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Correction Appended

Attorney-Client Sex Should Always Be Off Limits

By Abed Awad

The issue of attorney-client sex has come under heightened scrutiny by courts and state bar associations in the past several years.

In New Jersey, the Supreme Court's Special Committee on Matrimonial Litigation released a report in February 1998 strongly recommending the prohibition of attorney-client sexual relations during representation in matrimonial cases.

To implement Recommendation 13 of the Special Committee on Matrimonial Litigation Report, the Supreme Court directed the Professional Responsibility Rules Committee, chaired by Justice Robert Clifford, to draft an appropriate amendment to the Rules of Professional Conduct. The Supreme Court also directed the Professional Responsibility Rules Committee to consider whether the prohibition should be a rule of general application.

In May 1999, the Professional Responsibility Committee requested comments from the bar regarding whether the prohibition on attorney-client sexual relations during representation should extend beyond matrimonial matters.

The prohibition of consensual attorney-client sex during legal representation should be a rule of general application. After a brief survey of the states on the issue of attorney-client sexual relations, this article will examine why a consensual sexual relationship with a client would likely violate numerous rules of conduct.

New Jersey's Rules of Professional Conduct do not expressly prohibit consensual attorney-client sexual relations during legal representation. However, in *In re Liebowitz*, the New Jersey Supreme Court held in a case that did not involve a consensual sexual relationship that attorney-client sexual contact during representation is suspect and may implicate several rules of professional responsibility. 104 N.J. 175 (1985).

Recognizing that a consensual sexual relationship with a client would likely implicate the rules of professional responsibility, California, Florida, Iowa, Minnesota, New York, North Carolina, Oregon, West Virginia, Utah, Wisconsin and Maryland have adopted express rules prohibiting attorney-client sexual relations during legal representation.

Colorado, Georgia, Illinois, Indiana, Kentucky, Kansas, Louisiana, Michigan, New Hampshire, New Jersey, South Carolina, Ohio, Rhode Island, South Dakota, Hawaii (unpublished disciplinary decision), and Texas have disciplinary decisions holding that attorney-client sexual relations during representation violated the rules of professional conduct. Alaska and Pennsylvania have issued ethics opinions advising the bar that attorney-client sexual relations during representation is unethical.

Recently, the American Bar Association Ethics 2000 Commission released for public comment a proposed amendment to Rule 1.8 of the Model Rules of Professional Conduct that would prohibit attorney-client sexual relations during representation. Alabama, Arizona, Massachusetts, Michigan, New Jersey, Oklahoma, Texas and Washington either considered or are presently considering a similar rule. And at least one state, Georgia, had considered a bill to criminalize attorney-client sexual contact.

The clear trend among states is toward prohibiting consensual attorney-client sexual contact during representation. For a comprehensive examination of attorney-client sexual relations, see generally, Abed Awad, *Attorney-Client Sexual Relations*, 22 *J. of Legal Prof.* 131 (1998).

Conflict of Interest

On its face, an attorney-client sexual relationship is likely to raise several conflict of interest issues. It is recognized that a sexual relationship may alter the lawyer's objectivity and detachment, resulting in incompetent representation. For instance, the termination of the sexual relationship can result in the termination of the legal representation to the detriment of the client.

A sexual relationship may raise disagreement on lawyers' fees. A sexual relationship will undoubtedly result in a change in attorney-client self-interest. An attorney in a sexual relationship with a client may not pursue the client's interests zealously out of fear that conclusion of the legal matter would end the sexual affair. In a divorce matter, for example, an attorney may be reluctant to pursue serious reconciliation between the client and his or her spouse. An attorney living with the client or considering a serious relationship with the client may urge the client not to seek child custody.

In short, a lawyer may pursue an unwise course of action on behalf of his/her client due to the sexual involvement. Most important, sexual involvement with the client may lead a lawyer to commit other ethical violations, such as disclosing confidential information or becoming a potential adverse witness.

Generally, any information obtained by the attorney in the professional relationship is privileged. When the lawyer is sexually involved with the client, it becomes difficult to determine whether information was obtained in the professional or sexual relationship. For example, a party in a marital dispute could subpoena the opposing attorney to testify regarding any matter arising out of the personal relationship that may be relevant to the divorce and other related issues, as opposed to the professional relationship, which is privileged.

Thus, the sexual relationship can prejudice or injure the client's case. Even a pre-existing sexual relationship with a divorce or custody client, for example, can prejudice the client's case. In essence, the emotional involvement characteristic of a sexual relationship has the potential to compromise the objective detachment that is required for adequate representation.

Misconduct

The misconduct rule stands for the proposition that if a lawyer is involved in conduct that is untrustworthy or deceitful, it reflects negatively on the practice of law. A lawyer must not be involved in conduct that will prejudice the administration of justice. Practitioners must ensure that their conduct does not suggest that they are not worthy of practicing law.

Courts have found the following conduct as reflecting negatively on the profession: commencing a sexual relationship with a divorce client during legal representation; having a sexual relationship during a contested will action where the attorney revealed confidences obtained during the sexual relationship; and engaging in sexual intercourse with client in a jail meeting room.

Courts have also found the following conduct prejudicial to the administration of justice: sexual relations with matrimonial clients; sex in a jail room with a client; sex in a vacant military courtroom with a client; sexual relationship with clients where the clients believed that their legal fees would be reduced due to the sexual relationship; and an affair with a client that resulted in the husband obtaining a divorce on the ground of adultery.

Fiduciary Duty

Lawyers owe their client a fiduciary duty. When attorneys commence a sexual relationship with a client, they are more likely to place their personal interest in the sexual relationship above the client's interest in the case. Therefore, this breaches the attorney's sacred fiduciary duty to clients.

In order for attorneys to fulfill their fiduciary duty to clients, lawyers are expected to provide emotionally detached, objective analysis of legal problems and issues for clients. A sexual relationship with a client betrays the client's trust and sets the stage for continued unfair exploitation of the lawyer's fiduciary position.

The ABA, commentators and courts have recognized that a sexual relationship between a lawyer and client may involve unfair exploitation of the lawyer's fiduciary position and/or significantly impair a lawyer's ability to adequately represent the client competently. Objective and detached analysis of the client's case becomes difficult when the attorney is sexually involved with a client.

Courts have found that using information obtained in the attorney-client relationship to initiate a sexual relationship is a breach of the fiduciary duty. One court found that by furthering his own interest in the sexual relationship, the attorney violated his fiduciary relationship as the client's attorney to act in her best interests.

The Need for an Express Rule

Many critics of an express rule prohibiting attorney-client sexual relations argue that the current rules of professional responsibility are adequate and sufficient to address the issue. Such argument is flawed.

Clearly, a conflict of interest is likely to arise when an attorney commences a sexual relationship with a client during representation. The exact nature of the violation, however, is not clear cut. If the attorney can demonstrate that the quality of the legal representation was not under-

mined, the sexual relationship may pass ethical scrutiny. Whether there can actually be effective consent to a conflict of interest in an attorney-client sexual relationship is dubious at best.

Clients in need of legal assistance usually view the attorney with utmost reverence, a savior so to speak. The attorney-client relationship is inherently unequal from the outset. Such an unequal relationship, especially where a client is emotionally or financially vulnerable, could be a recipe for abuse by attorneys. Can there be consent in such an unequal relationship? In most cases especially emotionally charged cases such as divorce, child custody, criminal and probate the answer is probably not.

Although an attorney-client sexual relationship would likely create a conflict of interest, and probably seriously harm the client, the conflict of interest inquiry would focus on the attorney's competency in representation relying on a subjective and arbitrary examination, overlooking the emotional harm that might result to the client.

The misconduct principle is general and arbitrary. Given the arguably consensual nature of an attorney-client sexual relationship, it is difficult to prove that such a relationship involved fraud, misrepresentation or deceit, and thus reflected negatively on the attorney's fitness to practice law, or prejudiced the administration of justice or violated the attorney's fiduciary duty to their client. The misconduct rule lacks specificity and is not adequate to address the problem of sexual relations. Like the conflict of interest and misconduct rules, the fiduciary duty concept is not always clear in application.

The principles of conflict of interest, misconduct, and fiduciary duty have been employed by analogy to deal with the ethical implications of attorney-client sexual relations. Such analysis can be subjective, arbitrary and cause uncertainty. An express rule stating that a sexual relationship with a client is a per se conflict of interest, misconduct, or breach of fiduciary duty, is a more effective and appropriate course of action.

Some commentators suggest that the prohibition should be limited to the matrimonial bar where clients are most vulnerable. That argument is also misplaced, because clients are involved in highly traumatic cases and are vulnerable, not only in matrimonial cases. In Formal Opinion 92-364 (1992), the ABA's Committee on Ethics and Professional Responsibility eloquently articulated the vulnerability of clients in general:

An individual client, in particular, is likely to have retained a lawyer at time of crisis. The divorce client's marriage is disintegrating. The criminal client may have just been arrested and could be facing the possibility of jail. The probate client is dealing with the loss of a loved one. The immigration client may be in fear of deportation. Other client may be trying to save a business or salvage a reputation.

New Jersey should adopt an express rule of general application prohibiting attorney-client sexual relations during representation. An express rule prohibiting attorney-client sex during representation is a minor regulation of an attorney's conduct and is likely to pass constitutional scrutiny.

An effective rule would prohibit sexual relations whether or not the relationship is viewed as exploitative of the attorney-client relationship. The rule should define sexual relations, exempt pre-existing relationships and provide that in-house attorney sexual relations with employees in the same entity would be governed by the general conflict of interest rule.

The proposed ABA rule prohibiting attorney-client sexual relations and the rules adopted by Iowa, Oregon, North Carolina, Minnesota, West Virginia, Utah and Wisconsin are excellent models for the New Jersey drafters.

If an attorney is romantically interested in a client, that practitioner should withdraw from representation, refer the client to another lawyer, or wait until the legal representation is concluded and then pursue the sexual or romantic relationship. Such conduct does not violate any rules.

Even an arguably consensual relationship may end up with a client alleging they were coerced or manipulated into the relationship. In sum, attorney-client sexual contact during representation undermines the integrity of the legal profession and may contribute to the negative image the public holds of lawyers. An express rule would protect the client from the attorney and the attorney from the client, thereby preserving the integrity of the legal profession.

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CORRECTION-DATE: April 3, 2000

CORRECTION:

Also in the March 13 issue, the name of author Abed Awad's firm was misspelled [In Practice, 159 N.J.L.J. 1081]. It is Chiaia, Von Schaumburg & Sabbath.

The Law Journal regrets the errors.