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Anthony E. Davis

Judith Grimaldi

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SEXUAL CONFUSION: ATTORNEY-CLIENT SEX AND THE NEED FOR A CLEAR ETHICAL RULE

ANTHONY E. DAVIS*
JUDITH GRIMALDI**

An area of professional responsibility which has come under particular scrutiny in recent months is that of sexual involvement between lawyers and their clients during the course of the professional relationship. Despite the ramifications of such conduct, neither the Model Rules of Professional Conduct (Rules) nor the Model Code of Professional Responsibility (Code) contain any direct reference to the appropriateness or otherwise of sexual relations between the attorney and client; neither expressly prohibits nor directly regulates such conduct.

Some argue that the absence of a specific rule is appropriate.¹ Some existing general provisions of the Code and Rules have been determined to regulate such conduct indirectly: particularly the provisions concerning the attorney's fiduciary duty to his or her clients, the requirements of integrity and competence, and the rules governing conflicts of interest. Opponents of a rule suggest that a specific rule on attorney-client sexual relations is therefore unnecessary, would amount to excessive

* Anthony Davis practices in New York in matters involving legal profession issues and legal ethics, and has taught the "Legal Profession" course at Brooklyn Law School as an Adjunct Professor of Law since 1986, and previously at New York Law School. He received his law degree from Cambridge University, and an LL.M from New York University School of Law. Presently a partner in the New York office of Berwin Leighton, he is admitted in New York, and also as a solicitor in England.

** Judith Del Rey Grimaldi is an associate with the law firm of Goldfarb & Abrandt, New York City, which concentrates in elder law, health law and estates and trusts. She is a graduate of Brooklyn Law School, 1993, and Hunter College School of Social Work, M.S.W. 1982. Prior to law school, Ms. Grimaldi had a career in geriatric and health care services. This paper was begun as an independent study while in law school.

1. Interview with David Bell, Senior Staff Attorney, Office of Professional Competence, Planning and Development, State Bar of California (Mar. 1, 1992). Mr. Bell reported that this was a widespread view among the responses received from attorneys to the circulation of CALIFORNIA RULES OF PROFESSIONAL CONDUCT Proposed Rule 3-120, regarding sexual relations with clients.

regulation and would involve unacceptable interference with attorneys' private lives.

Advocates for a specific ethical rule regulating sexual conduct between attorney and client believe that sexual involvement in the course of professional representation damages the attorney's objectivity, unacceptably interferes with the professional relationship, undermines the integrity of the legal profession as a whole, and most importantly, is likely to violate the client's trust and call into question the lawyer's ability to fulfill his or her obligations as a fiduciary.² The authors firmly belong to this group, and will demonstrate in this article why they believe that the time has come for the adoption of clear and specific regulation of sexual relations between attorneys and their clients.

The unequal balance of power between the attorney and client, which is intrinsic to the relationship because of the attorney's special skill and knowledge on the one hand, and the client's vulnerability on the other is at the core of this issue. This inequality creates the potential for the attorney to dominate the client and to take unfair advantage. When this power to dominate is used to initiate a sexual relationship, actual harm to the client and to the client's interests will almost inevitably result. This kind of overreaching by an attorney is harmful in any legal representation, but is most dangerous when a client is seeking legal assistance during a time of personal crisis such as divorce, after the death of a loved one, or when facing criminal charges. The trust inherent in the role of lawyer creates the expectation that whatever confidences the client has vouchsafed to the lawyer will be solely used to advance the client's interest, and will not be used to the attorney's advantage, sexual or otherwise. Within this fiduciary framework, the initiation of sexual behavior is always wrong, no matter who is the initiator, and no matter how willing the participants say they are. The parallels in the therapeutic professions discussed below, clearly indicate that apparent consent is in fact not true, volitional, or uncoerced consent. In this area, called the "forbidden zone" by psychiatrist Peter Rutter, the factors of power, trust and dependency remove the possibility of the client freely con-

2. The extent of the sexual exploitation of clients by attorneys is perceived by many to be a growing problem. A proposal for a rule change in Illinois by Illinois State Senator Adeline Geo-Karis was motivated by at least 50 cases alleging sexual harassment by attorneys which were brought to her attention which she details in her press release on the subject. She advocates a specific rule which would prohibit sexual involvement between lawyers and their clients during the continuation of the professional relationship.

senting to sexual contact, because the lawyer has the greater power. Therefore, the responsibility is on the lawyer to guard this "forbidden boundary."³

This article will demonstrate the present need for a specific ethical rule, where none has previously existed, and will suggest the form which such a rule should take. In addressing these issues, this article will review the standards used by other professions in regulating its members' sexual relations with their clients. This article will explore the application of existing, non-specific regulations now used in these situations within the legal profession by analyzing malpractice case law, disciplinary cases, and ethics opinions. The proposed ethical rules being debated in California, Oregon and Illinois will be reviewed and discussed. Finally, the authors will propose their own model rule to regulate sexual relations between attorneys and their clients.

I. THE HEALTH PROFESSIONS STRICTLY PROHIBIT SEXUAL INVOLVEMENT WITH PATIENTS

A. *The Mental Health Professions*

In response to incidents of psychotherapist-patient sexual relations, mental health professional organizations have universally condemned sexual activity in therapeutic relationships as exploitative.⁴ The American Psychiatric Association expressly states in its code of ethics that ". . . sexual contact with a patient is unethical."⁵ The American Psychological Association's rules of ethics mirror the other health professions in noting that "sexual intimacies with clients are unethical."⁶ The National Association of Social Workers has adopted a code which states that "The social worker should under no circumstances engage in sexual activities with clients."⁷ The medical profession as a whole needs to look no further than its ancient Hippocratic Oath to find a clear prohibition of sexual relations with patients. The oath states: "In every house where I come I will enter only for the good of my patients, keeping myself far

3. PETER RUTTER, *SEX IN THE FORBIDDEN ZONE* 28 (1989).

4. Linda M. Jorgenson et al., *The Furor over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 *WM. & MARY L. REV.* 645 (1991).

5. AMERICAN PSYCHIATRIC ASS'N, *THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS APPLICABLE TO PSYCHIATRY* § 2, at 1 (1986).

6. AMERICAN PSYCHOLOGICAL ASS'N, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS* § 6(a) (1991).

7. NATIONAL ASS'N OF SOCIAL WORKERS, *CODE OF ETHICS* § II(F)(5) (1980).

from all intentional ill-doing and seduction, and especially from the pleasures of love with men and women"⁸

The medical and mental health professions thus specifically and unequivocally prohibit sexual contact with clients or patients. Notwithstanding this clear prohibition, sexual involvement with patients is a leading cause of malpractice claims against psychotherapists.⁹ Individual states have addressed this abuse through the imposition of criminal sanctions, civil liability and licensing requirements.¹⁰

The mental health professions have documented evidence in surveys and studies that sexual exploitation of clients causes damage to the therapeutic relationship and to the client directly.¹¹ Therapists report that abused patients have difficulty continuing their therapy, and may sometimes need hospitalization and even become suicidal.¹²

Psychotherapy is rendered ineffective when sexual contact is incorporated into the professional relationship. The patient has sought out therapy to bring about a life change. The therapist's role is to maintain reality and solidify the boundaries of appropriate behavioral responses to life's decisions. Engaging in sexual relations with a patient flies in the face of the goals of therapy, by breaching the important boundaries being created, and by eliminating essential objectivity. For these reasons, the mental health professions adhere to such explicit codes of professional ethics in the area of sexual relations between patients and therapists.

B. *The Medical Profession Generally*

The American Medical Association (AMA) condemns sex relations between patients and physicians.¹³ The report of the AMA's Council on Ethical and Judicial Affairs states that any relationship in which a physician takes or risks taking advantage

8. STEDMAN'S MEDICAL DICTIONARY 579 (3d ed. 1972).

9. See Irwin PERR, *Medicolegal Aspects of Professional Sexual Exploitation*, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS, 211, 212 (Glen Gabbard ed. 1989).

10. See, e.g., ILL. REV. STAT., ch. 70, para. 802 (1990) (providing a statutory cause of action for sexual exploitation of patients by psychotherapists).

11. Nanette Gartrell, M.D. et al., *Reporting Practices of Psychiatrists Who Knew of Sexual Misconduct by Colleagues*, 57 AM. J. ORTHOPSYCHIATRY 287, 292-93 (1987).

12. Jorgenson et al., *supra* note 4, at 662.

13. AMA Council on Ethical and Judicial Affairs, Op. 8.14 Sexual Misconduct (1989). This article covers the laws of six states which prohibit sexual contact between physicians and patients as it jeopardizes patient care.

of a patient's emotional or psychological vulnerability is unethical.¹⁴ The Council further advises that "before initiating a dating, romantic or sexual relationship with a patient, a physician's minimum duty would be to terminate his or her professional relationship with the patient."¹⁵ In addition, the report extends the caution further to a physician's former patients stating, "[I]t would be advisable . . . to seek consultation with a colleague before initiating a relationship with the former patient." Restriction of sexual contact with former patients is rooted in the potential for unethical behavior resulting from the special trust, knowledge and influence the physician derives from the former professional relationship. The intensity and emotional nature of the physician-patient relationship makes it difficult for the romantic relationship not to be affected by the professional relationship.¹⁶

A relationship between patient and physician may include considerable trust, intimacy or emotional dependence.¹⁷

The length of the former professional relationship, the extent to which the patient has confided personal or private information to the physician, the nature of the patient's medical problem, and the degree of emotional dependence that the patient has on the physician all may contribute to the intimacy of the relationship.¹⁸

Finally, the general knowledge that the physician acquires about the patient's past, the patient's family situation, and the patient's emotional state all may render the sexual or romantic relationship with a patient or former patient unethical since the physician does not reciprocate in kind with similar information. These factors together combine to create an imbalance in their relationship, and this imbalance can breed sexual exploitation.

To summarize, the medical professions find sexual relations with patients unethical for the following reasons:

1. The physician's medical judgment, is obscured, thereby jeopardizing the patient's diagnosis and treatment.
2. The physician's gratification inappropriately interferes with the professional relationship.

14. AMA Council on Ethical and Judicial Affairs, *Sexual Misconduct in the Practice of Medicine*, 266 JAMA 2741 (1991) [hereinafter *Sexual Misconduct*].

15. *Id.*

16. *Id.*

17. *Id.* at 2743.

18. *Id.*

3. The patient's trust — that the physician will work only for the patient's welfare — is violated.¹⁹

The medical profession considers patient-physician romantic and sexual conduct so potentially harmful that it expressly warns against even non-sexual touching if it may be misinterpreted or lead to sexual contact.

Five states have taken the ethical sanction against patient-physician sexual conduct to another level, by passing criminal statutes to control such conduct. Colorado, Michigan, New Hampshire, Rhode Island, and Wyoming have defined sexual contact or assault under the guise of medical treatment as rape.²⁰ For example, New Hampshire makes it a felony to engage in "sexual penetration with another person '[w]hen the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are not medically recognized as ethical or acceptable.'"²¹ The stakes for physicians sexually involved with their patients in these states are high. These criminal statutes reflect the almost universal agreement among researchers that the impact of this conduct on the patient experience is negative.²²

The members of the AMA's Council on Ethical and Judicial Affairs have found the need to control physician-patient sexual conduct paramount. They advocate education on ethical issues involving sexual misconduct throughout all levels of medical training. The AMA also encourages the reporting of sexual misconduct by a colleague. Four states have made this reporting mandatory.²³

II. A COMPARISON OF THE POLICY ISSUES AFFECTING THE MEDICAL AND LEGAL PROFESSIONS

Having reviewed the rationale for the existence of the express rule which exists in the health professions we can now

19. *Id.*

20. See Jorgenson et al., *supra* note 4, at 668. The relevant statutes are: COLO. REV. STAT. § 18-3-403(h)-404(g)(1986); N.H. REV. STAT. ANN. § 632-A:2(VII) (1986); R.I. GEN. LAWS § 11-37-2(D) (Supp. 1989); WYO. STAT. § 6-2-303(a)(vii) (1988).

21. N.H. REV. STAT. ANN. § 632-A:2(VII) *quoted in* Jorgenson et al., *supra* note 4, at 668.

22. David Karp & Judy Huerta, *Professional Therapy Never Includes Sex*, 7 CALIF. PHYSICIAN 42 (1990).

23. *Sexual Misconduct*, *supra* note 14 (quoting Kathryn C. Bemmen, M.D. & Jean Goodwin, M.D., *New Laws About Sexual Misconduct by Therapists: Knowledge and Attitude Among Wisconsin Psychiatrists*, WISC. MED. J., May 1989, at 11).

turn to consider whether the same rationale exists for an equivalent rule for relationships between attorney and client. The parallel, surely, is the fiduciary relationship with their clients/patients which both professions share. This relationship arises from the professional's special expertise, and the confidence which the client/patient places in the professional.²⁴ By virtue of the client's/patient's needs, this relationship is not one of equals. Every professional bears full responsibility for his or her actions since the client is dependent. The essence of the fiduciary relationship is that the parties do not deal on equal terms;²⁵ the fiduciary may not overreach, take advantage of, or abuse the client in any way.

Thus, the example of the medical profession has lessons for the legal profession. The attorney, no less than the physician, from the outset exists in a fiduciary relationship with his²⁶ client. The client shares highly personal and intimate information with the attorney in the expectation that the attorney will take care of the issue at hand. The client places herself in the "hands of the attorney" expecting her interests to be protected.²⁷ The client may be ignorant of the legal system. The attorney becomes the sole representative in solving the problem; this necessarily creates an unequal balance of power and dependency, no less in many instances than in the doctor-patient relationship. This is especially accentuated when the client's problem is emotional as well as legal. The lawyer in this situation is as much a counselor as an advocate, and is often seen as a therapist-like figure, even more closely mirroring the relationship of the physician and patient. Professor John Elson, of Northwestern University School of Law, notes that attorneys attempt to justify their sexual relationships with their clients when their client/sexual partners are not at any economic or psychological disadvantage. He states, "[c]ommon sense and scholarly authority, however, make clear that this is rarely the case, at least in the divorce context."²⁸

24. See *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 432 (Cal. Ct. App. 1983).

25. See *id.*; see also Linda M. Jorgenson & Pamela K. Sutherland, *Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact*, 45 ARK. L. REV. 459 (1992).

26. For convenience, and because most of the reported cases involve male attorneys and female clients, this article adopts the convention of referring to attorneys in the masculine and clients in the feminine genders, and pronouns are used accordingly.

27. Andrew S. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 8 (1965).

28. Letter from John Elson, Professor, Northwestern University School

The counselor role carries the responsibility to avoid the harm which a sexual relationship could cause. Case studies of sexual exploitation of patients by psychotherapists found that ninety percent of the patients were adversely affected.²⁹ With the harm so clearly documented in the medical profession, there is reason to suppose that a parallel breach in the trusting relationship between an attorney and client is no less harmful. Surely, the client who places her trust in the attorney is as susceptible to harm as the patient who trusts her doctor.

The legal profession can learn from the clear boundaries which are set by the medical/psychotherapeutic professions in the area of sexual relations with clients. The prohibition in those professions is based, as we have seen, on a firm belief that sexual relations with patients cause harm. Lawyers must recognize that the burden is squarely on the legal profession to demonstrate why its clients are less likely to experience similar damage from such conduct than that which has been clearly shown to be experienced by doctors' patients thus abused. Suggesting that the different nature of the help sought in some way outweighs the identity of trust reposed in the two professions, or the identity of harm caused by any breach of that trust, simply is not credible.

III. COURTS HAVE HITHERTO NOT PROVIDED A LEGAL REMEDY TO CLIENTS FOR AN ATTORNEY'S SEXUAL OVERREACHING

To date, the courts have generally held that there is no legal remedy for sexual exploitation of a client by an attorney unless there has been harm to the legal representation, or the attorney has made the legal representation contingent on sexual submission. In *Barbara A. v. John G.*,³⁰ the court considered whether sexual relations with a client constitutes a compensable breach of the fiduciary duty.³¹ In this case, the attorney brought the suit against his client for collection of legal fees. He was met with a cross-claim by his client for damages she suffered from an ectopic pregnancy as a result of their sexual contact. The attorney had misrepresented his ability to cause her to become pregnant. In assigning and analyzing the attor-

of Law to California State Bar (Nov. 27, 1991) (commenting on proposed rule of professional conduct regarding attorney-client sexual relations).

29. Jacqueline Bouhoutros et al., *Sexual Intimacy Between Psychotherapists and Patients*, PROF. PSYCHOL.: RES. AND PRAC., Feb./Dec. 1983, at 191.

30. 193 Cal. Rptr. 422 (1983).

31. *Id.*

ney's liability, the court held that the finding of a fiduciary relationship was a question of fact for the jury, except when the fiduciary duty has been legally recognized. The court was cautious in finding fiduciary responsibility as a matter of law because of the "unique facts of this case."³² The court recognized that an attorney's relationship with a client is divided into two spheres, "social" and "legal" and determined that a jury would be better able to assess whether the attorney — because of the legal relationship — was dominant, or whether the parties functioned on a more or less equal basis in their personal relationship.³³ The lawyer has the burden of proving that the sexual involvement was consensual. The lawyer would also have to show that the client's reliance on his sterility statement was unreasonable. By leaving open the possibility of the jury finding a breach of the fiduciary duty as a result of the attorney's personal dealings with the client, the court intended to create the possibility of liability for coercive conduct without completely chilling all personal relationships.³⁴ Although the court reversed the judgment against the client and ordered a new trial, the court refused to hold that an attorney necessarily breaches his fiduciary duty when he induces a client to have sexual relations during the course of representation. The California court instead directed this question to the California State Bar for resolution.³⁵ As a result, a rule of professional responsibility regulating attorney-client sexual relations was adopted by California which is discussed later in this article.

Illinois faced a similar challenge in the malpractice case of *Suppressed v. Suppressed*.³⁶ The court in that case followed the lead of *Barbara A. v. John G.* by refusing to hold that an attorney has a fiduciary duty in all his relations with the client, and directed the issue to the Illinois legislature. In this case, the client was seeking to recover for allegedly being harmed by sexual contact with her attorney. Although the emotional harm to the client was clearly demonstrated, no remedy was forthcoming in Illinois. The plaintiff, Jeanne Metzger, had hired an attorney to represent her in a divorce case in 1983. She stated in her testimony to the Illinois Senate Judiciary Committee, on May 1, 1991, that,

32. *Id.* at 432.

33. *Id.*

34. *Id.* at 432-33.

35. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Proposed Rule 3-120 is now before the California Supreme Court.

36. 565 N.E.2d 101 (Ill. App. 1990).

Over a period of six weeks, he coerced me into having sex with him on three different occasions People frequently ask me: How could I *let* my lawyer do it? Why did I agree to have sex with him? Anyone who has been through a divorce knows that at best it is a stressful and difficult experience As my marriage deteriorated, I began to feel very much out of control of my life. The prospect of divorce was frightening to me. The happy life I had led seemed about to end. With all these fearful, confused feelings, my lawyer became my support and my only hope.

I was devastated when my lawyer coerced me into having sex with him, not once but three times. I felt confused, helpless and humiliated, and degraded. Worse yet, I felt powerless to stop it from happening again. I felt that if I did not comply with his demands, he wouldn't represent me well. I was terrified to say no to him.

I also felt trapped. I had given my attorney a \$2,500 retainer, and I was afraid I wouldn't be able to get it back. Finally, I found another attorney to represent me and finished up the divorce proceedings.

For a long time, I just wanted to forget the whole degrading experience, but I felt that many other women were probably also being sexually abused by their lawyers, so I finally decided I had to take some action.³⁷

Ms. Metzger did take action, in the form of a complaint to the Illinois Attorney Registration and Disciplinary Commission. The Commission dismissed the complaint, finding that it pitted the attorney's word against hers.³⁸ The matter did not end there for Ms. Metzger; she filed a civil suit. The defendant attorney petitioned the court to suppress the names of the parties, and the court obliged. Thus, her case became known as *Suppressed v. Suppressed*. She claimed that this suppression was not to protect her identity but to protect the lawyer's identity. In the interim, Ms. Metzger has revealed her identity as the plaintiff in *Suppressed* in order to promote the passage of the proposed new ethical rule in Illinois.³⁹ Ms. Metzger's civil case was dismissed as well; the judge ruled pre-trial that a lawyer does not have any special duty not to take sexual advantage of

37. Direct Testimony of E. Jeanne Metzger to Illinois Senate Judiciary Committee on Illinois Senate Bill 824 on May 1, 1991.

38. *Id.*

39. *Id.*

his client.⁴⁰ Ms. Metzger's appeal was also denied by the appellate court which stated that the plaintiff's claim failed because she failed to show that the defendant had breached his fiduciary duty arising out of the attorney-client relationship. The court reasoned:

Initially we note that if we were to accept plaintiff's contention that defendant in this case breached a fiduciary duty arising from the attorney-client relationship, we would be creating a new species of legal malpractice action and we would necessarily be holding that inherent in every attorney-client contract there is a duty to refrain from intimate personal relationships. The plaintiff can cite no support for this proposition, nor do we believe that any exists.⁴¹

The court affirmed the concept that an attorney owes a fiduciary responsibility to his client arising out of the legal relationship with the client. However, the court refused to hold that the high standard of care required of a fiduciary should extend to an attorney's personal relationships with his client. The court held that proof 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, needs to be established before such conduct will be considered to be in breach of the attorney's fiduciary duty.⁴²

The Illinois court thereby declined to provide the client with a remedy in this case, and instead charged the legislature with the task of creating a new rule of professional conduct or a statutory cause of action to address the propriety of sexual rela-

40. *Id.*

41. *Suppressed*, 565 N.E.2d at 104-05.

42. *Id.* at 105. Justice Murray in the *Suppressed* opinion had compared an attorney's fiduciary responsibility to the duty of a psychotherapist to a patient. In Illinois, it is considered malpractice for a psychotherapist to be sexually involved with his or her patient during the course of treatment in acknowledgement of the phenomenon of transference which occurs in the therapeutic relationship. Transference creates a strong emotional bond between the patient and therapist in which emotional material is displaced on to the therapist in order to work out emotional barriers. Misusing the trust which develops in this process by the therapist to secure sexual favors can be psychologically damaging. The judge did not attribute this same high standard to the attorney as the therapist, since he stated that the responsibilities of a therapist versus an attorney are rooted in different goals. The psychotherapist, he stated, is to engage in activity to improve the patient's mental and emotional well-being, whereas the attorney has a duty to only provide competent legal representation. *Id.* at 105 & n.2.

tions between an attorney and his client during legal representation. This case demonstrated that neither the existing rules of professional conduct, nor the basic principles of fiduciary duty are clear enough to prohibit this conduct, or to provide a remedy to the aggrieved client. The Illinois court viewed the sexual conduct as a personal choice which did not impact on legal representation.

IV. REGULATION OF ATTORNEY-CLIENT SEX IN THE CODE AND RULES

Some states have successfully applied the Model Rules and the Model Code to obtain sanctions in attorney disciplinary cases involving attorney-client sexual involvement. These disciplinary proceedings have assigned fault to attorneys who become sexually involved with their clients.⁴³ Attorneys have been reprimanded, otherwise sanctioned, and even disbarred when found to have breached their fiduciary duty by putting their clients' legal representation at risk. However, the outcome of these disciplinary cases is unpredictable since, in the absence of specific rules, state disciplinary tribunals enjoy wide discretion.

Neither the Code nor the Rules deal explicitly with the issue of sexual relations with clients. However, several general provisions have been used to address the issue of attorney-client sexual conduct when complaints have arisen or opinions have been requested. The preamble of the Code sets the tone for attorneys' conduct by stating:

Each lawyer must find within his own conscience the touchstone against minimum standards. But in the last analysis it is the desire for respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.⁴⁴

Thus the attorney is encouraged to uphold and maintain his own integrity and that of the legal profession. The Code requires attorney self-regulation and assumes that each attor-

43. See *Committee on Prof. Ethics v. Durham*, 279 N.W.2d 280 (Iowa 1979); *In re Howard*, 681 P.2d 775 (Or. 1984); *In re Gibson*, 369 N.W.2d 695 (Wisc. 1985).

44. MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. (1983) [hereinafter MODEL CODE].

ney will conduct him self with the utmost propriety. The Rules also state:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the process of government and law enforcement The legal profession's relative autonomy carries with it special responsibilit[y] . . . to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. . . . Neglect of these responsibilities compromise the independence of the profession and the public interest which it serves.⁴⁵

V. APPLICATION OF EXISTING, GENERALIZED RULES IN ATTORNEY DISCIPLINE CASES TO MISCONDUCT INVOLVING SEX WITH CLIENTS

The high moral standards set out in the preambles to the Code and Rules are rendered more concrete in Canon One of the Code, which is intended to encapsulate the basic tenets of the Code and to set forth the Code's fundamental moral standards. Ethical Consideration (EC) 1-2 states, "The public should be protected from those who are not qualified to be a lawyer by reason of deficiency in education or *moral standards*."⁴⁶ In addition, EC 1-5 advises attorneys to "maintain high standards of professional conduct" and to "refrain from all illegal and morally reprehensible conduct." Disciplinary Rule (DR) 1-101 mandates the maintenance of the integrity and competence of the legal profession. More specifically, DR 1-102 in addressing misconduct states,

(A) A lawyer shall not:

-
- (3) Engage in illegal conduct involving moral turpitude.
 - (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
 - (5) Engage in conduct that is prejudicial to the administration of justice.

45. *Id.*

46. MODEL CODE, *supra* note 44, EC 1-2.

- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.⁴⁷

Disciplinary Rule 1-102 focuses on the lawyer's need to observe strictly his fiduciary responsibility to the client and to demonstrate a high sense of honor. However, the meaning — or limits — of "moral turpitude," as used in DR 1-102(A)(3), have not been clearly defined by the courts.⁴⁸ In spite of the vagueness of terms, sexual conduct between the attorney and client, especially when the attorney has sought sexual favors in lieu of legal fees, has been designated by the courts as conduct involving moral turpitude, such as in *In re Howard*.⁴⁹

Disciplinary Rule 1-102 (A)(3) has also been applied in disciplining attorneys for sexual conduct which also constituted criminal behavior. Examples include *In re Hicks*,⁵⁰ in which an attorney was disbarred for sexual relations with a mentally retarded woman resulting in pregnancy;⁵¹ *Florida Bar v. Hefty*,⁵² where an attorney's sexual misconduct with his minor step-

47. *Id.* DR 1-102.

48. The annotations provided to the disciplinary rules note:

Perhaps the best general definition of the term 'moral turpitude' is that it imparts an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow.

49. 681 P.2d 775 (Or. 1984). In this case, the defendant attorney engaged in sexual conduct with his client in exchange for legal services. His conviction of the crime of prostitution resulted in a public reprimand. The attorney was denied the request that a stipulation be added to his public reprimand stating he was seeking counseling. The Disciplinary Board advised leniency because the misconduct was only a single act with a prostitute. The court disagreed with the board, stating that the reason for misconduct is irrelevant, since the law specifically provides that a conviction of a misdemeanor involving moral turpitude is conclusive evidence.

50. 20 P.2d 896 (Okla. 1933).

51. *Id.* This 1933 case held that the attorney can be disbarred for "willful, flagrant or shameless acts" and "conduct unbecoming a lawyer" in making a mentally retarded unmarried female dwarf of 28 years old pregnant. The Oklahoma rules for disbarment are as quoted in this case:

- (1) That he has ceased to possess that good moral character prerequisite to admission to the practice of law.
- (2) That he is guilty of the commission of an act, though disassociated from his duties to the court or to his clients which renders him an unfit, unsafe, and untrustworthy person to be entrusted with the powers, duties and responsibilities of an attorney and counselor at law, even though the commission of such an act not be punishable as a crime.

Id. at 896.

52. 213 So.2d 422 (Fla. 1968).

daughter was held to justify disbarment; and *In re Kimmel*,⁵³ where conviction of a felony involving sexual misconduct with a minor was held to warrant suspension from practice during the period of probation for the offense. Attorneys have been found to be unfit to practice law and disbarred as a result of their sexual involvement with clients when the acts are highly sensational or involve criminal conduct. In *Matter of Wood*,⁵⁴ an attorney reduced his legal fees in return for sexual favors from his client, induced his client to pose for pornographic pictures, and was disbarred. In general, the Code has formed the basis for finding an attorney unfit to practice law when he commits acts of moral turpitude even if these acts fall outside the role of lawyer or officer of the court.

Sections (A)(4), (A)(5), and (A)(6) of DR 1-102 have been indirectly applied to sexual contacts with clients, forming the basis for findings of misconduct when the sexual relations with a client involved misrepresentation, or were prejudicial to the client and to the administration of justice. In *In re McDow*,⁵⁵ an attorney's sexual relations with his client during the client's divorce proceeding resulted in the husband being granted a divorce based on the wife's adultery with her attorney. The courts have sanctioned attorneys involved in divorce cases when their sexual involvement harmed the client's legal position. In *Lehr v. Lehr*,⁵⁶ the attorney's sexual involvement with

53. 322 N.W.2d 224 (Minn. 1982).

54. 489 N.E.2d 1189 (Ind. 1986). The attorney was charged with engaging in acts of moral turpitude in violation of DR 1-102 (A)(3), with engaging in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5), and with engaging in conduct which adversely reflected on his fitness to practice law in violations of DR 1-102(A)(6). In this case the attorney reduced his legal fees in exchange for sexual favors and posing for pornographic photos. One of clients involved was under eighteen. The court found that the attorney "exploited his client's plight for his personal and sexual gratification." 489 N.E.2d at 1191. In addition, the court found his lack of professionalism an embarrassment and a breach of the confidence his client placed in him when they relied on his legal skills. *Id.* at 1189.

55. 354 S.E.2d 383 (S.C. 1987). The attorney was disciplined for engaging in an adulterous relationship with a client during the course of a divorce action which directly resulted in the husband being granted a divorce on the grounds of his wife's adultery. The court held that this conduct had an adverse impact on his client's financial settlement in the divorce. This was considered professional misconduct because it was:

- (1) damaging or prejudicing the client during her representation
- (2) engaging in conduct which created the appearance of impropriety
- (3) engaging in conduct prejudicial to the administration of justice.

Id. at 384.

56. 583 P.2d 1157 (Or. Ct. App. 1978). In this divorce proceeding, the

the client prejudiced his client's case and legal position. The court responded negatively to the wife's child custody petition because there was evidence that she was sexually involved with her attorney.

Despite all of these decisions in cases where harm, or direct breach of the professional obligations has been established, sexual relations between attorneys and their clients have never been found to be, *per se*, acts of "moral turpitude," or otherwise automatically in violation of the Canon One group of interdictions. The Rules also address misconduct in Rule 8.4, specifically prohibiting conduct involving: dishonesty, fraud, deceit, or misrepresentation. This last category, misrepresentation, has been applied to incidents of sexual relations with clients when the sexual contact involved or was induced by dishonesty and/or misrepresentation. Specific references to moral turpitude found in the Code have been omitted from the Rules. Instead, the Rules focus on illegal conduct reflecting adversely on the attorney's fitness to practice law.⁵⁷ Thus, under the Rules, sexual involvement between attorney and client is clearly barred only if the activity is the result of fraud, deceit, misrepresentation or illegal acts.

VI. APPLICATION OF THE REGULATIONS GOVERNING CONFLICTS OF INTEREST IN DISCIPLINARY CASES INVOLVING SEX WITH CLIENTS

A central theme in many disciplinary cases involving sexual involvement of attorneys and clients is conflict of interest. Canon 5 of the Code, dealing with conflicts of interest, has

wife was not awarded custody of her three-year-old child, although she was the primary caretaker, because the trial judge was incensed because the man she moved in with was her lawyer and her employer.

57. The Rules provide:

Many kinds of illegal conduct reflect adversely on the fitness to practice law However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to law practice.

MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.4 cmt. (1992) [hereinafter MODEL RULES]. This comment suggests that whom an attorney chooses to have sexual relations with is immaterial unless it affects the ability to practice law. There is no presumption of impropriety inherent in the sexual involvement with clients in this Model Rule.

been applied to attorneys' conduct which overreaches the interests of their clients. Canon 5 states, "A lawyer should exercise independent professional judgment on behalf of a client."⁵⁸ Ethical Consideration 5-1 states, "The professional judgement of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, nor the interests of other clients . . . should be permitted to dilute his loyalty to his client."⁵⁹

Rule 1.8 parallels EC 5-1 in addressing conflicts of interest. It states that an attorney breaches the duty of loyalty to the client if the attorney acts with self or adverse interest.⁶⁰ If the attorney becomes emotionally and personally involved with his client, this self interest can cause an attorney to lose his objectivity. In *Kentucky Bar Ass'n v. Meredith*,⁶¹ the attorney engaged in sexual relations with his client which impaired his professional judgment. Thus, sexual intimacy with a client can violate both the Code and Rules when the lawyer's personal interest and gratification clouds his primary responsibility to the client.

Ethical Consideration 5-5 states that "A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client he is susceptible to the charge that he unduly influenced or over-reached the client."⁶² This prohibition may be considered analogous to influencing a client to provide sexual favors to an attorney. This need to express appreciation can operate as a form of transference similar to that which is found in psychotherapist and patient relationships.⁶³ To date, however, the legal profes-

58. MODEL CODE, *supra* note 44, Canon 5.

59. *Id.* EC 5-1.

60. MODEL RULES, *supra* note 57, Rule 1.8.

61. 752 S.W.2d 786 (Ky. 1988). In this disciplinary proceeding the Supreme Court of Kentucky held that professional misconduct in the form of personal and emotional involvements with a client which had an adverse effect on the advice or services during employment and attorney client relationship to the client's disadvantage warrants public reprimand. The attorney engaged in sexual relations with his client while representing her. This impaired his professional judgment. He also revealed confidences gained during the professional relationship to his client's detriment which resulted in her removal as her minor child's guardian. The court found that the lawyer's action may have been motivated by his discharge from the representation of this client. His personal and emotional involvement resulted in a serious failure of his judgment which brought the legal profession into disrepute.

62. MODEL CODE, *supra* note 44, EC 5-5.

63. One commentator writes:

[T]ransference causes a desire to bestow affection. [Watson] warns

sion has not considered sexual favors to be a gift as described in EC 5-5 in spite of the fact that the client's agreement to have sex with the attorney may stem from the same desire to express appreciation as improper gift giving. Even where this does represent the client's motivation, allowing the attorney to participate in such sexual activity is no less inappropriate or harmful than the manipulation of transference in psychotherapeutic treatment. Nevertheless, application of EC 5-5 to the situation of sexual involvement between a client and attorney is untested at this time.

Disciplinary Rule 5-101(A) makes it improper to accept employment if the exercise of the attorney's professional judgment on behalf of the client will be reasonably affected by his own personal interests. A lawyer's desire to have a sexual relationship with a client is surely a personal interest.⁶⁴ If a lawyer should act on that sexual or romantic interest, it can impair his judgment and adversely affect the best interests of the client. In *People v. Zeilinger*,⁶⁵ an attorney was publicly censured for engaging in sexual relations with his client while representing her in a divorce proceeding. The dissolution of the marriage involved the custody of minor children and property settlement matters. The court held the lawyer violated DR 1-102(A)(1) and DR 5-101(A) in that he should not have agreed to represent this client while involved in a sexual relationship. Although the court noted that the client suffered no actual harm from the sexual relationship, it acknowledged that the potential for harm to the client is substantial and obvious. The attorney, by engaging in a sexual relationship with a client undergoing a divorce, may destroy the chances of the couple's reconciliation, and blind the attorney to the proper exercise of independent judgment. There is also a significant danger that when the division of property or custody of minor children is contested, the attorney who is sexually involved with his client may himself become the focus of the dissolution or custody proceeding, be called as a witness, and thereby inflict great

that this affectionate feeling [between attorney and client] is unrealistic, wholly a product of the professional relationship; to act on it "would be as unethical as making personal use of the client's money or property which was entrusted to [the attorney] in the course of carrying out the professional role."

Thomas Lyon, Note, *Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?*, 10 HARV. WOMEN'S L.J. 159, 186 (1987) (quoting Andrew Watson, *The Lawyer as Counselor*, 5 FAM. L.J. 7 (1965)).

64. Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585, 594 (1988).

65. 814 P.2d 808 (Colo. 1991).

harm on the client.⁶⁶ The distinction between the reasoning of this court, in the context of a disciplinary proceeding, and the Illinois court hearing a malpractice suit, is stark. When the lawyer's sexual involvement has an adverse impact on his client's legal position, a violation of DR 5-101 (conflict of interest) is demonstrated.⁶⁷ Rule 1.7(b) addresses the area of conflict of interest stating, "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . to [his] own interests."⁶⁸ Rule 1.8(b) mandates that an attorney shall not use information relating to representation of the client to the client's disadvantage without the client's consent.⁶⁹

How the Rules have been applied to a conflict of interest involving the impairment of independent judgment is demonstrated in *In re Ridgeway*,⁷⁰ in which a public defender represented a woman charged with forgery on probation in an alcoholic treatment program. A condition of the client's probation was abstinence from alcohol. The client left the treatment program without permission. She then consulted with her attorney for advice in avoiding the revocation of her probation. While meeting with the client the attorney made sexual advances toward her. The client avoided this encounter, but stated that she believed she owed her attorney a lot. On the following day, the attorney arranged to meet her at a hotel in which he provided his client with alcoholic beverages in violation of her probation. After consuming three beers she acceded to his sexual advances. The attorney encouraged her to violate the terms of her probation by drinking to serve his own interest, and preyed on her vulnerability and her need of his legal expertise to avoid the suspension of her probation.⁷¹ The legal harm the attorney caused his client is clear, and a direct result of his failure to deal with the evident conflict of interest. This case, and others, have held that the client must, at the very minimum, be warned of the possible negative effect of sexual involvement of the attorney and client, especially in divorces involving custody and financial settlements, or when an attorney may be called as a witness.⁷² In the case of *In re*

66. *Id.* at 810.

67. See *supra* note 64 and accompanying text.

68. MODEL RULES, *supra* note 57, Rule 1.7(b).

69. *Id.* Rule 1.8(b).

70. 462 N.W.2d 671 (Wis. 1990).

71. *Id.* at 672-73.

72. See, e.g., *In re Drucker*, 577 A.2d 1198 (N.H. 1990) (attorney had

Bourdon,⁷³ the attorney assured his client that the upcoming custody hearing would be successful instead of warning her of the potential for problems resulting from their sexual involvement during her representation.

A most serious conflict of interest resulting from such sexual liaisons is the potential for the attorney to be called as an adverse witness against his client. This may arise whenever the client's behavior is an issue in the case, such as a case involving custody of children. The regulations most directly on point in this area are: Rule 3.7 and DR 5-102. The Rule warns that an attorney shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.⁷⁴ The Code's counterpart prohibits a lawyer from serving as an advocate if the lawyer "learns or it is obvious that he/she will be called on as a witness."⁷⁵

VII. APPLICATION OF THE REQUIREMENT OF COMPETENT AND DILIGENT REPRESENTATION TO DISCIPLINE CASES

The ethical codes specifically require the competent, diligent and (in the case of the Code only) zealous provision of legal representation. Violations to this cluster of rules have been found in attorney-client relationships which involved sexual contact. For example, a lawyer who is sexually involved with his client may be in jeopardy of violating DR 7-101(A)(1),

sexual relations with an emotionally vulnerable client while representing her in a divorce and custody proceeding).

73. 565 A.2d 1052, 1057 (N.H. 1989).

74. MODEL RULES, *supra* note 57, Rule 3.7.

75. MODEL CODE, *supra* note 44, DR 5-102; *see also* *Edwards v. Edwards*, 567 N.Y.S.2d 645 (N.Y. App. Div. 1991). This case involved a lawyer's failure to withdraw from representing a wife in a divorce action until the husband formally alleged that the lawyer was involved sexually with the wife. The lawyer was not automatically disqualified from representing the client with whom he was sexually involved. The NY Appellate Division stated that there is no law or ethics rule mandating the lawyer's disqualification solely on the basis of sexual involvement, but when the lawyer becomes involved in the case as a witness in a divorce action as the alleged lover of the wife, then it is proper for the attorney to withdraw.

The Court further stated in this case, that withdrawal was not necessary: Even assuming the truth of the allegations there is not the slightest hint that the lawyer, who knew the wife since 1981, took advantage of her or the attorney-client relationship. She made no complaint. There is also no finding that the lawyers's representation was deficient, and nothing to support a finding that the wife or the litigation was compromised. It was not until the litigation was affected by the lawyer being called as an adverse witness was the attorney required to withdraw and he did so with his client's consent.

567 N.Y.S.2d at 648.

which requires that a lawyer represent a client zealously and not prejudice the rights of the client.⁷⁶ In the disciplinary cases already described, the attorneys risked prejudicing the rights of their clients through their romantic involvement. Disciplinary Rule 7-101(A)(3) specifically states that a lawyer shall not intentionally prejudice or damage his client in the course of the professional relationship.⁷⁷ In the *Lehr*, *Bourdon* and *Drucker* cases referred to above,⁷⁸ the attorneys were found to have seriously impaired their clients' legal position.

Rule 1.3 requires a lawyer to act with diligence in representing a client. The comments following this Rule direct a lawyer to represent a client despite opposition, obstruction, or the personal inconvenience to the lawyer.⁷⁹ The Rules do not provide more specific guidance, but the Rule clearly places the client's needs above the lawyer's personal wishes, and at least points to the potential disadvantage to a client's case where there is sexual involvement between the attorney and the client. This Rule can only indirectly prevent harm to the client, by requiring the attorney to withdraw from representation if the attorney's personal interest in the relationship interferes with the client's best interest. Here again, as in the cases discussed above, only if the sexual relationship actually interferes with the lawyer's ability to provide diligent representation is the attorney required to withdraw. The decision to withdraw is left to the attorney, so that the interests of the client are left in the hands of the attorney from whose attentions the Rule purports to protect the client. This example of discretionary self policing once again leaves clients at risk.

The disciplinary tribunals have also referred to DR 6-101(A)(3) when disciplining attorneys for neglecting legal matters entrusted to them. When a lawyer is sexually involved with a client, the lawyer may be inclined to delay the legal proceedings in order to extend the legal relationship to insure the continuation of the sexual relationship. This prolonging of the legal controversy to the attorney's advantage violates DR 6-101(A)(3),⁸⁰ EC 6-4,⁸¹ and Rules 1.1⁸² and 1.3⁸³ involving competence and diligence.

76. MODEL CODE, *supra* note 44, DR 7-101(A)(1).

77. *Id.* DR 7-101(A)(3).

78. *See supra* notes 57, 73 and 72.

79. MODEL RULES, *supra* note 57, Rule 1.3.

80. MODEL CODE, *supra* note 44, DR 6-101(A)(3) ("A lawyer shall not neglect a legal matter entrusted to him.").

81. *Id.* EC 6-4 ("Having undertaken representation, a lawyer should use proper care to safeguard the interest of his client In addition to

VIII. APPLICATION OF THE CATCH-ALL "APPEARANCE OF IMPROPRIETY" PROVISIONS TO ATTORNEY-CLIENT SEX CASES

The appearance of impropriety provision is set out in Canon 9, and may be applied to attorney-client sexual relations. Ethical Consideration 9-6 asks an attorney to conduct himself as to reflect credit on the legal profession and to inspire the confidence, respect and trust of the client and the public.⁸⁴ The Canon continues by urging lawyers to strive to avoid not only professional impropriety but also the appearance of impropriety.⁸⁵ When the confidence or trust of a client is compromised it becomes incumbent on the attorney to withdraw from representation as required by rule DR 2-110(B)(2).⁸⁶ If the lawyer knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule he must withdraw. Rule 1.16, on terminating representation, also stipulates that a lawyer shall not represent a client and shall withdraw from representation if the representation will result in violation of the rules of professional conduct or law.⁸⁷ Rule 8.4(d) also provides that it is misconduct to engage in conduct which is prejudicial to the administration of justice.⁸⁸ These general guidelines can be used as a basis for determining that sexual involvement with clients is a violation of the rules, but they are far from specific, leaving the attorney with a vague standard by which to measure behavior.

In summary, neither the Code, the Rules, nor the various enactments in the states, presently address directly the issue of

being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.").

82. MODEL RULES, *supra* note 57, Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

83. *Id.* Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

84. MODEL CODE, *supra* note 44, EC 9-6.

85. *Id.* Canon 9.

86. *Id.* DR 2-110 (B)(2). The rule provides:

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if: He knows or it is obvious that his continued employment would result in violation of a Disciplinary Rule.

Id.

87. MODEL RULES, *supra* note 57, Rule 1.16.

88. *Id.* Rule 8.4(d).

attorney-client sexual conduct in any specific way. To find rules which even partially address the potential violations requires careful analysis. The result of this absence of express rules is that attorneys enjoy great discretion in deciding whether their sexual involvement with a client violates an ethical rule — if they give the regulations any thought at all. The Code and the Rules avoid the issue of emotional or psychological harm to clients by narrowly interpreting the attorney's fiduciary duty, limiting it to conduct within the legal representation. Even where the Rules and Code have been applied to discipline attorneys in these situations, proceedings were generally limited to cases in which the sexual involvement was actually shown to have impaired the client's legal representation and caused legal harm, or when the attorney's sexual activity violated a criminal statute. The available Codes and Rules have not been fully utilized as, nor understood to be, prophylactic regulations to control the harmful aspects of attorney client sexual relationships.

IX. EVEN WHERE ATTORNEYS ARE SANCTIONED FOR IMPROPER SEXUAL CONDUCT WITH CLIENTS, THE DISCIPLINARY PROCESS HAS BEEN LENIENT IN THE SANCTIONS IMPOSED

In the disciplinary proceedings described above, attorneys breached the applicable codes because of the harm they caused to the client's legal position. In general, the states' disciplinary tribunals and courts have arguably even then been lenient in imposing sanction for these violations. In recent years, the usual punishment in these cases is the public reprimand in a published opinion.⁸⁹ Suspensions from practice were sometimes imposed, varying from thirty days to two years, the latter only in the most serious cases.⁹⁰ Disbarment was imposed only for repeat offenses, or in cases involving criminal convictions.⁹¹ Public defenders and prosecutors were held to more stringent standards in recognition of their public trust.⁹²

The courts have become more lenient over time. Disbarment in a 1933 case, *In re Hicks*,⁹³ was unequivocal, yet in a 1982 case an attorney convicted of sexual misconduct with a

89. See, e.g., *In re Adams*, 428 N.E.2d 786 (Ind. 1981).

90. See *In re Gibson*, 369 N.W.2d 695 (Wis. 1985).

91. See *In re Bourdon*, 565 A.2d 1052 (N.H. 1989); *In re Bowen*, 542 N.Y.S.2d 45 (N.Y. App. Div. 1989).

92. See *In re Ridgeway*, 462 N.W.2d 671 (Wis. 1990).

93. 20 P.2d 896 (Okla. 1933).

minor was suspended for a period only equal to his criminal probation.⁹⁴ In a recently reported New York Disciplinary Proceeding, *In re Rudnick*,⁹⁵ the attorney was suspended from the practice of law for two years as a result of coercing his client into having sex with him and failing to act competently. He withdrew from the case on the day of her divorce hearing after she ended their relationship, generally prejudicing her legal rights. In imposing the two year suspension, the court considered the fact that this attorney had previously been issued a letter of reprimand in 1986 for a similar offense. This, his second appearance before the Disciplinary Committee, resulted in the supposed severity of the suspension.⁹⁶

The variability of sanctions imposed on attorneys demonstrates again the internal conflict of the profession over this issue. There is a great reluctance on the part of the disciplinary tribunals to punish in cases involving sexual conduct. As the court stated in *In re Addonizio*:⁹⁷

In setting the appropriate discipline, we are not interested in punishing the attorney, that is the province of the criminal law. The primary purpose of the professional discipline is to protect the public against a member of the bar who is unworthy of the trust or confidence essential to the relationship of attorney and client.⁹⁸

The *Addonizio* case further states, "[a]ny violation of law creates some question about trust and confidence that the public may reasonably expect to repose in the attorney. No matter what the violation, *some* discipline *may* be needed to deter both the attorney involved and other members of the bar."⁹⁹ The court was tentative in stating that, "some discipline may be neces-

94. *In re Kimmel*, 322 N.W.2d 224 (Minn. 1982). The attorney was convicted of a felony involving sexual misconduct with minors. The court was lenient because it attributed the attorney's misdeed to sexual dysfunction which is treatable. Since the defendant in this case was undergoing treatment and cooperating, the court concluded he was unlikely to be a danger to the public and the profession. Although the opinion clearly did not condone the attorney's behavior and considered the acts serious, the court only restricted the lawyer's practice of law, allowing him to continue to "examine titles during the period of suspension coextensive with the criminal probation." The attorney retained the right to resume full practice at the conclusion of his probation.

95. 581 N.Y.S.2d 206 (N.Y. App. Div. 1992).

96. *Id.* at 207.

97. 469 A.2d 492 (N.J. 1984).

98. *Id.* at 493 (quoting *In re Introcaso*, 140 A.2d 70, 74 (N.J. 1958)).

99. *Id.* at 493 (quoting *In re Hughes*, 446 A.2d 1208, 1213 (N.J. 1982) (Schreiber, J., dissenting from order of disbarment)) (emphasis added).

sary."¹⁰⁰ In this case the attorney had pleaded guilty to a criminal sexual violation, yet he was only suspended from the practice of law for three months. In sanctioning the attorney, the court quoted extensively from Ethical Consideration 1-5 citing that the respect for the law must be more than a platitude and claiming that the public confidence is paramount. Yet, in applying EC 1-5, they suspended the attorney from practice of law for three months, believing this to be ample punishment.¹⁰¹

The Wisconsin Court in *In re Gibson*,¹⁰² also meted out a ninety-day suspension to the attorney for unsolicited sexual advances to a client. His behavior was corroborated by other clients who presented similar complaints that the attorney had made unwanted sexual offers during the period from 1975 to 1982. In disciplining this attorney, the court rejected the attorney's argument that his actions did not harm or damage the client's legal interest or impact on his representation. The attorney dismissed the client's nightmares as a result of his advances and her general distraught condition, implying that these could not reasonably be considered "damage" or "prejudice" as cited in the Code.¹⁰³ The court in this case relied on a prior case, *State v. Heilprin*, which involved an attorney charged with similar but more aggravated conduct, and stated: "Conduct of the type engaged in by Heilprin cannot be condoned, whatever the cause. The public must not be exposed to this type of action from members of the legal profession."¹⁰⁴

The *Gibson* court determined that "the public must not be subjected to unsolicited sexual conduct by attorneys in the context of the attorney-client relationship."¹⁰⁵ These are strong words, but the limited three month suspension used to discipline the attorney tells another story, a story of ambivalence on the part of the profession unable to come to grips with the problem.¹⁰⁶

100. *Id.* at 493.

101. *Id.* at 494.

102. 369 N.W.2d 695 (Wis. 1985).

103. *Id.* at 699.

104. *Id.* (quoting *State v. Heilprin*, 207 N.W.2d 878, 883 (Wis. 1973)).

105. *Id.* at 699.

106. The mixed record of sanctions continues to the present. In a number of recent cases, despite increasingly critical language of the tribunals towards this conduct, the sanctions imposed generally continue to be limited to censure or periods of suspension. *See, e.g.*, Florida Bar v. Samaha, 557 So. 2d 1349 (Fla. 1990) (minimum of one year suspension); *In re Lewis*, 415 S.E.2d 173 (Ga. 1992) (three year suspension); Drucker's Case, 577 A.2d 1198 (N.H. 1990) (two year suspension); *In re Kiley*, 572 N.Y.S.2d 601 (Sup. Ct. 1991) (censure); Office of Disciplinary Counsel v. Rassing, 559 N.E.2d

X. STATE ETHICAL OPINIONS — AN OPPORTUNITY LOST

State ethical opinions issued in the last few years also give mixed messages, and have generally avoided the opportunity to provide clear-cut, generalized guidance. Closest to a general prescription, Maryland issued Opinion 84-9 mandating that a lawyer must withdraw from employment when he is sexually involved with a client.¹⁰⁷ The Opinion cites a situation in a divorce proceeding in which a wife seeks legal advice on transferring property. This Opinion warns that sexual relations between attorney and client reflect negatively on the integrity of the legal profession and may have adverse effects on a lawyer's ability to protect his client's interest.¹⁰⁸

In 1991, Oregon published Opinion 1991-99, which dealt with the adverse effect on professional judgment of sexual relations with clients in a divorce case.¹⁰⁹ The Opinion states, "[a] lawyer may not have sexual relations with a client while the lawyer is representing the client in divorce proceedings as such conduct may prejudice or damage the client unless the client is capable of giving *knowing* consent to the continued representation."¹¹⁰ The Opinion implicitly acknowledges doubt that a client can give informed voluntary consent. This concern is addressed directly in Oregon's proposed new rule.¹¹¹ An example of the client's limited ability to give informed consent was demonstrated in the case which was rendered concurrent to the issuance of this Opinion, *In re Howard*,¹¹² in which the attorney provided legal services for a female criminal defendant. He was paid for his services with sexual favors. The client's situation made her dependent on the attorney. Her ability to objectively consent to having sex with the attorney was compromised by her immediate need for the legal representation and her inability to pay.

1359 (Ohio 1990) (public reprimand); *In re Wolf*, 826 P.2d 628 (Or. 1992) (18 month suspension); *In re Bellino*, 417 S.E.2d 535 (S.C. 1992) (37 month suspension); *Discipline of Bergren*, 455 N.W.2d 856 (S.D. 1990) (one year suspension).

107. Maryland State Bar Comm. on Ethics, Op. 84-9 (1984), *quoted in* [Ethics Opinions] Laws. Man. on Prof. Conduct (ABA/BNA) 801:4334 (1985).

108. *Id.*

109. Oregon State Bar Ass'n Legal Ethics Comm., Op. 1991-99 (1991) (emphasis added), *quoted in* [Ethics Opinions] Laws. Man. on Prof. Conduct (ABA/BNA) 1001:7114 (1992).

110. *Id.*

111. *See infra* notes 140-41 and accompanying text.

112. 681 P.2d 775 (Or. 1984).

The inability of the client to resist sexual advances was also discussed in an Iowa case, *Committee on Professional Ethics v. Durham*,¹¹³ in which a female attorney was reprimanded for sexual contact with a criminal defendant whom she visited in her professional capacity while he was in prison. The court in this case admitted that there was little specific guidance on the subject of sexual conduct,¹¹⁴ but held the attorney to be accountable for professional behavior. The court held, "[s]exual contact with a client in a professional context is not activity which a reasonable member of the bar would suppose to be allowed by the [Iowa Code of Professional Responsibility for Lawyers]."¹¹⁵

In contrast to the somewhat generalized prohibitions indicated in the Maryland and Oregon Opinions on sexual conduct, California only prohibits sexual relations between attorneys and clients in situations when the legal representation is actually and demonstrably impaired. In California's Ethical Opinion 1987-92 the Bar stated:

A lawyer may engage in sexual relationship with client so long as the lawyer's independent professional judgment remains uncompromised, client confidence is maintained and the client is able to consent to the sexual relationship, the client is able to maintain independent judgment in the professional relationship and the lawyer is careful to preserve the client's secrets and avoid the possibility of

113. 279 N.W.2d 280 (Iowa 1979).

114. *Id.* at 283.

115. *Id.* at 284. This case scrutinized the disciplinary rules very carefully in an attempt to overturn the lawyer's long term suspension. The court distinguished the fact that there is nothing inherently wrong in sexual contact between a lawyer and client as long as it does not involve the legal representation. This attorney was reprimanded not for the act, but for the impropriety of involving her client in sexual conduct during a visit at the penitentiary when the attorney was there to render legal service. This attorney was censured for "impropriety" and embarrassment to the legal profession, rather than for taking advantage of her client in a vulnerable situation. If this same activity had taken place in a more private setting rather than a prison consultation room, the court may not have censured the attorney. Because the attorney had signed the prison log as attorney, the sexual contact which took place on the visit could not be considered of a private nature between consenting adults. *Id.*

A positive aspect of this decision is that the court stated that an attorney familiar with Iowa's Code should be on notice that sexual contact with a client amounts to professional impropriety if the involvement occurs while in the role of attorney, but the court would not hold that sexual involvement with a client was a violation *per se.* *Id.* at 284.

undue influence in either the personal or professional relationship.¹¹⁶

Alaska Opinion 88-1 parallels California's position by prohibiting sexual relations with clients only if:

- 1) the lawyer initiates the relationship and the client's ability to consent is impaired;
- 2) the lawyer performs legal services in exchange for sexual favors;
- 3) the lawyer's involvement inhibits the lawyer's ability to protect client's interests or otherwise damages the client's case;
- 4) the sexual relationship may adversely affect the client's emotional stability;
- 5) the sexual conduct is illegal.¹¹⁷

The Opinion clearly permits an ongoing sexual relationship which pre-dates the legal relationship. Exception Number 4 breaks new ground in acknowledging the emotional impact of attorney-client relationships, but this opinion has yet to be applied in an Alaskan case.

Other than those cited here, the authors are unaware of opinions from ethics committees in any other state directly dealing with the permissibility or otherwise of attorney-client sexual relations.

XI. THE PROFESSION IS SLOW TO RECOGNIZE THE EMOTIONAL HARM TO CLIENTS

The vagueness of the codes and the discretion available in applying them in this area demonstrates that the profession has largely ignored or at least down-played an important aspect of the issue — the harm caused to clients. The emotional suffering experienced by the client who is sexually involved with the attorney deserves special concern. This is especially true in divorce cases. Audrey Rubin, Chairperson of the Illinois Task Force on Gender Bias in the Courts 1990, noted in her committee report that the vulnerable clients are usually women who lack financial resources and may fear they will lose their house, their children and their source of income if they do not get good legal help. They seek legal help in a highly emotional

116. State Bar of Cal. Standing Comm. on Prof. Responsibility & Conduct, 114 Formal Op. 1987-92 (1987), *quoted in* [Ethics Opinions] Laws. Man. on Prof. Conduct (ABA/BNA) 901:1603 (1991).

117. Alaska Bar Ass'n Ethics Comm., Formal Op. 88-1 (1988), *quoted in* [Ethics Opinions] Laws. Man. on Prof. Conduct (ABA/BNA) 901:1303 (1991).

state. Thus, their relationship with their attorney is delicate, and should not be compromised and contaminated by sexual relations.¹¹⁸ In fact, the American Academy of Matrimonial Lawyers in Chicago drafted a guide called "Bounds of Advocacy", which advises that attorneys must never have intimate sexual relations with clients. The group cites the pressure clients feel when an attorney makes sexual advances believing they (the clients) must submit to these demands to get good representation.¹¹⁹

Northwestern University Law Professor John Elson, who represented the plaintiff in the *Suppressed*¹²⁰ case, noted that "[i]t's a very tense time, in which they [clients] are dependent totally on this attorney often for child custody, for their financial future."¹²¹ According to Elson, the attorney may seem like the last refuge in a world that is falling apart. "The woman will throw her feelings of attachment onto an attorney, trying to find in the attorney someone to develop her self-esteem."¹²² Professor Elson believes the relationship which develops in this situation is artificial, built on fears and anxiety, not real feelings of intimacy. Elson, and other attorneys, liken this bonding to the transference which occurs between patients and therapists.

Criminal defendants and grieving widows may also experience this vulnerability when seeking legal representation. Thus, the caution against attorneys having sex with their clients does not only apply in divorce cases, but in any situation in which the client may be in a vulnerable or emotionally needy state, making them susceptible to personal as well as legal harm from their romantic involvement with their attorney.

XII. ILLINOIS, CALIFORNIA, AND OREGON PROPOSE ETHICAL RULES ON SEXUAL CONDUCT BETWEEN ATTORNEYS AND CLIENTS

The Illinois legislature passed a resolution prohibiting sexual relations between the attorney and client which urges:

[T]he Illinois Supreme Court should adopt a rule of professional conduct prohibiting attorney-client sexual relationships during the period of the attorney-client relationship, unless the client is the spouse of the attor-

118. See Mary Wisniewski, *Sex with Clients an Unfair Affair*, CHI. DAILY L. BULL., Apr. 20, 1991, at 1.

119. *Id.* at 12.

120. See *supra* text accompanying note 33.

121. Wisniewski, *supra* note 118, at 12.

122. *Id.*

ney, the sexual relationship pre-dates the commencement of the attorney-client relationship, or some other situation exists in which the court deems the prohibition would not detract from the attorney's representation of the client.¹²³

The resolution asserts,

Emotional detachment is essential to the lawyer's ability to render competent legal services, yet it is extremely difficult to separate sound judgment from the emotion or bias that may result from a sexual relationship between a lawyer and his or her client during the period that an attorney-client relationship exists.¹²⁴

The goal of the resolution, according to its sponsor, Illinois Senator Adeline J. Geo-Karis, is to prevent sexual coercion of clients by attorneys. She advocates the inclusion of a specific rule to eliminate any ambiguity in the standards for proper professional conduct.¹²⁵ She is supported in her efforts by the Illinois Task Force on Gender Bias in the Courts. Their report published in July of 1990, stated that it is difficult to document the incidence of attorney-client sexual relationships. The report pronounced:

Most clients are not likely to file grievances or lawsuits, and only 1% of the 5,000 complaints which the Attorney Registration and Disciplinary Commission (ARDC) received last year involved this conduct. Nonetheless, the ARDC determined that the problem is a "systemic, unchanging and consistent trend" in the domestic relations field. Although all sexual harassment charges are automatically referred to the Inquiry Board, the ARDC has never been able to prove a case, because the evidence presented always pits the female client's word against the male attorney's which has invariably been regarded as inadequate under the burden of proof applied by the panels.

Because of the vulnerability of a typical divorce client and the resultant potential for abuse by the domestic relations attorney, it is fundamentally unethical for an attorney to engage in sexual relationship with his or her

123. S. Res. 361, 87th Gen. Assembly (1991) Ill. Laws.

124. *Id.*

125. Press Release of Illinois State Senator Adeline J. Geo-Karis (R-Zion), July 2, 1991.

client which the attorney is representing that client in a marriage dissolution proceeding.¹²⁶

The Illinois rule has yet to be written, and it is unknown whether the rule will prohibit sexual relations only if it interferes with legal representation, or will it prohibit sexual conduct with client as a *per se* breach of the fiduciary duty of the attorney to the client. Local Illinois bar associations are skeptical of the rule and are resisting the presumption that attorney-client sexual relations are inherently unethical and unprofessional. Advocates for the proposed rule fear that placing the responsibility for the new rule's adoption with the court is futile. Karen Winfield, president of Illinois Legal Reform Association, stated, "What this does is kick the ball back to the court which already rejected it."¹²⁷

California adopted a rule of professional conduct in September 1992. Rule 3-120, *Sexual Relations with Client* 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
 - (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 3-110.¹²⁸
- (C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual relationships 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 sub-

126. ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, 1990 REPORT (1990).

127. *Reaction Mixed to Lawyer/Client Sex Harassment Ban*, NEWS-SUN (Waukegan, Ill.), July 5, 1991, at 3a.

128. Rule 3-110 requires that attorneys represent clients competently.

ject to discipline under this rule solely because of the occurrence of such sexual relations.¹²⁹

In the discussion of this rule, the Bar Association of California noted that a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel. Attorneys owe the utmost duty of good faith and fidelity to their clients, in the context of a fiduciary relationship of the very highest character. As a result, California has already provided that all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with utmost strictness for unfairness.¹³⁰ Where attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate.¹³¹ The goal of the rule is to ensure that the client's interests are kept paramount in the course of the member's representation.

This proposed rule was circulated for public comment on the question of the rule's creating a presumption that if the attorney engages in sexual conduct with a client, a rule violation has occurred. The lawyer has the burden to prove otherwise. The comments on the presumption issue were submitted to the California Supreme Court on January 9, 1992. The collection contained twelve favorable responses, eight opposed, and four neutral. The favorable comments generally expressed concern that the attorney's professional judgment is affected when engaged in a sexual relationship with a client. Several respondents saw the rule as a means of protecting consumers from attorney misconduct, unwanted coercion and duress. The

129. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Proposed Rule 3-120. In the form in which this Rule was originally proposed by the State Bar of California, there was an additional sub-paragraph (E):

(E) A member who engages in sexual relations with his or her client will be presumed to violate rule 3-120 paragraph (B)(3). The 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.

Id., quoted in *Sexual Relations with Client: Problem with No Clear Answer*, [8 Current Reports] *Laws. Man. on Prof. Conduct (ABA/BNA)* 171, 172 (June 17, 1992).

The authors believe that by creating the presumption and shifting the burden of proof to the attorney, this clause would inevitably have fostered and encouraged the very battles of testimony which it is intended to avoid. As is well understood from rape cases (not to mention the Clarence Thomas confirmation hearings), this can itself be a process harmful to the victim.

130. See *Giovanazzi v. State Bar*, 619 P.2d 1005, 1009 (Cal. 1980).

131. See *Magee v. State Bar*, 374 P.2d 807, 812 (Cal. 1962).

supporters of the rule believed that the need to protect the client overrode the attorney's right to have sex with whom he or she chooses. Others stated that attorneys need to be held to the same standard set for the medical profession which strictly forbids sexual relations with patients.¹³²

The critical comments which opposed the rule did so on the grounds that the State Bar does not have the right to pry into an attorney's bedroom, and that consenting adults have the right to decide about their sexual activities. The opposition to the rule also stated that any attempt to regulate an attorney's inter-personal relations is impossible, expensive and unnecessary, claiming that the harmful effects of intimate relations between attorney and client are already proscribed by other disciplinary provisions. The critical comments expressed concern that the rule may violate the First and Fourteenth Amendments resulting in an increase in difficult and protracted litigation and enforcement. The final concern of the opponents of this rule was their fear that the over regulation of the legal profession would lead to an increase in malpractice actions.¹³³

Former California Assembly Member Lucille Roybal-Allard,¹³⁴ one of the leading proponents of a formal rule, is apparently unsatisfied with the rule as adopted. She has organized passage of a bill through the California legislature, which was signed into law in September, 1992, which varies from the Supreme Court's Rule 3-120 in three material particulars.¹³⁵ First, in place of paragraph (B)(1) of Rule 3-120, the code adopts the following language:

- (1) 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 attorney.¹³⁶

Second, it adds the italicized language at the end of paragraph (B)(3), as follows:

- (3) Continue representation of a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompe-

132. Memorandum from the Subcommittee on Sex with Clients to the Members of the Board of Governors, State Bar of California, Report and Recommendation Re: Proposed New Rule 3-120 (Apr. 10, 1991) [hereinafter Report on Sex with Clients].

133. *Id.*

134. Ms. Roybal-Allard is currently serving in the U.S. Congress.

135. CAL. BUS. & PROF. CODE § 6106.9 (West 1992).

136. *Id.*

tently in violation of Rule 3-110 of the Rules of Professional Conduct of the State Bar of California, *or if the sexual relations would, or would be likely to, damage or prejudice the client's case.*¹³⁷

Third, it adds the following paragraph (e):

- (e) Any complaint made to the State Bar alleging a violation of subdivision (a) shall be verified under oath by the person making the complaint.¹³⁸

Oregon's State Bar recently adopted an express rule concerning attorney-client sex, which is subject to Oregon Supreme Court approval. The proposed Oregon rule is as follows:

DR 5-110 SEXUAL RELATIONS WITH CLIENTS

- (A) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced.
- (B) A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.
- (C) For purposes of DR 5-110 "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 lawyer for the purpose of arousing or gratifying the sexual desire of either party.
- (D) For purposes of DR 5-110 "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.¹³⁹

* * *

DR 5-105 CONFLICTS OF INTEREST: FORMER AND CURRENT CLIENTS

* * *

- (C) Vicarious Disqualification of Affiliates. Except as permitted in subsections (D) and (F), when a lawyer is required in decline employment or to withdraw from employment under a disciplinary rule other

137. *Id.*

138. *Id.*

139. OREGON RULES OF PROFESSIONAL RESPONSIBILITY Proposed Rule 5-110.

than DR 2-110(B)(3) or DR 5-102(A) or DR 5-110 no other member of the lawyer's firm may accept or continue such employment.¹⁴⁰

XIII. SHORTCOMINGS OF THE PROPOSED RULES

None of the rules, as adopted, or as proposed, go far enough to solve the dilemma of when sexual relations between attorney and client are unethical. The California Rule prohibits lawyers from demanding or coercing sex from clients, but the measure of unethical behavior is still rooted in performance of legal representation. Therefore, a violation of the rule will only exist if the sexual involvement impairs the attorney's ability to render competent legal services. The issue of harm to a client beyond the legal representation is still not addressed — even in Former Assembly Member Roybal-Allard's bill.

Former California State Senator Lucille Roybal-Allard originally proposed an outright ban on all sexual relations between attorneys and clients except when the attorney and client are married or their personal relationship predates their professional one.¹⁴¹ She began her efforts in 1989 to have the California State Bar restrict sex with clients through a new disciplinary rule. Her intent was to discipline attorneys who prey on clients' "vulnerability during period of emotional stress" particularly in divorce and probate cases.¹⁴² The outright ban was defeated; the Board of Governors of the California Bar Association modified the absolute ban on attorney client sexual relations, finding it too restrictive. They contended that an absolute prohibition may violate constitutional rights to association, privacy and the right to choose counsel.¹⁴³

140. *Id.* Proposed Rule 5-105.

141. Memorandum from Michael Simon, Staff Attorney, Office of Professional Competence, Planning and Development, State Bar of California, to Judith Grimaldi (Sept. 13, 1991); *see also* Report on Sex with Clients, *supra* note 132.

142. Dan J. DeBenedictis, *California Restricts Attorney-Client Sex*, A.B.A. J., July 1991, at 26.

143. *Id.* This view is supported in Yael Levy, *Attorneys, Clients and Sex: Conflicting Interests in the California Rule*, 5 GEO. J. LEGAL ETHICS 649 (1992). The author, while not suggesting that there should be no rule, argues for an even more restricted and narrowly drafted rule than that adopted.

XIV. AN ANALYSIS OF THE CONSTITUTIONAL ISSUES
RELATING TO A PROPOSED RULE PROHIBITING
ATTORNEY-CLIENT SEX

A. *The Right of Privacy Cases*

The contention that an absolute prohibition may violate the right of privacy is in direct opposition to the court's holding in *Barbara A. v. John G.*¹⁴⁴ which stated that the right to sexual privacy is not an absolute right.¹⁴⁵ The Supreme Court has held that the right to sexual privacy exists within the family right of privacy¹⁴⁶ or within an individual's right to bear and beget a child.¹⁴⁷ This type of privacy may only be infringed upon to uphold a compelling state interest. Regulation in this area must be drawn narrowly to provide the least restrictive alternative necessary to facilitate a compelling state interest. It is unclear that this right to privacy extends to extramarital sexual relationships. In Justice Goldberg's concurring opinion in *Griswold*, he stated that the constitutionality of Connecticut's laws against adultery and fornication was "beyond doubt," and that *Griswold's* holding in "no way interferes with the State's proper regulation of sexual promiscuity or misconduct."¹⁴⁸ In *Eisenstadt v. Baird*,¹⁴⁹ Justice Brennan conceded that the legislature enjoys a full measure of discretion in fashioning means to prevent fornication.¹⁵⁰ In *Bowers v. Hardwick*,¹⁵¹ the Court would not grant sexual autonomy to homosexual relationships under the right to privacy. It is clear from the *Griswold-Eisenstadt* line of cases that Justices have consciously been unwilling

144. 193 Cal. Rptr. 422 (Ct. App. 1983).

145. *Id.* at 431. The court stated in this case,

Although the right to privacy is a freedom to be carefully guarded, it is evident that it does not insulate a person from all judicial inquiry into his or her sexual relations. We do not think it should insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to another.

Id. Public policy does not demand such protection for the right of privacy. The court cited several instances where the right of privacy has been invaded because of compelling state interests. It is clear from this case and from other California case precedents that the right to privacy is not absolute and government intervention in matters affecting an individual right to privacy in sexual matters has been sanctioned in both criminal (marital rape cases) and civil law (paternity suits).

146. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

148. 381 U.S. at 498 (Goldberg, J., concurring).

149. 405 U.S. 438 (1972).

150. *Id.* at 449.

151. 478 U.S. 186 (1986).

to extend a right of sexual privacy to unmarried persons. The individual's right to decide to prevent conception and the right to choose whether to bear a child has been upheld in *Griswold*, *Eisenstadt* and *Roe*, but contraception and abortion are issues factually and legally distinct from a right to engage in sexual relations. The Court has limited the right to privacy to marriage and childbearing, not to a generalized right of sexual autonomy. Finally, even if the right to sexual privacy is attributed to the Constitution, the *Eisenstadt* opinion of Justice Brennan relied on a rational basis test, making no attempt to identify a fundamental right or imply any need for heightened scrutiny.¹⁵²

The California courts have recognized that the state has a fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender's right to privacy.¹⁵³ Thus, the California State Bar in proposing its rule regulating attorney-client sexual contact itself cites the following compelling state interests to justify the rule:

- 1) the State's interest in regulating the practice of professions operating within its jurisdiction;
- 2) the State's interest in protecting the public welfare in relation to services provided by State regulated professions;
- 3) the State's interest in promoting competent legal representation through avoidance of emotional bias and loss of professional judgment resulting from attorneys' sexual contact with clients;
- 4) the State's interest in promoting competent legal representation through avoidance of conflicts of interest (on the part of the attorneys) resulting from attorneys' sexual contact with clients.¹⁵⁴

B. *The Right of Association Cases and the Overbreadth Doctrine*

In order not to run afoul of the constitutional right to privacy and association, the California State Bar has attempted to tailor its proposed regulation to provide what they view as the least restrictive alternative necessary to achieve the compelling

152. 405 U.S. 438 (1972), quoted in Bruce Hafén, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy*, 81 MICH. L. REV. 463, 541 (1983).

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

154. STATE BAR OF CALIFORNIA, REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE PROPOSED RULE 3-120, ENCLOSURE 12 AT 7-8. (May, 1991).

state interests set forth. The California State Bar concluded that a flat prohibition in this area was not the least restrictive alternative and was too absolute to meet a constitutional challenge. In reaching this conclusion, the California State Bar examined how its proposed rule affected the right to freedom of association.¹⁵⁵ In *Roberts v. United States Jaycees*,¹⁵⁶ the United States Supreme Court recognized the constitutional right to "freedom of intimate association" and "freedom of expressive association." The Court held that choice to enter into an intimate human relationship cannot be intruded on by the state. Freedom of association is viewed as a fundamental personal liberty and is afforded constitutional protection.¹⁵⁷ *Palko v. Connecticut*,¹⁵⁸ supports *Roberts* in holding that the freedom to express basic human emotions and feelings is implicit in the concept of ordered liberty. In the face of these constitutional provisions and protections, a rule regulating an attorney's sexual relations with the client must balance compelling and important state interests and an individual's right to privacy and freedom of association. The match between the state need and the outcome of the rule must be very close, eliminating the possibility of being over inclusive and over regulatory. For these reasons, the California State Bar declined to proceed with the originally proposed flat prohibition rule, in order to permit supposedly consensual sexual relationships between attorneys and clients, as long as the relationship was not induced by coercion, intimidation, or undue influence and would not interfere with competent legal representation. This reasoning is flawed and incomplete.

The First Amendment does not guarantee the right to employ every conceivable method of expression at all times and in all places; a restriction on expressive activity may be invalid only if the remaining modes of expression are inadequate.¹⁵⁹ Even an absolute rule prohibiting sexual relations between attorney and client during the professional relationship is not so restrictive that the attorney is unable to express himself sexually; he or she is only restricted from sexual intimacy with a client *during legal representation*. If the attorney

155. Interview with David Bell, Senior Staff Attorney, and Michael Simon, Staff Attorney, Office of Professional Competence Planning and Development, State Bar of California (Mar. 15, 1992).

156. 468 U.S. 609, 617-18 (1984).

157. *Id.* at 618.

158. 302 U.S. 319 (1937).

159. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

wishes to engage in sexual acts with a client, a *choice* is presented: either to continue to act as attorney, and to forego a sexual relationship, or to withdraw as counsel and thereby become free to engage in the sexual relationship.

In two cases, *Broadrick v. Oklahoma*,¹⁶⁰ and *City Council of Los Angeles v. Taxpayers for Vincent*,¹⁶¹ the Supreme Court has held that States have leeway and authority to curtail First Amendment freedoms for plainly legitimate reasons, and that any alleged overbreadth must be real and substantial, and judged in the context of a state's legitimate purpose. Any absolute prohibition of sexual relations between attorney and client during the course of representation would be constitutional under this standard. A law which said that attorneys must be celibate while they practice law would be overbroad — because the prescription would go beyond the purpose of the rule, namely preventing attorneys from having sex with clients. But a rule which says, in effect, that lawyers may not have sex with clients because it is expressly related and limited to the legitimate state purpose, and because even an absolute prohibition leaves the attorney with a choice — between continuation or termination of the professional relationship, and foregoing or commencing a sexual relationship — would not be overbroad. Such a rule is directly and expressly limited to the prevention of the harm against which it is directed.

In contrast to the California State Bar's (and, now the California Supreme Court's) narrow interpretation of what violates their fiduciary duty to their client, the medical professions' strict ethical rule prohibiting sex with patients has never been successfully challenged on these constitutional grounds. Indeed California law itself now bans sex between physicians and psychotherapists and their patients.¹⁶² This rule has never been found to violate either the right to privacy or the right of free association. For all of these reasons, the constitutional arguments apparently adopted by the California State Bar to avoid an absolute prohibitory rule are unpersuasive.

We do believe, however, that the California State Bar probably represents well the whole of the legal profession in its reluctance to accept an absolute prohibition, precisely because it resents the imposition of restrictions on the privilege of sexual freedom in adult consensual relations. This is probably a fair statement of the views of many attorneys, even though

160. 413 U.S. 601 (1973).

161. 466 U.S. 789 (1984).

162. CAL. BUS. & PROF. CODE § 729 (West 1990).

most attorneys would probably also agree with Justice Murray who stated in *Suppressed v. Suppressed*,¹⁶³ that "the activity involved [sexual relations with clients] has been considered wrong since biblical times."¹⁶⁴ Consistent with this historic view, when a emotionally vulnerable client looks to the attorney for guidance during a crisis, the fiduciary duty ought to take precedence over the "right" to sexual freedom. The lawyer who engages in sexual relations with his client compromises the client's best interest. There can be no truly consensual relationship between an attorney and client, because the dynamics of power and subservience favor the attorney. The client suffers from the same, inherent psychological vulnerabilities found in medical, therapeutic or pastoral relationships. These inequities inherent in the relationship leave the client vulnerable to an attorney's advances.

The attorney's fiduciary duty should override the attorney's right to freedom of association. The California State Bar's proposed rule protects the client from legal harm and from illegal activities such as sex in lieu of legal fees, but leaves the client open to other possible harm. The proposed rule fails to recognize the compromise of the client's best interest for the attorney's own interest. Instead of the simplicity and easy enforceability of an absolute rule, the proposed California State Bar rule would create a morass of contradictory testimony between attorney and client in every contested case. Surely the spectacle of the Clarence Thomas confirmation hearings has sufficiently demonstrated how much of a "no-win" situation this would be. In many cases, such a battle could serve only to compound in public humiliation the harm already caused to the client.

The legal profession has a history of regulating and restricting its members so as to avoid possible conflicts of interest, and to maintain its ethical standards. A rule prohibiting attorney-client sexual relations is within the state's right to regulate the profession as part of the licensing of attorneys. Since the interest of the state is to insure both competent legal representation and to prevent harm to clients, a properly crafted rule must recognize the attorney's fiduciary responsibility. As a result, the state must expressly protect the vulnerable client, and seek to prevent emotional or personal harm which result from breaches of that responsibility. Thus, the legal profession must develop a rule similar to that controlling their medical

163. 565 N.E.2d 101 (Ill. App. 1990).

164. *Id.* at 104.

brethren, strictly prohibiting sex with clients. No less restrictive rule will adequately protect clients from harm or prevent these breaches of the fiduciary relationship.

The Supreme Court has been consistent in holding that the practice of law is a right for one who is qualified by his learning and *moral* character.¹⁶⁵ Justices Blackmun, Harlan, and White, dissenting in *Baird v. Arizona*,¹⁶⁶ describe the state's right to regulate the Bar to protect a client's confidences, aspirations, freedom and property and to demand of the lawyer more than the completion of formal legal education and passing the bar. The state can demand character of its attorneys, and it is this character that the state holds out to the public when it authorizes an applicant to practice law. The opinion also quotes Justice Frankfurter who stated:

The Bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities . . . from a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, have been compendiously described as "moral character."¹⁶⁷

The plurality in *Baird* also acknowledges that Arizona has a legitimate interest in determining whether the applicant has the "qualities of character," but this right may be counterbalanced by the attorney's individual First Amendment rights.¹⁶⁸

Drawing the line between permissible and impermissible sexual relationships between attorney and client is a difficult one. An absolute ban on sex between attorney and clients, if observed, affords clients complete protection from negative consequences of the sexual relations. The ban may preclude relationships that do not involve problems of overreaching, but this prohibition is temporary, lasting only the duration of the legal relationship. The restriction will only interfere with sexual autonomy, if the sexual relationship and the legal relationship exist contemporaneously.

Lawrence Dubin in his article on attorney-client sex in matrimonial cases in the *Georgetown Journal of Legal Ethics* proposed the following rule be added to the Model Code as DR 5-

165. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 384 (1866).

166. 401 U.S. 1, 20 (1971).

167. *Id.* (quoting *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (concurring opinion)).

168. 401 U.S. at 6.

108 and to the Model Rules as Rule 1.8 (k): "A lawyer shall not engage in any sexual relations with a divorce client during the lawyer-client relationship."¹⁶⁹

A rule such as this would eliminate the distinction some courts have drawn between professional and personal conduct and would acknowledge that the professional relationship is inextricably bound up with the personal feelings of the individuals involved. This rule would recognize that it is artificial to separate the emotions of personal life from the representation of the client.¹⁷⁰ In almost all cases, the sexual relationship between the attorney and client would be unlikely but for the professional relationship which brought the partners together. However, even this rule is inadequate, being too narrowly focused on one kind of representation.

The regulations governing professional responsibility need to label *all* sexual relations with clients during the course and continuation of the professional relationship as misconduct. This behavior, in addition to its adverse effects upon the client, damages the integrity of the legal profession. Each time an attorney misuses his influence over a client to gain sexual advantage, the attorney not only harms the client, but also reflects adversely upon his fitness to practice law.¹⁷¹ As we have demonstrated, these violations can sometimes be forced to fit the mould of the existing rules, but an explicit rule will take the guess-work out of the issue. As Dubin explains in the conclusion of his article, because there is no *per se* rule prohibiting sexual relations with clients, lawyers defend against disciplinary proceedings citing the general provisions of the codes in their favor.¹⁷²

The rule should also not be limited to certain practice areas, such as divorce, but should apply to all types of legal representation. The rule should require that lawyers withdraw from legal representation when there is sexual involvement with the client. The risk of compromising a client's interest, overreaching or manipulating a client for the attorney's self gratification must be avoided.

Therefore a specific, clear and universal rule is needed which bans sexual relations between an attorney and client unless the client is the attorney's spouse or the relationship predates the initiation of the attorney-client legal relationship.

169. Dubin, *supra* note 64, at 618.

170. Lyon, *supra* note 63, at 180.

171. See *supra* pp. 62-64.

172. Dubin, *supra* note 64, at 618.

Even then, it is the pre-existence of the sexual relationship, and not the lack of potential harm from mixing the professional with the sexual relationship which gives presumptive legitimacy to the simultaneous continuation of the two relationships. However, the potential for harm remains. Accordingly, even the Oregon rule¹⁷³ does not go far enough, in that it fails to require attorneys to forgo the professional relationship where that relationship, or the client may be harmed, notwithstanding that the sexual relationship preceded the professional involvement.

The rule proposed by the authors is as follows:

1. A lawyer shall not, for so long as the attorney-client relationship continues to exist, have sexual contact with a client unless the client is the spouse of the attorney or the sexual relationship predates the initiation of the attorney-client relationship. Even in these provisionally exempt relationships, the attorney should strictly scrutinize his/her behavior for any conflicts of interest between the attorney's personal interests and the interests of the client, and to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may or will be impaired, or the client harmed by the continuation of the sexual relationship during the course of representation, the attorney should immediately withdraw from the legal representation.
2. A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.
3. 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 lawyer for the purpose of arousing or gratifying the sexual desire of either party.

The authors would also follow DR 5-105(C) of the Oregon rule in imposing vicarious disqualification of a lawyer's firm where a lawyer is required to decline or to withdraw from employment by operation of the prohibition. The Oregon rule does permit representation to continue, however, where the sexual relation-

173. See *supra* pp. 90-91.

ship is between a lawyer who provides no assistance in the representation of the client (DR 5-110(D)). This appears to be fraught with its own perils, relating to questions of disclosure, and "Chinese wall" issues familiar in other conflict of interest situations, but on balance is probably appropriate, and better expressed than unstated and left to be imputed in subsequent interpretations of the rule.

The rule as proposed will withstand constitutional challenge because of the compelling state interest in preventing abuse of the fiduciary obligations at the heart of the attorney-client relationship, and the imbalance of the power relationship between the attorney and client. No convincing argument has been advanced by the bar stating why the legal profession should not treat itself in any way differently from the medical, psychotherapy or social work professions. Lawyers are (or should be) entitled to no greater constitutional protections than these other professions. Nothing in the proposed rule prevents any sexual relationship; what it prohibits is the sexual and professional relationship from co-existing. Freedom of choice, freedom of association and privacy rights are maintained unimpaired. The attorney (and the client) are merely required to *choose* which relationship is paramount. When the issue is presented in this way, the opportunity within the professional relationship for overreaching and coercion is eliminated. The attorney who violates the authors' proposed rule is subject to discipline; and if the attorney is interested in behaving ethically, he must give his client a real choice as to what kind of a relationship the client wishes — personal or professional. This choice cannot be presented as unfair, or burdensome on the bar; we challenge our readers to argue otherwise.¹⁷⁴

174. Support for a *per se* rule based on the Oregon model is to be found in two recent articles, Caroline Forell, *Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues*, 22 GOLDEN GATE U. L. REV. 611 (1992); and John M. O'Connell, Note, *Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule*, 92 COLUM. L. REV. 887 (1992). The rules proposed in these articles do not, however, deal with the problems which exist where sexual relations precede the commencement of the attorney-client relationship. It is notable that at least one court has recognized that the pre-existence of a relationship does not preclude discipline in an appropriate case. *In re Lewis*, 415 S.E.2d 173 (Ga. 1992).