

## A Case For An Impractical Rule

### By the NHBA Ethics Committee

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Sexual relationships between lawyers and their clients conjure up images at which we can all frown. We have read accounts or watched dramatizations about lurid attorney-client sexual relationships imbued with coercion, intimidation and undue influence. Our own Supreme Court has strongly condemned such relationships in three recent cases. *See In Re Otis*, 135 NH 612 (1992); *Bourdon's Case*, 132 NH 365 (1989); and *Drucker's Case*, 133 NH 326 (1990). And we have witnessed public outcries when professionals, be they teachers, counselors, lawyers, doctors, or others, have engaged in harmful sexual relationships with those students, patients or clients who had come to trust them. So why should there be any reluctance to adopt a rule which prohibits sexual relationships between attorneys and their clients?

Before continuing, this article should be prefaced with an explanation of what it is, and conversely, what it is not. This article is not an endorsement of sexual activity between attorneys and clients. In a majority of instances, such activity should be and has been condemned. Indeed, for reasons stated in a companion article advocating an absolute prohibition, sexual relationships between attorney and client are ripe with pitfalls and problems. Likewise, this article does not purport to express the views of even a substantial segment, let alone a majority, of the members of the New Hampshire Bar Association or its Ethics Committee. Those views are not known. Rather, this article seeks to explain why a *per se* rule banning sex between attorneys and clients is both unworkable and unnecessary.

### General Overview

A careful review of case law demonstrates that states rely on several different principles to discipline attorneys for engaging in sexual relationships. First, there are those jurisdictions that discipline attorneys on grounds that a sexual relationship with a client constitutes "moral turpitude". *See ABA Model Code of Professional Responsibility* ("Model Code"), DR 1-102(A)(3); *Committee on Professional Ethics of Conduct of Iowa State Bar Association v. Hill*, 436 N.W.2d. 57 (Iowa 1989). Other jurisdictions, including New Hampshire, pose the problem as a conflict of interest - that engaging in a sexual relationship can adversely affect representation of a client or the independent judgment of the attorney. In *Re Otis, Supra*. Still others rely on the vague principles of the Model Code which prohibit conduct that adversely reflects on the lawyer's fitness to practice law and counsel a lawyer to avoid the appearance of professional impropriety. *See Model Code*, DR 1-102(A)(6) and Canon 9; *Office of Disciplinary Counsel v. Rensing*, 53 Ohio St.3d. 265, 559 N.E.2d. 1359 (1990). And there are those which have framed improper sexual relationships as a loathsome example of the wrongful use of client information to the disadvantage of the client, especially in cases of undue influence or client susceptibility. *See Bourdon's Case, supra.* and the New Hampshire Rules of Professional Conduct, Rule 1.8(b); *Barbara A. v. John G.*, 145 Cal.App.3d. 369, 193 Cal.Rptr. 422 (1983).

In some states, this has led to the promulgation of disciplinary rules concerning sexual relations with clients. For example, California's Rule 3-120 states:

- (A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.
- (B) A member shall not:
  - (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
  - (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 . . . .
- (C) Paragraph B shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

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

The Oregon State Bar prohibits any sexual relations with current clients unless the relationship existed prior to the attorney-client relationship. Even if there is a pre-existing sexual relationship, Oregon bars continued relations with a client which would, or would likely, damage or prejudice the client in representation. *See Oregon Code of Professional Responsibility*, DR 5-110.

### **Underinclusion**

Despite an admirable attempt to curb sexual relationships between lawyer and client, there are problems with these rules. First, both rules are plagued by definitional underinclusion. The term “sexual relations” covers only the physical aspects of sex - intercourse and intimate touching. It does not cover improper demands for sex in the course of the relationship or statements intended to cause sexual arousal or gratification (such as so-called “phone sex”). Also, the prohibited act of “touching” applies only to “intimate parts” of another, although we are all aware of sexual harassment claims which involve unwanted touching of any body parts, whether they be intimate or not. Conversely, the 1992 New Hampshire Bar Association subcommittee studying a proposed rule against sexual relationships between attorneys and their clients, queried whether the definition of “client” was overinclusive, especially where the client is an entity, such as an association or corporation, and the attorney engages in a sexual relationship with its employee or agent.

The rules barring sexual relationships with clients are also plagued by philosophical underinclusion. Specifically, much of the case law condemns such relationships because they so affect the attorney that they create prejudice or a likelihood of prejudice to a client’s case, or adversely affect the lawyer’s representation of the client under Rule 1.7(b) (prohibiting conflicts of interest if representation would be materially limited by, *inter alia*, the lawyer’s own interests). *Bourdon’s Case, supra.*; *Kentucky Bar Association v. Meredith*, 752 SW2d. 786 (1988); *Edwards v. Edwards*, 165 A.D.2d. 362, 567 NYS2d. 645 (1st Dept. 1991). The courts reason that a relationship consisting of a client who is susceptible to emotional distress, and vulnerable to and dependent upon the advice of an attorney, coupled with an attorney who is motivated by the passion of the relationship, creates an atmosphere so charged with irreconcilable conflicts that adequate representation cannot occur. Consent by the client becomes meaningless.

However, if one ponders this rationale, it is apparent that any relationship swept up in a whirlwind of emotions is subject to these very same dangers. It could include representation of spouse or family member, a close friend or associate, or a long-time client with whom the attorney has developed a strong empathetic and/or sympathetic bond, although sex plays little or no part in the relationship. Following this logic, an invitation to create rules governing sexual relationships is an invitation to create rules governing every other relationship in which a lawyer’s judgment or a client’s susceptibility is called into question by the circumstances of the relationship. Yet, if we wish to avoid the dangers caused by an attorney-client sexual relationship through creation of a rule, the rule is underinclusive since other relationships present identical problems.

Thus, the difficulty in drafting a rule which covers all conceivable sexual misconduct and the unprecedented invitation to establish other relationship-based rules due to the policy considerations that underlie such a rule, counsel against the development of a *per se* rule against sexual relationships with clients.

### **An Issue Of Privacy**

The companion article to this piece goes at least one step beyond the dangers described above. It advocates that even in consensual sexual relationships, “with no hint of exploitation, intimidation or coercion present”, a *per se* prohibition against such relationships should be developed. See Chapman, *Lawyer-Client Sex: A Per Se Violation of Rule 1.7(b)*, *NH Bar News*, August 18, 1993. Yet, the article’s philosophical underpinning seems to ignore an attorney’s privacy interests. Specifically, there are concededly situations where an attorney’s involvement in a sexual relationship with a client may not adversely affect that attorney’s ability to render effective representation, diminish a client’s independence or autonomy, or call into question issues of exploitation, intimidation, or coercion.

The most obvious example, and one which deserves an exception in the companion piece, is representation of a spouse, assuming no other conflict of interest exists. Further examples might include representation of a client, with whom the attorney has had a pre-existing sexual relationship, in a relatively uncomplicated, short-term matter, such as the purchase of a home or the drafting of a simple will (assuming no violation of Rule 1.8(c) regarding lawyers as beneficiaries). In fact, in the above situations, it is likely to be irrelevant whether the sexual relationship occurred during or prior to the representation, so long as it is consensual, and does not adversely impact on the client's ability to make decisions or the attorney's obligations to provide effective representation.

To be sure, we can all agree on the companion article's aspirational language about the lawyering profession, as well as its pragmatic insights on the explosive mix of sexuality and human relationships. However, in situations where neither the lawyer's professional judgment nor the client's personal independence is in doubt, it is difficult to justify a *per se* bar on a most private relationship. We can all agree that any incident in a lawyer's personal or professional life which adversely affects the fitness of that lawyer to practice, should be the subject of discipline. *See gen.* Rule 8.4. Conversely, it should therefore follow that if an event in the lawyer's personal or professional life - including a sexual relationship with a client - has no impact on one's fitness to practice law, it should not be prohibited.

### **Availability Of Other Rules And Remedies**

Finally, our Supreme Court has adequately armed the bar with the tools necessary to prevent the abuses that pervade improper sexual relationships between lawyers and their clients. Rules governing client confidentiality (Rule 1.6), conflicts of interest (Rule 1.7), use of confidential information against a client (Rule 1.8(b)), representation of clients under a disability (Rule 1.14), general misconduct (Rule 8.4), and counseling with independence (Rule 2.1) all have been and/or can be used to discipline attorneys who engage in improper sexual relationships. Tort remedies, such as claims for malpractice, breach of fiduciary duties, or infliction of emotional distress, have also been recognized where an attorney engages in an improper sexual relationship. *See e.g., McDaniel v. Gibe*, 230 Cal.App.3d. 363, 281 Cal.Rptr. 242 (1991) (withholding of legal services in an attempt to gain sexual favors constitutes grounds for malpractice and intentional infliction of emotional distress).

The rules and case law, much to their credit, seek not to discipline or penalize an attorney for a *per se* relationship, but to impose discipline or remedial relief if the attorney harms or creates the likelihood of harm to the sacred rights and obligations that characterize an attorney-client relationship. Indeed, our Rules are an attempt to move away from vague, broad pronouncements of the Code against moral turpitude or appearances of impropriety. Rather, they seek to focus upon those acts and omissions that affect the honesty, trustworthiness and integrity of those in our profession and our fitness to practice law. In New Hampshire, we have been able to use existing rules of professional conduct to impose discipline from suspension to disbarment for improper sexual relationships. A *per se* rule is not only unnecessary, but carries with it all of the problematic baggage described above.