiduciary duty to her.²⁰¹

In holding that this conduct did not implicate the attorney-client fiduciary duty the court said such a duty would only apply to attorney-client sexual relations where "there is tangible evidence that the attorney actually made his professional services contingent upon the sexual involvement or that his legal representation of the client was, in fact, adversely affected."²⁰²

The court distinguished an attorney's fiduciary relationship from that of a psychoanalyst on the grounds that the latter relationship involves transference while the former does not. Furthermore, the court viewed sexual relations with a client *even where initiated by the attorney in a coercive setting* to be "errors in judgment" rather than a failure "to exercise a reasonable degree of care and skill."²⁰³ The *Suppressed* court noted that "[a]n attorney, just like the client, is at best and at worst, a human being fraught with all the frailties that the status entails."²⁰⁴

Based on the holding of *Suppressed*, this court would not have allowed the attorney-client relationship in *Barbara A.* to

199. 565 N.E.2d at 104.

200. *Id.* at 105. See *supra* note 63 and accompanying text for Jeanne Metzger's account of this incident.

201. See *supra* note 63 and accompanying text for description of how Jeanne Metzger felt.

202. 565 N.E.2d at 105.

203. *Id.* at 105.

204. *Id.*

have affected the result of the case in any way, since no allegations of quid pro quo or poor legal results were made.

The *Suppressed* court also concluded that "no actual damages were alleged" since the only injuries Jean Metzger claimed were purely emotional.²⁰⁵ Thus the court held that even if the fiduciary duty had been breached, no liability would have been allowed. Therefore, *even if Jeanne Metzger had been able to prove that her attorney had made performance of his legal services expressly contingent on having sex with him, unless this had caused either financial or physical injury to her, no recovery would have been allowed.*²⁰⁶

How would Jeanne Metzger's case have been decided in California? I will outline four different grounds for tort liability for a client seeking to recover against her attorney for purely emotional harm caused by attorney-client sex: 1) attorney malpractice, 2) breach of fiduciary duty, 3) violation of ethical rules or guidelines contained in formal opinions, and (4) intentional infliction of emotional distress.

First, the client could allege attorney malpractice. The elements of a cause of action for attorney malpractice are:

- (1) the duty of the attorney to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise;
- (2) a breach of that duty;
- (3) a proximate causal connection between the negligent conduct and the resulting injury;
- and (4) actual loss or damage resulting from the professional's negligence.²⁰⁷

As noted in *Day v. Rosenthal*²⁰⁸: An attorney's duty, the breach of which amounts to negligence, is not limited to his failure to use the skill required of lawyers. Rather, it is a wider

205. *Id.*

206. If the *McDaniel* facts had been before the Illinois court, it might have allowed the case to proceed, since the attorney was seeking quid pro quo and had abandoned the case to his client's pecuniary detriment when she refused to submit to his sexual advances. See *McDaniel v. Gile*, 230 Cal. App. 3d 363, 281 Cal. Rptr. 242, (1991) discussed *supra* note 153 and accompanying text.

207. *Garris v. Severson*, 252 Cal. Rptr. 204, 206 (Cal. Ct. App. 2d Dist. 1988). See also *Budd v. Nixon*, 491 P.2d 433 (1971); *McDaniel v. Gile*, 230 Cal. App. 3d 363, 281 Cal. Rptr. 242, 249 (1991).

208. 217 Cal. Rptr. 89, 102 (Cal. Ct. App. 2d Dist. 1985).

obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances.²⁰⁹

Without question, a client's best interests, including her interest in mental tranquility, are adversely affected by attorney-client sex of the kind alleged by Jeanne Metzger in *Suppressed*. The client expects to be able to trust her attorney; a betrayal of that trust through conduct such as that alleged in *Suppressed* can devastate an already vulnerable client. If initiation of sexual relations with a client in the manner employed by the attorney in *Suppressed* fell below the standard of conduct to which members of the bar should adhere, then a breach of the attorney's duty could be found.

Such conduct could clearly be the proximate cause of emotional distress. That is, emotional distress would be a reasonable and foreseeable consequence of the attorney's negligence.

The final hurdle in a legal malpractice action is the element of damages. Recently, a number of California cases have allowed recovery for damages based on negligent infliction of emotional distress against attorneys by their clients. The three leading cases are *Betts v. Allstate Ins. Co.*²¹⁰ decided in 1984; *Holliday v. Jones*²¹¹ decided in 1989; and *Tara Motors v. Superior Ct. (Jasper)*²¹² decided in 1990. In these cases the client was also able to show either economic damages or interference with the client's liberty interest.

If a client alleging emotional distress from attorney-client sex could also show that her financial interests were adversely affected, the right to recovery seems quite certain based on the established caselaw. *McDaniel v. Gile* is directly on point

209. *Id.* at 102. The *Day* court also said:

[I]t is an attorney's duty to "protect his client in every possible way," and it is a violation of that duty for an attorney to "assume a position adverse to or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances.

Id. at 99-100. Certainly, as California Legal Ethics Opinion 1987-92 notes, there are many instances where attorney-client sexual relations would adversely affect the client's interests without the client being fully cognizant of this. One of the interests that could be adversely affected is the clients mental peace of mind if she feared retaliation if she did not submit to her attorney's advances. See Op. 1987-92, *supra* note at 40.

210. 201 Cal. Rptr. 528 (Cal. Ct. App. 4th Dist. 1984).

211. 264 Cal. Rptr. 448 (Cal. Ct. App. 4th Dist. 1989).

212. 276 Cal. Rptr. 603 (Cal. Ct. App. 4th Dist. 1990).

and there the court allowed an action for attorney malpractice.²¹³ If, however, as in Jeanne Metzger's case, no financial harm was alleged, unless she could prove that her liberty interest was somehow affected, recovery would be an open question. As the *Tara* court stated: "We leave for another day attorney malpractice cases which do not involve such economic losses or the interests discussed in *Holliday*."²¹⁴ The rationales for allowing emotional distress injuries in the previously decided attorney malpractice cases apply equally to those attorney-client sex cases where a breach of the attorney's duty of care has caused emotional distress. The court in *Holliday v. Jones*, explaining why attorneys must be held to high standards similar to those for other professionals, said that "a special rule benefitting only negligent lawyers" would be detrimental to both the public and the profession. The court continued: "In our view, not only is such a special interest rule unfair, but public perceptions regarding it poorly serve the broader interests of the legal profession."²¹⁵ The *Holliday* court reasoned that if a patient proved an improper psychiatric diagnosis had caused her mistaken commitment, the California Supreme Court case of *Molien v. Kaiser Foundation Hospitals*²¹⁶ would clearly allow recovery for emotional harm against the negligent psychiatrist. It therefore found that it was appropriate to allow recovery for emotional distress where defendant attorney's negligent representation of his client resulted in his client being convicted of murder and imprisoned.

The *Holliday* court's analogy to other professions is also appropriate in cases involving attorney-client sex. In California, a psychiatrist's patient can recover for emotional distress against the psychiatrist because the psychiatrist engaged in sexual relations with the patient's wife.²¹⁷ The

213. The *McDaniel* court made it clear that this was malpractice. It said: The facts before this court show that [McDaniel] not only delayed rendering legal services, but also withheld them and gave substandard services when [Gile] did not grant him sexual favors. This conduct necessarily falls below the standard of care and skill of members of the legal profession. *Id.* at 370.

214. 276 Cal. Rptr. at 669 n.7.

215. 264 Cal. Rptr. at 455.

216. 616 P.2d 813 (1980) (noting that a complaint alleging that defendant doctor had negligently concluded that plaintiff's wife had syphilis, had instructed the wife to advise plaintiff of the diagnosis, and had required plaintiff to submit to a blood test adequately stated a cause of action for negligent infliction of emotional distress.).

217. *Richard H. v. Larry D., M.D.*, 243 Cal. Rptr. 807 (Cal. Ct. App. 1st Dist. 1988).

basis for recovery in such a medical malpractice actions is "liability for breach of [] professional and fiduciary responsibilities."²¹⁸ A psychiatrist who has sex with his patient should also be held liable for any emotional distress damages the patient herself suffers.²¹⁹ An attorney should not be treated differently when he causes the same kind of harm to his client by engaging in the same conduct.

The California Supreme Court recently narrowed the grounds of recovery for negligently inflicted emotional distress in a bystander case, *Thing v. La Chusa*.²²⁰ Nevertheless, it is still appropriate to allow recovery for direct emotional distress in cases like Jeanne Metzger's. Furthermore, attorney liability is already circumscribed by the general limitation of recovery to clients only and the harm alleged must be directly caused by the attorney-client relationship.²²¹

In summary, although there are no cases directly on point, there is a strong argument based on analogous cases that a client who alleges emotional harm from an attorney-client sexual relationship will, in some instances, be able to recover on the grounds of attorney malpractice.

A related equitable claim can also be made based on breach of the attorney's fiduciary relationship to his client. *Barbara A.* could be extended to purely emotional harm based on the Bar's Ethical Opinion No. 1987-92 referring to the various ethical problems with many attorney-client sexual relationships. Where the breach of fiduciary duty has resulted in economic injury, the courts have expressly based a finding of breach on the relevant ethical rules. For example, in *David Welch Co. v. Erskine & Tulley*²²² the court held that defendant attorney breached his fiduciary duty to his former client by violating rules 4-101 and 5-101 of the Rules of Professional Conduct. The court noted that "these rules, together with the statutes and general principles relating to other fiduciary

218. *Id.* at 810.

219. See *Waters v. Bourhis*, 40 Cal. 3d 424, 434, 709 P.2d 469, 475, 220 Cal. Rptr. 666, 673 (1985) (client sued her attorney for charging excessive fees for settling a case against her psychiatrist who sexually exploited her). But see *Atienza v. Taub*, 194 Cal. App. 3d 388, 239 Cal. Rptr. 434 (1987) (physician's sexual relationship with patient not medical malpractice where not initiated under guise of treatment).

220. 771 P.2d 814 (1989).

221. *Goodman v. Kennedy*, 556 P.2d 737 (1976). See also *Tara Motors v. Superior Ct. (Jasper)*, 276 Cal. Rptr. 603, 669 (Cal. Ct. App. 4th Dist. 1990).

222. 250 Cal. Rptr. 339 (Cal. Ct. App. 1st Dist. 1988).

relationships, all help define the duty component of the fiduciary duty which the attorney owes to his or her client.²²³

A client alleging injuries similar to those suffered by Jeanne Metzger could allege that her attorney breached his fiduciary duty to her by violating rules 3-110 and 3-310.²²⁴ The client could also allege her attorney misused transference, thereby negating the client's consent through the exercise of undue influence, as discussed in California Ethical Opinion No. 1987-92.²²⁵

A third basis for civil liability might exist in violation of the ethical rules themselves.²²⁶ The only cases in California where such claims have been made involved third parties who sued opposing counsel based on those lawyers' conduct in the case against the third party.²²⁷ While recovery has been denied in these cases, a suit based on violations of ethical rules brought by a client against her own attorney is clearly distinguishable. It does not present the specter of chilling access to the courts that actions by third parties raise.²²⁸

Although other jurisdictions have generally denied recovery where a cause of action is based solely on the breach of an ethical rule, those cases, like the California cases, have for the most part involved actions by third parties.²²⁹ A much more

223. *Id.* at 343. See also *Day v. Rosenthal*, 217 Cal. Rptr. 89 (Cal. Ct. App. 2d Dist. 1985).

224. See *supra* note 63 and accompanying text.

225. Op. 1987-92, *supra* note 61, at 40.

226. See Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281 (1979). See generally Forell, *The Interrelationship of Statutes and Tort Actions*, 66 OR. L. REV. 219 (1987); Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781 (1990).

227. See, e.g., *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269 (Cal. Ct. App. 2d Dist. Div. 4 1973).

228. See *Bob Godfrey Pontiac, Inc. v. Roloff*, 291 Or. 318, 630 P.2d 840 (1981) in which the court sets out why it refuses to create a new tort action based on an ethical violation alleged by a third party. It points out that the legislature (or Bar) did not intend to create a tort action. Of course, this shouldn't stop the court from creating one so long as the legislature or Bar didn't clearly intend to bar such an action. It then points to other remedies, most notably malicious prosecution. Such an action is not available to a client injured as a result of attorney-client sex. And, at this point and time, no other remedy is available either. Finally the court pointed to the danger that exposing attorneys to liability to third parties could chill the public's access to the courts. This rationale is clearly inapplicable to attorney-client sex cases. *Id.* at 326, 630 P.2d at 848.

229. See *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); *Bob Godfrey Pontiac, Inc. v. Roloff*, 291 Or. 318, 630 P.2d 840 (1981). *Bob Godfrey* lists the jurisdictions which have rejected such an action. *Id.* at 325, 630 P.2d at 847.

compelling case for allowing an action based on violation of ethical standards exists where the injured party is the attorney's client to whom he owed a fiduciary duty.

A final basis for civil liability in a case like Jeanne Metzger's would be intentional infliction of emotional distress. *McDaniel v. Gile* allowed such an action where the client who was sexually harassed alleged both financial and emotional harm.²³⁰ However, so long as the conduct is both intentional and outrageous, purely emotional harm is recoverable. To recover under this claim a client must show: (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering, and (4) actual and proximate causation of the emotional distress.²³¹

As the *McDaniel* court noted, conduct is more likely to be found outrageous where a power relationship such as attorney-client exists.²³² The kind of attorney conduct that Jeanne Metzger described in her personal statement satisfies both the "outrageous" and "intentional" elements of the action.²³³ Metzger's attorney clearly acted both outrageously and intentionally when he forced her to have oral sex in his office. It is quite likely that in some situations, like that of Jeanne Metzger, a claim for intentional infliction of emotional distress can be made out where the attorney sexually exploits his client.

In summary, at least four theories of recovery may be available to clients who allege emotional distress injuries from attorney-client sexual relations. It remains to be seen whether the California courts will do justice by allowing recovery under one or all of these bases. If the California courts refuse to allow recovery for emotional distress in this context, I would urge the California state legislature to enact a statute creating such liability.²³⁴

230. *McDaniel v. Gile*, 230 Cal App. 3d 363, 281 Cal. Rptr. 242 (1991).

231. *Agarwal v. Johnson*, 25 Cal.3d 932, 946, 160 Cal. Rptr. 141, 603 P.2d 58 (1979). *Accord McDaniel*, 281 Cal. Rptr. at 247.

232. *McDaniel*, 281 Cal. Rptr. at 247.

233. *See supra* note 63 and accompanying text.

234. *See, e.g., Coleman, Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex*, 53 ALB. L. REV. 95, 139-141 (1988) (proposed statute called "Uniform Sexual Exploitation Act" creating tort liability whenever a fiduciary has sex with his client).

IX. ILLINOIS

As explained at the beginning of this paper, this is a tale of three jurisdictions. I have discussed the responses of Oregon and California to attorney-client sexual relations in detail. I will conclude with an examination of Illinois' treatment of this issue. What has occurred in Illinois is truly frightening. It is a demonstration of raw power silencing the voices of women clients who have been brutally victimized.

Women who allege their attorneys have sexually exploited them in Illinois simply do not stand a chance of recovering for their injuries or seeing the offenders punished. Although approximately 50 complaints related to the sexual misconduct of attorneys are brought to the attention of Illinois Attorney Registration and Disciplinary Commission (ARDC) each year, I have been unable to find a single reported case where an attorney was disciplined following such a complaint.²³⁵

Included among the attorneys who have not been publicly disciplined is the unnameable attorney who was sued by two of his clients in *Suppressed v. Suppressed*²³⁶ and *Doe v. Roe*²³⁷. According to the Professor John Elson, the attorney who represented both of these clients in their suits against Mr. Unnameable, two additional women have filed formal grievances against this man, and Professor Elson knows of two other victims who have not yet come forward.²³⁸ That makes six victims of a single attorney. Professor Elson told me that he felt it was extremely unlikely that this attorney would be disciplined in any way because of these complaints.²³⁹

The lack of any meaningful attorney discipline in Illinois leaves civil litigation as the only possible way to obtain a remedy, punish the offenders, and let the public know who the sex-

235. California is no better. According to Henry Contreras, Chief Consultant to Assemblywoman Roybal-Allard, no attorneys have ever been publicly disciplined in California for sexual misconduct affecting their clients. Presentation on Attorney-Client Sex, February 8, 1992, Golden Gate University School of Law. In contrast, Oregon has two recent cases in which an attorney was disciplined at least in part because he had sex with his client. See *In re Ofelt*, 1 D.B. Rptr. 22 (Or. 1985); *In re Wolf*, 312 Or. 655 (1992).

236. 565 N.E.2d 101 (Ill. Ct. App. 1st Dist. 1990).

237. 756 F.Supp. 353 (N.D. Ill. 1991).

238. Chicago B. Ass'n Report, *supra* note 22, at 14.

239. Telephone interview with Professor John Olson, Jan. 20, 1992.

ual predators are. But in Illinois that avenue has also been effectively eliminated. When Jeanne Metzger first planned to file her suit for money damages in Chicago against her attorney in 1988, the attorney successfully obtained an injunction requiring that the filing of the suit be kept secret. Presiding Chancery Division Judge David J. Shields directed the clerk to accept the filing of Mr. Unnameable's complaint for injunctive relief "without revealing the names or identities of the parties."²⁴⁰ Judge Shields issued a temporary restraining order, impounded the file and ordered Metzger's attorney to file her suit with him instead of in the clerk's office.²⁴¹

Metzger's attorney, John Elson, filed the suit with Judge Shields as ordered. Since the suit alleged a tort, it actually belonged in the Law Division, so Judge Shields telephoned Law Division Presiding Judge Sorrentino and "explained the situation." An emergency closed door meeting was held, which also included Judge Foreman of the Law Division's motion section.²⁴² After this meeting Foreman impounded the Law Division file and imposed a gag order on Metzger and Elson forbidding them to discuss the names of the litigants or the contents of the complaint with anyone.²⁴³ The gag order would automatically be lifted if Mr. Unnameable lost his pending motion to dismiss the complaint. However, he won the motion to dismiss, and even though the case came to an end when the Illinois Supreme Court declined review of *Suppressed* in 1990, those connected with the suit are still not sure if they would be found in contempt if they revealed the name of Metzger's former attorney.²⁴⁴

These proceedings appear to be in blatant violation of both constitutional and statutory law. For example, in *Nixon v. Warner Communications*,²⁴⁵ the United States Supreme Court said that "[it] is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."²⁴⁶ There is also a statutory right in Illinois to public access to court records. Illinois Revised Statutes, Ch. 25, Section 16 states that

240. Warden, *supra* note 24, at 11-12.

241. *Id.*

242. *Id.*

243. See *supra* note 35, where excerpts of the gag order are set out verbatim.

244. Telephone interviews with Professor John Elson and attorney Margaret Paris, Jan. 20, 1992.

245. 435 U.S. 589 (1978).

246. *Id.* at 597.

“[a]ll records, dockets and books required by law to be kept by [circuit court] clerks shall be deemed public records, and shall at all times be open to public inspection”²⁴⁷

Mr. Unnameable nonetheless succeeded in keeping his name from the public, a public which includes future victims of his sexual conduct. Judge Shields commented on his suppression of the records by saying: “I knew this belonged in the Law Division and I didn’t care what the Law Division did with it, but I didn’t want the allegations to become public by accident.”²⁴⁸ Even more disturbing are the facts alleged in the RICO action against Mr. Unnameable by another former female client. The facts, as stated in the court’s opinion, are as follows:

In April 1983, Doe met Roe at a social gathering. After inquiring about her divorce proceeding, Roe suggested Doe’s counsel was inadequate and that he could do a better job. In June 1983, Doe went to Roe’s office to discuss her divorce. Roe again derided the work of Doe’s counsel and she decided to hire Roe instead. In July, Doe paid a \$7,500 retainer. No written agreement was entered into . . .

Doe placed great trust in Roe because he was her attorney and because she understood he had an outstanding reputation. Additionally, because of the emotionally trying nature of the divorce proceeding, Roe advised Doe on personal matters as well as legal matters. As a result, Doe developed a psychological dependency on Roe. On her second visit to Roe’s office, Roe made sexual advances. Doe initially resisted, but Roe persisted. Although Plaintiff felt repulsed by Roe’s sexual advances, she submitted because of her fear that otherwise he would not represent her and that since she could not afford a retainer fee to hire a third counsel in her divorce case, she might go unrepresented and lose both custody of her child and the opportunity for financial security for

247. Warden, *supra* note 24, at 9.

248. *Id.*

herself and her child. From 1983 through 1988 Doe continued to submit to Roe's sexual demands, at his offices, in her home, and at other locations. Doe continued to do so because of both her emotional dependency and her fear of what would happen if she lost Roe's legal representation. . .

In November 1989, after Doe's present attorney first wrote a letter to Roe indicating Doe would seek redress for her injuries and that Roe should not contact Doe except through counsel, Roe nevertheless made threatening phone calls directly to Doe. Among other threats, he threatened to "rip Plaintiff to shreds," to "get everyone he knew to make her look terrible - like a slut," and to "get her for this." Roe also informed Doe "she should be concerned about her family, her reputation, and the success of her business." Roe continued to make harassing phone calls to Doe at her house. Also, in December 1989, he sent her a note stating "DON'T DO THIS TO ME/YOU'LL BE SORRY." In January 1990, Roe approached Doe on a sidewalk in downtown Chicago and shouted obscene epithets at her. On an afternoon in June 1990, a middle-aged male in business attire, who was acting at Roe's direction, approached Doe at an intersection in downtown Chicago and made a vulgar sexual proposition.²⁴⁹

This is just a portion of Doe's tale of abuse. Roe also went after Doe's attorney who is employed by Northwestern University in their law school's legal clinic:

On October 4, 1990, Roe wrote Northwestern University's general counsel threatening to sue the University for malicious prosecution after the successful dismissal of the present lawsuit unless the University intervened to have the lawsuit dismissed. Prior

249. Doe v. Roe, 756 F. Supp. 353, 356 (N.D. Ill. 1991).

to the letter, Roe is alleged to have had a friend who is a "prominent" Northwestern Law School alumnus contact the University's general counsel regarding Doe's continued representation by the Legal Clinic. The alumnus had also contacted Northwestern University Law School's current dean and former dean.²⁵⁰

The tale of Illinois has another chapter. When Albert Brooks Friedman sought to collect fees from his female divorce client, she refused to pay the \$15,500 he claimed was owed, partly because he billed her for the hours they spent having sexual intercourse.²⁵¹ When Friedman sued to collect these fees, the trial court granted his motion for summary judgment and denied his former client's petition. On appeal the appellate court reversed the judgment and award of \$16,392.17 in attorney fees and remanded the case for trial. However, it expressly refused to reach the issue of whether the alleged sexual relationship breached Friedman's fiduciary duty.²⁵² As mentioned earlier in this paper, after this case was filed the Supreme Court of Illinois appointed Friedman to the committee on character and fitness of the State Board of Law Examiners.²⁵³

There may be some hope for Illinois, however. In his special concurrence in *In re Marriage of Kantar*, Justice Greiman states that he believes Friedman's alleged sexual misconduct should have been addressed by the appellate court. He describes attorney-client sex as the legal profession's "dirty little secret."²⁵⁴ He then examines the issue in detail, and concludes that "where there is an allegation of sexual relationship between a domestic relations lawyer and client . . . [this] constitutes a *per se* conflict of interest."²⁵⁵ His remedy is excellent: once a sexual relationship occurs, the attorney's "per se conflict of interest . . . would render his fees forfeit where the client

250. *Id.*

251. *In re Marriage of Kantar*, 581 N.E.2d 6, 9 (Ill. Ct. App. 1st Dist. 1991).

252. *Id.* at 11.

253. Gill & Holt, *surpa* note 24, at 10.

254. 581 N.E.2d at 12. Attorneys in California keep dirty little secrets too. In *McDaniel v. Gile* the client who was sexually harassed by her attorney claimed that the attorney had done similar things to other women divorce clients "and that his reputation for this was 'well known around the Ontario courthouse.'" 230 Cal. App. 3d 363, 281 Cal. Rptr. 242, 245 (1991).

255. 581 N.E.2d at 12.

brings the matter to the attention of the court within a reasonable time and provides evidence sufficient to carry her burden of proof."²⁵⁶

There have been some attempts towards change. The Illinois legislature at the behest of Jeanne Metzger²⁵⁷ passed a resolution in 1991 requesting "that a rule of professional conduct governing sexual relations between attorneys and their clients be adopted ...".²⁵⁸ The legislature was dissuaded from passing a statute like California's by the weak argument that such a statute would violate separation of powers.²⁵⁹ Another ray of hope has come from the Chicago Bar Association, which has drafted a rule regulating attorney-client sex that the Association has forwarded to the Illinois Supreme Court.²⁶⁰

X. CONCLUSION

Attorney-client sex injures women and the legal profession. Only recently have these injuries begun to receive serious public scrutiny. The pressure to adopt ethical rules restricting attorney-client sex must continue. Similarly, courts should seriously consider imposing civil liability for physical and emotional injuries suffered from attorney-client sex. The law must no longer silence the voices of women clients who are victims of such conduct. If the courts and legal profession refuse to act, the state legislatures should. One possible legislative remedy could be a statutory tort claim against any professional who abuses his trust by sexually exploiting his client. A draft of such a statute was set out in a recent article by Professor Phyllis Coleman.²⁶¹ The cause of action would be analogous to the sexual harassment actions now available where such harms occur in the workplace.

The law profession's dirty little secret is secret no more. Hopefully, the light now being shed on it will cause change from within the legal profession before change from without is imposed.

256. *Id.* at 16.

257. Telephone interview with Jeanne Metzger, Jan. 28, 1992.

258. S. Res. 361, 87th General Assembly, 1991 Illinois.

259. Telephone interview with John Elson, Jan. 20, 1991.

260. Grady, Crawford, & O'Brien, *supra* note 22. The proposed rule is set out *supra* note 136.

261. See Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex*, 53 ALB. L. REV. 95, 139-141 (1988).