

Ethical Sex?

By the NHBA Ethics Committee

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New Hampshire has not adopted any rule explicitly dealing with the sexual behavior of lawyers, but lawyer-client or lawyer-employee sex can still get the lawyer into plenty of hot water. In addition to the penalties provided for sexual harassment of employees, there is a recent trend toward big civil damage awards against lawyers in cases brought by former sex partners/clients. Ethical penalties have not been lacking, either, and the New Hampshire Supreme Court has been a pace-setter in this field.

This article examines the ethical problems of lawyer-client sex, and discusses the reasons why, despite the problems, no explicit rule has been recommended by the committees examining the issue.

Bourdon's Case

The first of the recent cases was *Bourdon's Case*, 132 NH 365 (1989). The lawyer and the client “developed an emotional relationship and were sexually intimate during the period when respondent was representing her in her divorce case . . . Respondent knew, or ought to have known, that the custody of the minor children of [the client] might have become an issue in the divorce proceedings and that her conduct, both before and after the separation, might have an influence on the court’s decision as to child custody.” Id. at 368.

The Court found a violation of Rule 1.8(b): “A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation and with knowledge of the consequences.”

The Court found a violation of Rule 2.1 “because he failed to exercise independent professional judgment in his representation of [the client]...His emotional and physical entanglement with [the client] adversely influenced his professional decisions.” Id. at 371-2.

The Court found a violation of Rule 1.7(b): “Where representation of a client ‘may be materially limited ... by the lawyer’s own interests,’ this rule prohibits representation unless: ‘(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation and with knowledge of the consequences’”. Id. at 372.

As a result of these violations, the Court disbarred Bourdon.

Drucker's Case

In *Drucker's Case*, 133 NH 326 (1990), the Court found violations, again, of Rule 1.7(b) and Rule 1.8(b). Because the lawyer knew of the client’s “emotional problems and that she was seeing a psychiatrist”, the Court also found a violation of Rule 1.14(a), which “states, in part, that ‘[w]hen a client’s ability to make adequately considered decisions in connection with the representation is impaired . . . because of . . . mental disability . . . ’ the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Id. at 334.

Because the Court found that “there was no allegation or finding that Drucker’s sexual involvement with [the client] affected his independent professional judgment in his representation of her”, the Court limited its sanction to a two year suspension. Id. at 335.

Otis' Case

More recently, the Court considered ethical charges brought against a lawyer arising from his representation of six clients, one of whom was also an employee of Otis’. The Court rejected a defense

of a medical problem triggering uncontrollable antisocial behavior, pointing out that “he was capable of taking preventive measures to ensure that either his behavior changed or that people were not harmed by it”, *In re Otis*, 135 NH 612, 618 (1992). The Court again found violations of Rules 1.7(b) (Emphasizing that this Rule “only requires the possibility that the client’s interests may be materially limited by the lawyer’s interest) and 1.8(b), adding this time Rule 8.4(a), without discussion. Rule 8.4(a) states that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . .” *Otis* was disbarred as “unfit to continue practicing law.” *Id.* at 619.

National Trend

The New Hampshire cases apparently represent a fairly widespread problem both here and nationwide. See, e.g. “Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact”, 45 *Arkansas Law Review* 459 (1992), “Unfair Advantage”, *ABA Journal*, November, 1992, and “Dangerous Liaisons: Survey: Most Disapprove of Lawyer-Client Sex”, *ABA Journal*, November 1992. California has added an explicit ban to the Rules of Professional Conduct. The New Hampshire Supreme Court Professional Conduct Committee, the Rules of Professional Conduct Revision Committee, and the Ethics Committee have all considered recommending an explicit rule. All have recommended no rule. Given the pervasiveness and severity of the problem, why not?

New Hampshire Practice

The Rules of Professional Responsibility Revision Committee reviewed proposed rules in the autumn of 1992.

The subcommittee found two essential problems with a rule. First, drafting. What, for example, is sex? California’s rule (AB 1400, effective 1/1/93, and CRPC Rule 3-120, adopted earlier attempts a definition, including “sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.” Many questions are begged. A recitation that “we know it when we see it” is tempting, but not really helpful. For another example, what is a client? How about employees or officers of corporate clients? More important, how about a client with whom sex is generally permitted, such as the lawyer’s spouse? And must non-marital sexual relationships with a client necessarily result in a Rules violation? This last question leads into the second problem, privacy. Clearly, a lawyer has a right to privacy in relationships entered into “as a person”; equally clearly, there is no right to privacy in the application of the Rules to relationships entered into “as a lawyer”, meaning by use of the power and influence a lawyer enjoys by license of the state. Not all relationships will fall neatly into one or the other category.