Lawyer-Client Sex: A *Per Se* Violation of Rule 1.7 (b)

By the NHBA Ethics Committee
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A recent Practical Ethics article entitled "Ethical Sex?" discussed some of the ethical problems raised by lawyer-client sexual relationships. *N.H. Bar News* May 19, 1993 at 15. It reviewed three recent disciplinary cases in which the least severe sanction imposed by the New Hampshire Supreme Court was a two-year suspension, while the other two cases resulted in disbarment. Noting that New Hampshire does not have a professional conduct rule that explicitly governs lawyer-client sex, the article reviewed the work of a Bar subcommittee that recommended against adoption of a special rule. The article concluded with several observations intended to discourage lawyer-client sex, including the admonition that such relationships would likely violate Rule 1.7, the general prohibition against conflicts of interest, particularly if the "harsh reality" test is used to judge the lawyer's conduct.[1]

As the title to this article indicates, I believe Rule 1.7(b) erects a *per se* bar to a lawyer continuing to represent a client with whom he or she has developed a sexual relationship.[2] The New Hampshire Supreme Court has yet to be asked to so rule. But if disciplinary cases involving lawyers having sex with clients continue to go to the court, I believe it will be only a matter of time before the court adopts this view.

The case for a *per se* ban under Rule 1.7(b) is not difficult to make. It does not rest upon sociological studies or anecdotal evidence suggesting the difficulty clients may have in resisting lawyers' sexual advances. If we are to be regarded as professionals, not only must we act like professionals but we must define what professionalism means. Our responsibility to represent clients free of any conflict of interest should not depend on someone else's study or opinion. Rather, our commitment to professionalism and common sense are the only guides we need to conclude that lawyer-client sex creates an irreconcilable conflict of interest.

Rule 1.7(b)

Rule 1.7(b), in part, reads:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's . . . own interests, 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 . . . .

For purposes of this article, I have assumed that the lawyer-client relationship exists before the lawyer or the client takes the initiative to develop a sexual relationship.[3] I also have assumed, because it poses the case in the light most favorable to the lawyer, that the sexual relationship is consensual, with no hint of exploitation, intimidation, or coercion present. Under Rule 1.7(b) that relationship presents a conflict of interest which requires the lawyer to withdraw from representation.

A Lawyer's Personal Interests Will Materially Limit The Representation

Essential to the lawyer-client relationship is a lawyer's independence, his or her objectivity. Rule 2.1 requires a lawyer to "exercise independent professional judgment and render candid advice." How many times are we confronted with the difficult duty of telling a client that our role is to give objective advice, which may not be, and often is not, what the client wants to hear. Fulfilling the command of Rule 2.1 is not easy even under the best of circumstances, as a comment to the rule recognizes: a lawyer may "be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

Exercising independent professional judgment infuses all aspects of the lawyer-client relationship, from whether the lawyer possesses the competence and has the time to undertake the representation, to assessing whether the client's position is realistic and has merit, to recommending terms in a transactional matter or settlement in litigation. At each step along the way, the lawyer must independently and objectively evaluate the situation and proceed to act in the client's interests. Rule 1.7.

Will a lawyer's independence, objectivity, and ability to analyze what is best for the client be materially

limited by the lawyer being sexually involved with the client? In the best of cases, it is often difficult for a lawyer to remain objective because of the normal feelings he or she develops toward the client, not to mention the tendency of the lawyer to become convinced of the merits of the client's cause. If to these impediments to independence and objectivity are added feelings of love, desire, passion, sexual fulfillment, and the like, can there be any doubt that such feelings would not significantly influence the lawyer's conducts Is it realistic to believe that the lawyer's personal interests can be put aside as though a "Chinese wall" had been erected to prevent those interests from having an impact on the representation?

Some lawyers may disagree with this conclusion. They might argue that the hallmark of a lawyer, after all, is the ability to ignore personal feelings in representing a client. A lawyer who cannot do this has no business being in the profession. Sexual involvement with a client raises no different demand.

The situations are different, however. Being sexually involved with a client gives rise to a range and intensity of feelings that simply cannot be compared with, for example, the personal antipathy a lawyer might feel toward a client because of who the client is or what the client stands for. The lawyer's lack of sympathy or respect for the client can drive a wedge between the lawyer and client unless the lawyer is able to set personal feelings asides Sexual involvement with a client, on the other hand, dissolves the professional "wedge" that should exist between the lawyer and client, if the lawyer is to exercise the independent judgment that is necessary to sense the client's interests, not the lawyers Being able to represent the unpopular client or cause teaches nothing about keeping entirely separate the roles of lawyer as lawyer, and lawyer as sexual partner.

Having a sexual relationship with a client, by definition, means that the lawyer has the most basic personal interests at stake. And no matter how perfect the relationship, human experience teaches that there will be times when the lawyer's feelings and desires are in turmoil, and his or her interests in the relationship at risk. Inevitably, during those times the client's interests will suffer.

Under Rule 1.7(b) the test is whether there is "the possibility that the client's interests may be materially limited by the lawyer's interests." In *re Otis*, 135 N.H. 612, 617 (1992). That low standard will be met where a lawyer becomes sexually involved with a client. A lawyer simply cannot deny that "the possibility" for material limitation does not exist.

The Representation Will Be Adversely Affected

From the discussion thus far it is clear that I believe a lawyer's sexual relationship with a client would adversely affect the representation. A sexual relationship necessarily means that the lawyer has developed profoundly personal interests in the client, reflecting a complex of deeply-felt emotions, that have nothing to do with the representation. While those interests and emotions may leave the representation unaffected some of the time, that will not always be the case. Even in the best relationships the road is not always smooth; for a lawyer to believe otherwise would be folly. No matter what the representation is, it is bound to be adversely affected during rocky periods. Once the sexual relationship develops, no one, not least the lawyer can predict when those periods will occur, how serious they will be, or at what stage the representation will be. The only certain thing is the potential for the sexual relationship to disrupt and adversely affect the legal representation.

But assume this position is strained, that too much emphasis has been given the "possibility" versus "probability," and that in some cases, given the limited or straight forward nature of the representation,[4] a lawyer might reasonably believe the representation would not be adversely affected. In such cases, the lawyer must consider whether, consistent with Rule 1.7(b), the client may be asked to consent.

Client Consent May Not Be Requested

Rule 1.7(b) provides that the representation may go forward if "the client consents after consultation with knowledge of the consequences." However, as the comments make clear there are some cases where a lawyer may not ask the client to consent

> . . . when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of client consent.

Is a client involved in a sexual relationship with his or her lawyer in any position to withhold consent? Since the relationship is consensual, it follows that both the lawyer and client want it to continue. Given their mutual feelings, neither party can be expected to engage in the objective consultation required by Rule 1.7(b). This becomes obvious by considering the client's situation in both relationships.

Surely the client would realize that consent would not be sought if the lawyer did not want the client to give it. The mere asking carries that implication. And, to the client, it carries a further implication: now the lawyer has an additional reason to look out for the client. But the client also is likely to believe that to withhold consent risks losing not only a lawyer but a partner in the sexual relationship. That a client would be concerned about hurting both relationships is understandable. Refusing to consent, after all, would show a lack of respect for the lawyer's judgment, a rejection the lawyer would not be expected to take lightly. Given these likely client expectations and concerns, it would be the rare client who could say "no."

There is an additional consideration. It is likely that the client will have placed complete trust and confidence in the lawyer, and simply would defer to the lawyer's judgment on the matter.[5] To expect in this situation the client to make an informed and independent decision on consent is completely unrealistic. Under Rule 1.7(b) a lawyer should not be allowed to request consent

An Invasion of Privacy?

The most serious objection to a *per se* application of Rule 1.7(b), as the companion article argues, is that it constitutes an invasion of a lawyer's right of privacy. What compelling interest does the state have in regulating a matter so intimate as a lawyer's sexual relations? As the three cases that have gone to the New Hampshire Supreme Court make clear, the state's interest is "the protection of the public and the maintenance of public confidence in the bar." *Otis' Case*, 135 N.H. at 619. That interest is promoted, in part, by ensuring that lawyers serve and advance client interests, not their own.

Where a lawyer's sexual involvement with a client would materially limit the representation, no one can deny that the state has the authority to require the lawyer to withdraw from the representation. So the privacy objection does not go to the legitimacy of regulating a lawyer's private affairs but to a *per se* ban. The companion article contends that a blanket prohibition sweeps too broadly and forbids representations where client interests are not adversely affected.

One response to this objection is to argue that a *per se* ban does not intrude on a lawyer's private life because the lawyer remains free to continue the sexual relationship by giving up the legal representation. *See Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule, 92 Colum. L. Rev. at 918-19.* But this argument has the familiar ring of the "unconstitutional conditions" cases, which hold that the recipient of a governmental benefit may not be required to give up the otherwise permissible exercise of a constitutional right like privacy. The forthright response to the privacy argument is to ask whether the development of a sexual relationship *during the course of* the lawyer-client relationship necessarily can be expected to adversely affect the representation. If so, the state has the right to impose a *per se* prohibition.

An Absurd Result?

The New Hampshire Supreme Court has long followed the rule that a statute should not be "construed so as to lead to oppressive or absurd consequences." e.g., *In re Moore, 99* N.H. 209, 211 (1954). Where the language of a statute permits its application to a fact pattern that appears to be beyond its aim, the court asks whether that result is unreasonable, harsh or absurd. Nothing in the history of the model rules, or their adoption in New Hampshire, suggests that Rule 1.7(b) was intended to bar lawyer client sexual relationships. We must ask whether a *per se* application of the rule reaches an absurd result.

Consider the result of requiring the lawyer's withdrawal from the representation first from the client's standpoint. Another lawyer would be retained unencumbered by any interest other than those that comprise the lawyer-client relationship. The representation would proceed unimpeded, as would the client's sexual relationship with the former lawyer. The two relationships would be separate and distinct, as they should be.

But does this result interfere with "client choice"? A client should have the freedom to choose a lawyer. Rule 5.6. While that freedom of choice exists in theory, in practice it may be limited. There are a number of

reasons why a lawyer selected by the client may not be able to undertake the representation, not the least of which is a conflict of interest. We understand why a lawyer who represents a family is not able to represent one member in a dispute with another member. Here the result is no different. If a sexual relationship develops the lawyer must withdraw from representation. In a state with over 3,500 lawyers, the client's interests certainly can be served by other competent lawyers.

No different conclusion results if the question is looked at from the lawyer's perspective. Even if one were to assume that the sexual relationship would never adversely affect the representation, what is the harm of requiring withdrawal from representation? Certainly the lawyer must concede that the client's interests can be equally well served by another lawyer. And, more to the point, why take a chance? Why run the risk that the sexual relationship would adversely affect the representation? No matter how small, that risk spells trouble for both the lawyer and the client in each relationship. It cannot be absurd to steer well clear of that possibility.

Conclusion

Perhaps because daily toil in the modern legal vineyards has become, for so many, like any other type of work, we forget we are members of a "learned profession." The New Hampshire Supreme Court, however, has not. In a recent case, it served notice on all of us "what it means to be a member of the legal profession":

> It is a profession where . . . [t]he duty to "avoid even the appearance of impropriety" is not to be taken lightly because "[a]ttorneys 'constitute a profession essential to society. Their aid is required not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidences which they receive and the responsibilities which they are obliged to assume demand not only ability of a high order, but the strictest integrity'"' (citation omitted}.

Wehringer's Case, 130 N.H. 707, 719 (1986).

By stepping back and remembering the special responsibilities we take on in representing a client, the hopes, confidences, and trust placed in us, it should be obvious why we cannot become sexually involved with a client. Even if you disagree with my analysis of Rule 1.7(b), does not old fashioned common sense dictate the same result?

Endnotes

[1] Under the "harsh reality" test, which the Ethics Committee uses to analyze conflict of interest issues, a lawyer must ask if "a disinterested lawyer," looking back at the representation after something has gone wrong, would question (1) the wisdom of the lawyer for having requested client consent or (2) whether there had been full Disclosure prior to obtaining client consent. NH Op 1988-89/24.

[2] The author is unaware of any decision that has so interpreted rule 1.7(b), although at least one commentator agrees with this interpretation. Geoffrey C. Hazard, Jr., Lawyer-Client Sex Relations Are Taboo, *Natl L. J.* Apr. 15, 1991 at 13. In 1992, the American Bar Association declined to rule that either its model rules or code of professional responsibility imposes a *per se* ban on lawyer-client sex. ABA Formal Op. 92-364. That opinion, however, strongly advised against such a relationship on four grounds: (1) the lawyer may breach the fiduciary duty owed to the client; (2) the lawyer's independent judgment may be compromised; (3) the relationship may create a prohibited conflict of interest; and (4) confidential information may be disclosed in circumstances where the attorney-client privilege does not apply.

[3] Thus, rule 1.7(b) would not *per se* bar a lawyer from representing a spouse or other person where the sexual relationship predated the lawyer-client relationship

[4] Some representations, like preparing a simple instrument or handling a straight forward real estate matter, are of such short duration or involve such infrequent client contact that it seems unlikely a sexual relationship would develop. Yet, if it is "love at first sight," the lawyer should withdraw. Even the simplest representations demand independence and objectivity, which would be difficult to maintain in a new, rapidly developing relationship.

[5] ABA Formal Op. 92-364 describes how the lawyer-client relationship, itself, leads the client to defer to the lawyer:

> The client comes to a lawyer because he or she needs help to resolve a problem. The client puts his or her faith in the lawyer's ability to think reasonably and objectively for the client's benefit. The client relies on the lawyer's special knowledge, skills and access to the courts to solve the client's problem. The lawyer encourages this special relationship, offering to lead the client through a complex legal system.

Commentators have described this dynamic of the attorney-client relationship as a "power imbalance." *Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule, 92 Colum. L. Rev.* 887, 889-92(1992).