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Attorney-Client Sexual Relations

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I. Introduction

When one is presented with an opportunity for a consensual sexual encounter, it is possible that the person may proceed and succumb to temptation. Such a situation could, and often does, develop during an attorney's representation of a client. In an attorney-client relationship, the attorney holds the position of power and dominance. n1 When one is in [*132] volved in a legal matter, the attorney is viewed with utmost reverence, a sort of a savior. This perception explains the dominance an attorney has in an attorney-client relationship. The attorney-client relationship from the outset, therefore, is inherently unequal. n2 Such an unequal relationship, where the client in most cases is emotionally and financially vulnerable, is a recipe for abuse by attorneys. n3 Could there be consent in such a relationship? n4 In most cases, especially emotionally charged cases, n5 prob [*133] ably not. n6 Commenting on attorney-client sexual relations, one court succinctly stated: "we have nevertheless been consistent in noting that the professional relationship renders it impossible for the vulnerable layperson to be considered 'consenting.'" n7 It may be impossible for the lay person to be considered consenting. Certain non-lay persons may be considered consenting, for example, a high-powered corporate executive engaging in sex with her attorney. If, however, the executive is involved in a matrimonial or criminal matter, consent becomes questionable. n8 It is possible for a client to truly consent to a sexual relationship with an attorney, but it is rare. Clearly, the defense of consent is problematic due [*134] to the character of the majority of attorney-client relationships. n9 Given the nature of the attorney-client relationship, is the commencement of a sexual relationship between an attorney and client during legal representation unethical? The majority of jurisdictions and commentators would answer the question in the affirmative. n10

A myriad of law review articles have appeared in recent years exploring the regulation of attorney-client sexual relations. n11 This Article [*135] surveys the jurisdictions on attorney-client sexual relations. Most of what has been published on attorney-client sexual relations lumps sexual misconduct, such as unwanted sexual advances, with 'consensual' attorneyclient sexual relations. n12 Disciplining an attorney for unwanted sexual [*136] advances is simple, though, disciplining an attorney for a sexual relationship that is arguably consensual is not an easy task. This Article does not deal with sexual misconduct, as there are rules regulating such misconduct, but instead, focuses on 'consensual' attorney-client sexual relationships.

The Article consists of three parts. Part I surveys American jurisdictions' positions on attorney-client sexual relations and reveals that the majority have chosen to prohibit attorney-client sexual relations: ten states have adopted an express rule, n13 thirteen have disciplinary decisions prohibiting attorney-client sexual relations, n14 four have ethics opinions prohibiting attorney-client sexual relations, n15 and seven are considering a rule, or an ethics opinion prohibiting the same. n16 Part II analyzes the data from part I, finding that courts have employed, for the most part, three approaches to address attorney-client sexual relations: conflict of interest, misconduct, and fiduciary duty. This Article concludes that neither approach, deduced by analogy, is adequate to deal with the problem of attorney-client sexual relations and recommends an express rule prohibiting attorney-client sexual relations during representation. Finally, part III examines the constitutionality of a per se rule prohibiting attorney-client sexual relations concluding that such a rule would pass constitutional muster.

In the main, if an attorney is romantically interested in a client, he or she should either withdraw from representation or wait until the legal representation is concluded and then pursue a sexual or romantic relationship. Such conduct does not violate any rules. An express rule prohibiting attorney-client sexual relations is a minor regulation of an attorney's conduct and would pass constitutional scrutiny. n17 Even an arguably 'consensual' relationship could end up with a client alleging she was coerced or manipulated into the relationship. An express rule would protect the client from the attorney and the attorney from the client, thereby preserving the integrity of the legal profession. More importantly, an express rule would afford attorneys clear notice that a sexual relationship is a per se ethical violation. [*137]

Part One

I. Express Rule

This section examines the jurisdictions with express rules prohibiting attorney-client sexual relations. Ten states have adopted an express rule prohibiting attorney-client sexual relations.

A. California

California was the first State to enact a rule prohibiting attorney client sexual relations. California regulates attorney-client sexual relations under Rule 3-120 of its Rules of Professional Conduct. n18 The California rule postulates that a per se rule banning all sexual relations between attorney and client would be "overly broad and unnecessary." n19 Rule 3120 asserts that "a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel." The rule "is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation." n20 The rule expressly states that not all sexual relationships between an attorney and client are exploitative. Under what circumstances a sexual relationship is considered exploitative is not clear, however, the California Rule does provide some guidelines. For

example, demanding a sexual relationship with a client in exchange for representation or in lieu of legal fees or conditioning representation on sexual relations is unequivocally exploitative. n21 Moreover, coercing or intimidating or unduly influencing a client to engage in a sexual relationship is also unacceptable. n22 If the sexual relationship results in the attorney performing his service incompetently then the relationship is unethical. n23 The California rule, however, provides that a sexual relationship that predates [*138] the representation is permissible. n24 Finally, the California rule provides "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 are not within the ambit of the rule." n25

In addition to Rule 3-120, California has a statutory prohibition against attorney-client sexual relations. Section 6109.9 of the Business and Profession Code prohibits attorney-client sexual relations under certain conditions. n26 With the exception of minor drafting differences, section 6109.9 is almost identical to Rule 3-120. The main addition to section 6109.9 is that an attorney is prohibited from engaging in sexual relations with a client if the sexual relations "would be likely to damage or prejudice the client's case." n27

Overall the California rule is cautious but does not prohibit all sexual relations during representation. In essence, the California rule provides that sexual relations may create a conflict of interest. Unless the attorney's legal representation, due to the sexual relationship, was incompetent, however, the attorney will not have violated the rule. Further,

section 6109.9 does not provide that sexual relations would inherently damage or prejudice client's case. Attorney's would still be able to argue that their sexual relationship had not affected their legal representation nor prejudiced the client's case. Thus, many attorneys can engage in sexual relations with a client and not violate any professional rules of conduct. Nonetheless, the California rule unquestionably puts lawyers on notice that sexual relationships with clients may be suspect and result in some disciplinary action.

B. Florida

Unlike California, Florida regulates attorney-client sexual relations under the heading "Maintaining the Integrity of the Profession." n28 Rule 4-8.4(i) provides that a lawyer shall not "engage in sexual conduct with a client that exploits the lawyer-client relationship." n29 Unlike California's elaborate regulation, Florida succinctly states that if the lawyer exploits [*139] the client for sex, he will be violating the rule. Noting that "the lawyerclient relationship is grounded on mutual trust," the comment to the Florida Rule asserts that "a sexual relationship that exploits that trust compromises the lawyer-client relationship." n30 Like California, the Florida Rule recognizes that if the sexual relationship commenced prior to representation, it does not violate the Rule. n31 Except for the attorney who is actually representing the client, other attorneys at the firm are not subject to the Florida rule. n32

Under the Florida rule, a sexual relationship with a client is not exploitative per se. Thus, a lawyer can engage in sex with his client as long as he does not exploit the lawyer-client relationship. The circumstances in which an attorney is exploiting the attorney-client relationship are not clear.

C. Iowa n33

Iowa regulates attorney-client sexual relations under Disciplinary Rule 5-101-Refusing Employment When the Interest of the Lawyer May Impair The Lawyer's Independent Professional

Judgment. n34 The Iowa rule is more vocal against sexual relations. DR 5-101(B) states that "the attorney should not engage in a sexual relationship with a client." Unlike Florida's requirement that the sexual relationship be exploitative of the lawyer-client relationship and California's qualification that the sexual relationship result in incompetent representation, Iowa directs attorney not to have sexual relations. Under the Iowa Rule a spouse or pre-existing sexual relationship are exceptions, but not absolute exceptions. The Iowa [*140] rule suggests that "even in these provisionally exempt relationships, the attorney should strictly scrutinize his or her behavior for any conflict of interest to determine if any harm may result to the client or to the representation." n35 This emphasis indicates that sexual relations with clients in most instances, other than a spouse or pre-existing relationship, are clear violations of the Iowa rule.

Under the Iowa rule, an attorney should withdraw from representing the client if there is "any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship." n36 Any reasonable possibility is a strong presumption that an attorney-client sexual relationship would most probably violate the rule. The Iowa rule is much more explicit in its prohibition than Florida's and California's cautious approach.

D. Minnesota

Minnesota regulates attorney-client sexual relations under the conflict of interest heading. Unlike Florida and California which focus on the concept of sexual exploitation, Minnesota, like Iowa, to a great extent, has a blanket prohibition of attorney-client sexual relations. Rule 1.8(k) n37 provides that an attorney "shall not have sexual relations n38 with a current client . . . ." n39 Like California and Florida, but unlike Iowa where even a spouse or a predated sexual relationship is subject to scrutiny, Minnesota explicitly states that a consensual sexual relationship is not prohibited provided that the relationship "existed between them when the lawyerclient relationship commenced." n40 Like California, Iowa, and Florida, under the Minnesota rule, a sexual relationship with a client of the firm is not prohibited, as long as the attorney "has no involvement in the performance of the legal work for the client." n41 In-house attorney sexual relations with employees in the same entity are governed by Rule 1.7(b). n42 [*141]

E. New York n43

New York regulates attorney-client sexual relations under the heading of Misconduct. Unlike the above jurisdictions, New York was the first state to regulate sexual relations of attorneys and clients in domestic matters. n44 Disciplinary Rule 1-102(7) provides that a lawyer or law firm [*142] shall not "in domestic relations matters, begin a sexual relationship with a client during the course of the lawyer's representation of the client." n45 Although strictly speaking attorney-client sexual relations in non-domestic matters are not prohibited, New York case law suggests that sexual relations in non-domestic relations cases may violate the code of conduct. n46 [*143] New York observes, as is the case in most attorney-client sexual relations, that most attorney-client sexual relations are initiated during domestic matters where a client is most vulnerable. New York's response to this problem was a per se rule against any sexual relations between client and attorney in matrimonial matters. Although other jurisdictions have drafted rules broader in scope, they emphasized that the sexual relationship must have an exploitative nature to be prohibited. Unlike those jurisdictions, but like Iowa and Minnesota, New York has a blanket prohibition on attorney-client sexual relations in domestic matters.

F. North Carolina

North Carolina regulates sexual relations under Rule 1.18--Sexual Relations With Clients Prohibited. n47 Like Iowa and Minnesota, North Carolina provides that a lawyer "shall not have sexual relations with a current client of the lawyer." n48 Like most jurisdictions, North Carolina's prohibition does not apply to a spouse or to a preexisting consensual relationship. n49 Moreover, "a lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation." n50 Only the lawyer that is directly involved in the case is prohibited from engaging in sexual relations with client, while other attorneys in the firm are not within the ambit of the prohibition. n51

Recognizing the attorney's dominance in the attorney-client relationship, the Comment to Rule 1.18 clearly indicates that a sexual relationship is suspect and will violate the rule, even if consensual. Regardless of whether the relationship prejudiced the client's case, a sexual relationship with a client is prohibited. n52 According to the Comment, the rule "clarifies that a sexual relationship with a client is damaging to the lawyerclient relationship and creates an impermissible conflict of interest which cannot be ameliorated by the consent of the client." n53 Stating that attor [*144] ney-client sexual relations "present a significant danger to the lawyer's ability to represent the client adequately," the North Carolina rule asserts that a sexual relationship is a per se violation of the conflict of interest rule. n54 Unlike the cautious California and Florida rules, North Carolina's rule, like that of Iowa, weighs heavily against sexual relations.

G. Oregon n55

In Oregon, attorney-client sexual relations are regulated under the heading of conflicts of interest and mediation. The Oregon rule is identical to the Minnesota rule. Oregon Rule 5-110 provides that "a lawyer shall not have sexual relations n56 with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced." n57 Sexual relations with the client's representative falls within the Oregon rule. The rule states: "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." n58 Like the other jurisdictions, Oregon does not prohibit sexual relations with "other firm members who provide no" representation to the client. n59 The Oregon rule is a blanket prohibition against attorney-client sexual relations similar to the comparable rules in Minnesota, Iowa, and North Carolina. Both the Oregon and North Carolina rules, although exempting spousal and pre-existing relationships, state that the exemption could be superseded by con [*145] flict or prejudice to the client's case.

Although a pre-existing sexual relationship does not come within the rule, a 1995 Oregon State Bar Association Ethics Opinion watered down the exception. n60 Opinion 1995-140 states that despite the pre-existing exception, "continuing sexual relations during the course of the representation requires consideration of other rules." n61 The Opinion indicates that a conflict of interest could arise due to the continuing sexual relationship. The Opinion asserts that if the pre-existing sexual relationship could prejudice the client's case, continuing the relationship could result in a conflict of interest n62 and trigger the consent and disclosure requirement of DR 5-101(B). n63 Oregon, like Iowa, Minnesota, and North Carolina, clearly expresses its disfavor of attorney-client sexual relationships. H. West Virginia n64

Like New York and Florida, West Virginia regulates attorney-client sexual relations under the heading: Misconduct. n65 The West Virginia Rule is almost identical to that of Oregon and Minnesota. Rule 8.4 provides that it is professional misconduct for an attorney to "have sexual

relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed be [*146] tween them at the commencement of the lawyer/client relationship." n66 Unlike California and Florida where the sexual relationship must be exploitative or prejudicial to the client's case, West Virginia prohibits sexual relations with a client, unless the relationship predates representation, across the board. Like Minnesota, Iowa, North Carolina, and Oregon, West Virginia prohibits sexual relations even if the sexual relationship was not prejudicial or exploitative.

I. Utah

Utah regulates attorney-client sexual relations under misconduct. Rule 8.4(g) provides that it is professional misconduct for a lawyer to: "engage in sexual relations with a client that exploit the lawyer client relationship." n67 Like California, Utah focuses on the exploitative nature of a sexual relationship before prohibiting it. Unlike California, however, Utah creates a rebuttable presumption that an attorney-client sexual relationship is exploitative, except for a spousal or a pre-existing consensual relationship. n68

The Comments to the Utah rule emphasize that the policy behind their rule is basically to "proscribe sexual exploitation of the lawyer's client." n69 Moreover, the comments eschew that in an attorney-client sexual relationship, the lawyer "may be exploiting the client's trust in the lawyer, the client's vulnerability in a stressful situation, or the lawyer's superior professional position." n70 Such exploitation, the comment stresses, "compromises the lawyer client relationship." n71 Like North Carolina, Oregon, and Minnesota, Utah's rule weighs heavily against sexual relations. [*147]

J. Wisconsin n72

Wisconsin regulates attorney-client sexual relations under the heading of conflict of interest. In identical language to the Oregon, Minnesota, and West Virginia rules, Wisconsin Rule 20:1.8(k)(2) provides: "A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced." n73 Like Minnesota, in-house counsel engaging in a sexual relationship with employees of the same entity is regulated under Rule 1.7(b) and not under this rule. n74 Like Oregon, Minnesota, Utah, North Carolina, New York (domestic) and West Virginia, the attorney-client sexual relationship under the Wisconsin Rule is prohibited even if the sexual relationship is not found to be exploitative or prejudicial to the client's case. It is, therefore, a blanket prohibition.

Ironically, California, the first state to adopt an express rule dealing with attorney-client sexual relations, appears to have adopted the least effective rule. Unless the sexual relationship is found to be exploitative, the sexual relationship does not violate the California Rule. A sexual relationship is not a per se violation of the California rule. The focus remains on the legal representation rather than on the emotional harm to the client and the high probability that the sexual relationship would implicate many rules of conduct. With the exception of a cosmetic "sexual relationship" face lift, the arbitrary balancing of the conflict of interest rule remains intact under the California Rule. Florida followed the California approach. The California and Florida rules are difficult to characterize as explicit prohibitions. Many attorneys will be able to suc [*148] cessfully argue that their clients consented and that the sexual relationship was not exploitative nor did it adversely affect their legal representation. Nonetheless, both rules clearly indicate that a sexual relationship may likely be suspect and cause a violation of ethical rules.

The other eight states that have adopted express rules took the superior approach. Iowa, Oregon, Minnesota, New York (domestic), North Carolina, West Virginia, Utah, and Wisconsin adopted a rule explicitly prohibiting attorney-client sexual relationships stating that a sexual relationship is a per se violation, regardless of whether the sexual relationship was exploitative or not. This overwhelming majority will likely define the trend in other states. II. Disciplinary Decisions

This section examines the jurisdictions that do not have express Professional Rules of Conduct prohibiting attorney-client sexual relations. These jurisdictions, however, have applied other rules of conduct to prohibit attorney-client sexual relations. The survey reveals that these jurisdictions, like Minnesota, Wisconsin, and Oregon, have predominantly applied the conflict of interest rule. With minor rewording, Colorado, Indiana, Kentucky, New Hampshire, Ohio, Texas, Hawaii, and Rhode Island found that a sexual relationship between client and attorney "materially limited" the attorney's responsibilities to the client because of his own personal interests in the sexual relationship. Colorado, Kentucky, Ohio, and South Dakota held that a sexual relationship reflected negatively on the attorneys' fitness to practice law. Illinois, Ohio, South Carolina and South Dakota found that engaging in sexual relations with clients is conduct prejudicial to the administration of justice. [*149]

A. Colorado n75

In People v. Boyer, n76 Boyer, an attorney, engaged in a sexual relationship with a woman who retained him to represent her in legal separation proceedings. The sexual relationship continued during the legal representation. n77 In addition, Boyer met another woman who just had been served with a dissolution of marriage action. She discussed her legal problem with Boyer and believed that he would represent her. Boyer and this woman engaged in a sexual relationship. Although the woman represented herself in her marriage dissolution proceedings, Boyer represented her in a criminal case and during the conclusion of the marriage dissolution action. n78

The Court held that in both instances the respondent violated Disciplinary Rules 1-102(A)(6) and 5-101(A). n79 The Supreme Court of Colorado noted that although "'there is no evidence of harm to either' of the two women clients who consented to intercourse, we have clearly held in the past and here reaffirm that a sexual relationship between lawyer and client during the course of the professional relationship is inherently and insidiously harmful. The relationship can undermine the lawyer's professional integrity and judgment and dishonor the client's trust." n80 As such, [*150] Boyer was suspended for 180 days. n81

B. Georgia n82

In In re Lewis, the attorney engaged in a sexual relationship with a client he represented in a divorce and custody matter. n83 The special master found that this attorney's conduct violated the conflict of interest rule. n84 Suspending that attorney for three years, n85 the Supreme Court of Georgia held that in divorce and custody actions sexual conduct with the client is tantamount to a conflict of interest violation, that is, "his professional judgment on behalf of his client will be or reasonably may be affected by his own . . . personal interests." n86 The Court asserted that "every lawyer must know that an extramarital relationship can jeopar [*151] dize every aspect of a client's matrimonial case--extending to forfeiture of alimony, loss of custody, and denial of attorney fees." n87

C. Hawaii

There are no published opinions on sexual relations in Hawaii. However, the Hawaii State Bar Association has recently investigated two cases dealing with sexual relations. In the most recent case, the Ethics Committee found that an attorney's representation was materially limited by sexual contact (short of intercourse) with his client, and constituted a violation of HRPC 1.7(b)--conflict of interest. Lacking clear harm to the client, the attorney received the least severe form of discipline--a private informal admonition. n88

C. Illinois n89

In In re Rinella, n90 an attorney engaged in sexual relations with three clients while he represented them in matrimonial matters. The Illinois Supreme Court asserted that the attorney, by arranging "appointments purportedly to discuss their cases and by causing the clients to believe that their interest would be harmed if they refused his advances," n91 took advantage of his position and thereby committed "overreaching because [*152] he used his position of influence over the clients to pressure them to engage in sexual relations." n92

The Illinois Supreme Court approved the Hearing Board's findings. The attorney's sexual relationships with the three clients was "conduct prejudicial to the administration of justice," n93 that the attorney's professional judgment was affected by his personal interest, that he failed to "represent [his clients] with undivided fidelity," and brought "the legal profession into disrepute." n94 The attorney was suspended for three years. n95

D. Indiana n96

In In re Grimm, n97 the attorney was retained to represent the client in a divorce action. The attorney eventually engaged in sexual activity with the client. Subsequently, the client wanted to terminate the relationship. The attorney concluded this matter but then filed an attorney's lien against the client, even though he had not sent her an invoice for two years. n98

The Supreme Court of Indiana approved the hearing board's finding that the attorney's sexual relationship with his client violated Indiana Professional Conduct Rule 1.7(b), which provides in relevant part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not [*153] be adversely affected; and (2) the client consents after consultation. n99

The court pointed out that by failing to inform the client of the status of her attorney fees during the period of their personal involvement, the attorney "deprived her of notice that his legal bill was growing beyond his initial communicated estimation." n100 As such, the court found that the attorney "violated Professional Conduct Rule 1.7(b) by representing a client when the representation was materially limited by his own interests." n101 The court concluded by explaining that

lawyers are expected to provide emotionally detached, objective analysis of legal problems and issues for clients who may be embroiled in sensitive or difficult matters. Clients, especially those who are troubled or emotionally fragile, often place a great deal of trust in the lawyer and rely heavily on his or her agreement to provide professional assistance. Unfortunately, the lawyer's position of trust may provide opportunity to manipulate the client for the lawyer's sexual

benefit. Where a lawyer permits or encourages a sexual relationship to form with a client, that trust is betrayed and the stage is set for continued unfair exploitation of the lawyer's fiduciary position. Additionally, the lawyer's ability to represent effectively the client may be impaired. Objective detachment, essential for clear and reasoned analysis of issues and independent professional judgment, may be lost. n102

Finally, it was clear, according to the court, that the attorney's "intimate involvement with his client ultimately damaged his professional objectivity, poisoned their professional relationship, and led him to other professional misconduct." n103 As a result, the attorney was suspended for one year. n104 [*154] E. Kansas n105 [*155]

In In re Berg, n106 the attorney engaged in sexual relationships with several matrimonial clients. Berg was retained by a woman to represent her in a divorce proceeding. The client had been married for seventeen years, had two children and was suffering from psychological and physical abuse by her husband. n107 After a hearing in this matter, the attorney took the client to lunch and then engaged in sexual intercourse with her. The attorney had sex with the client on numerous other occasions. n108 Another woman retained the attorney for her divorce action. She was eighteen yearsold and had a one-year old child. n109 After the client's divorce was final, the client went to the attorney's office to sign certain court papers. While at the office, the attorney offered the underage child alcoholic beverages. Fearing that the attorney would not represent her in court, the client engaged in oral sex with the attorney. n110 The attorney continued his sexual relationship with the client. n111 Another client retained the attorney to regain custody of her two older children. The client was twenty-two years of age. After attending a court proceeding, the attorney engaged in sexual intercourse with the client. Feeling obligated t the attorney, the client continued to have sex with the attorney on other occasions. n112

Quoting ABA Formal Opinion 92-364, the disciplinary hearing panel found that the attorney manipulated and exploited these emotionally vulnerable, distraught, and financially dependent clients for his sexual pleasures. n113 Recognizing the vulnerability of divorce clients, the panel noted that an attorney engaging in sex with a client increases the likelihood that the attorney may becomes a witness in the proceedings and prejudice the client's case. n114 Although the sexual encounters were consensual and were not openly resisted, the panel recognized that "informed or [*156] meaningful consent" was questionable. n115 The panel concluded that the attorney violated MRPC 1.7(b) (conflict of interest), 1.8(b) (using information gained from the client to the disadvantage of the client), 2.1 (exercise of independent professional judgment), 3.7 (likely to be called as a witness), 8.4(d) (prejudicial to the administration of justice), 8.4(g) (conduct adversely reflecting on fitness to practice law), and 1.1 (competence). n116

F. Kentucky

In Kentucky Bar Association v. Meredith, n117 an attorney admitted that he became sexually involved with a client. n118 After being discharged as her attorney, Meredith "filed an affidavit with the district court to have his client, the mother, removed as guardian of her daughter." n119 The client filed an action against Meredith alleging an unethical sexual relationship during the representation and that the attorney revealed confidences gained during the attorney-client relationship. n120 The Kentucky Supreme Court agreed with the Kentucky Bar Association's inquiry tribunal that Meredith violated Disciplinary Rules 1-102(A)(6) and 5-101(A). n121 Disciplinary Rule 102(A) provides "that a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law Disciplinary Rule 5-101(A) provides that a law-

yer shall not accept employment, except with the consent of his client and after full disclosure, if the exercise of his professional judgment will be or reasonably may be affected by his own personal interests." n122

The court also agreed with the Commissioner's finding that "the relationship between them could also affect her creditability as a witness and that counsel should have been aware of this factor." n123 The Court stated that there was reasonable probability that the lawyer's personal and emotional involvement with the mother could have adversely affected the [*157] advice or services rendered during his employment." n124 The court publicly reprimanded the attorney for his conduct. n125

G. New Hampshire n126

In Drucker's Case, n127 an attorney was retained by a client to represent her in a divorce proceeding. Shortly thereafter, the attorney became sexually involved with the client. A judicial referee found that his conduct violated the Rules of Professional Responsibility and suspended him for two years. The Supreme Court of New Hampshire approved. The court indicated that in an earlier decision they "held that engaging in a sexual relationship with a client, without warning her of the potential effects on her case, was a violation of Rule 1.7(b). Rule 1.7(b) states, in part, that

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. n128

Finding that the attorney violated Rule 1.7(b), the court held that the attorney "not only failed to warn [the client] that having sexual relations could affect the divorce proceedings, especially the issue of child custody, but when she expressed concern he blandly reassured her that every [*158] thing would be fine." n129

The court also held that the attorney violated Rule 1.8(b) which provides, in pertinent part, that "a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation and with knowledge of the consequences." n130 The court noted, in this case, the attorney took advantage of the client's "emotional vulnerability by engaging in a sexual relationship with her, and that in doing so violated rule 1.8(b)." n131

Finally, the court found that, despite the attorney's awareness that the client suffered from agoraphobia and was seeing a psychiatrist, he proceeded to engage in a sexual relationship with the client during his legal representation of her. Thus, the court asserted, the attorney "failed to maintain a normal client-lawyer relationship." n132 As a result of his action, the attorney was suspended for two years. n133

H. New Jersey n134

In In re Liebowitz, n135 an attorney's law firm was involved in a matrimonial pro bono program. The firm was assigned an indigent case in which the woman was involved in custody litigation with her former husband. Liebowitz assigned this case to an associate at his firm. When the client came to the firm and met with Liebowitz, he informed her that her case had been assigned to his associate and then asked her out to dinner with other clients. After dinner, the attorney took the client to his [*159] apartment. She believed that they were to discuss her case. In

his apartment, Liebowitz made sexual advances toward her, including unbuttoning the top of her dress. The client resisted and left the apartment. n136 "The Special Ethics Master concluded that the evidence clearly and convincingly demonstrated that Liebowitz violated Disciplinary Rules 1102(A)(5) and (6). . . . The Master further found that 'sexual episodes with clients jeopardize the attorney-client relationship and have a strong potential to involve the attorney in a breach of one or more Disciplinary Rules.'" n137 The New Jersey Supreme Court agreed, pointing out that "the opportunistic misconduct toward his pro bono client . . . [and his] position of superiority or dominance . . . [indicated that the attorney's conduct] was prejudicial to the administration of justice . . . and brought the pro bono matrimonial counsel in disrepute. n138 The Supreme Court took under consideration many mitigating circumstances and recommended a public reprimand. n139

I. Ohio n140

In Disciplinary Counsel v. Booher, n141 an attorney was appointed by the common pleas court to represent a female client on felony charges. During the second meeting, he and the client engaged in sexual intercourse in the jail meeting room. n142 The Supreme Court of Ohio, agreed with the panel's findings, that the attorney violated Disciplinary Rule 5101(A) (accepting employment where a lawyer's professional judgment on behalf of his client reasonably may be affected by his own personal [*160] interest), 1-102(A)(5) (conduct prejudicial to the administration of justice), and 1-102(A)(6) (conduct adversely reflecting upon fitness to practice law). n143

Although it agreed with the findings of fact and conclusion of law of the Disciplinary Panel, the court felt that the attorney should get a more severe sanction. The court noted:

The lawyer-client relation in a criminal matter is inherently unequal. The client's reliance on the ability of her counsel in a crisis situation has the effect of putting the lawyer in a position of dominance and the client in a position of dependence and vulnerability. The more vulnerable the client, the heavier is the obligation upon the attorney not to exploit the situation for his own advantage. Whether a client consents to or initiates sexual activity with the lawyer, the burden is on the lawyer to ensure that all attorney-client dealings remain on a professional level. n144

The court held that the attorney failed to meet this burden and suspended him for one year. n145

J. Rhode Island n146

In In re Disandro, n147 a client retained an attorney in her divorce action. A sexual relationship began during the representation. n148 The Supreme Court of Rhode Island agreed with the board's recommendation that the attorney be publicly censured for violating Disciplinary Rule 5101(A) and Rule 1.7(b). n149 Noting that there is no specific prohibition [*161] against sexual relations between attorney and client under the Rules of Professional Conduct, the court asserted that

any attorney who practices in the area of domestic relations must be aware that the conduct of the divorcing parties, even in a divorce based on irreconcilable differences . . . may have a significant impact on the client's ability to secure child custody and/or may materially affect the client's rights regarding distribution of marital assets. An attorney who engages in sexual relations with his or her divorce client places that client's rights in jeopardy. The lawyer's own inter-

est in maintaining the sexual relationship creates an inherent conflict with the obligation to represent the client properly. n150

Thus, the court held that in a divorce action involving assets and child custody, "the attorney must refrain from engaging in sexual relations with the client or must withdraw from the case." n151 Although the court found that in the present case no actual adverse effect on the outcome occurred, it approved the Board's recommendation for public censure. n152 [*162]

K. South Carolina n153

In In re Bilbro, n154 an attorney represented a female client in a complicated divorce action during which they engaged in a sexual relationship. The Supreme Court of South Carolina agreed with the findings of the Panel and the Executive Committee that the sexual relationship was consensual and the attorney took advantage of his superior position as the client's lawyer. n155 The court concluded that "respondent engaged in sexual activity with Client and thereby knowingly jeopardized Client's right to alimony and could have prejudiced her custody of her children." n156 The attorney was suspended for six months.

L. South Dakota

In In re Discipline of Bergren, n157 Bergren had an on-going sexual relationship with a client and a similar relationship with another client. The Supreme Court of South Dakota found that both clients believed that their fees would be reduced or not billed if they gave sexual favors. The court held that "by violating the attorney-client relationship and taking advantage of his relationship, Bergren engaged in conduct that is prejudicial to the administration of justice. Such conduct demonstrates an unfitness to practice law." n158 Moreover, the court held "that having sexual relationships with clients violates Canon I, Disciplinary Rules 1102(A)(5) and (6) of the Code of Professional Responsibility. This Disciplinary Rule defines 'misconduct' as conduct which is prejudicial to the administration of justice and conduct that adversely reflects on fitness to [*163] practice law." n159 The attorney was suspended for one year. n160

M. Texas

An express rule prohibiting attorney-client sexual relations is under consideration in Texas. n161 Additionally, in a recent unpublished case the Texas State Bar Association publicly reprimanded an attorney for sexual contact with a client's wife. n162 In 1992, a client hired an attorney for a custody dispute with his first wife. Based on information from the attorney-client relationship, the attorney began a consensual sexual relationship with client's second wife. Three years later, the client discovered the affair and filed a complaint against the attorney. The Grievance Committee found the attorney's sexual relationship with his client's wife, and his [*164] personal interest in that relationship, adversely limited his representation of the client in violation of the conflict of interest rule. n163

III. Ethics Opinions

Although there are no explicit Professional Rules nor case law prohibiting attorney-client sexual relations, the respective Bars of Alaska, n164 [*165] Maryland, n165 and Pennsylvania n166 have published Ethics Opinions pro [*166] $ FN [*167] hibiting attorney-client sexual relations, either generally or under certain circumstances.

Considering a Rule or Ethics Opinion

In addition, there are news reports indicating that a rule or ethics opinion to addressing attorney-client sexual relations is under consideration, has been rejected or proposed in Alabama, n167 Arizona, n168 [*168] Oklahoma n169 Washington, n170 Michigan, n171 and Massachusetts. n172 [*169] $ FN [*170] The remaining jurisdictions, n173 as of yet, have not addressed the problems of attorney-client sexual relations.

Given that the majority of states have adopted the ABA Model Rules of Professional Conduct, the ABA's 1992 ethics opinion, indicating that a sexual relationship is suspect, will be very persuasive authority disfavoring attorney-client sexual relationships. The Chair of the Committee overseeing Vermont's n174 adoption of the ABA Model Rules, for ex [*171] ample, indicated that an attorney-client sexual relationship in Vermont would be subject to the conclusions reached in the 1992 ABA ethics opinion. It is just a matter of time when most states will adopt an express rule prohibiting attorney-client sexual relations. The trend is in the direction of express prohibition of attorney-client sexual relations.

Part Two

Part two analyzes the survey in part one. The jurisdictional survey conducted in part one indicates that courts have relied on one or a combination of the following rules to prohibit attorney-client sexual relations: conflict of interest, misconduct, or fiduciary duty rules. Part two examines each of these theories as they pertain to attorney-client sexual relations.

A. Conflict of Interest n175

The conflict of interest rule is the most popular approach utilized by courts and State Bars to prohibit attorney-client sexual relations. Rule [*172] 1.7(b) of the Model Rules of Professional Conduct provides that

a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or 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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. n176

Similarly, Disciplinary Rule 5-101(A) of the Model Code of Professional Conduct provides that, "except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." n177

Both rules address the quality of the legal representation. If the legal representation would be "materially limited" or "reasonably may be affected" by the lawyer's personal interest, then there is a conflict of interest. The underlying policy consideration for the conflict of interest rule is that "the lawyer's own interests should not be permitted to have an adverse effect on representation of a client." n178 Determining a conflict of interest is a matter of balancing the quality of representation with the personal interest of the attorney. n179 Where the quality of the legal representation is not affected by the lawyer's personal interests, the lawyer's actions do not rise to a conflict of interest. The comment to Model Rule 1.7 clearly illustrates that it is the "likelihood that a conflict will eventu [*173] ate" that gives rise to a conflict of interest. n180 If the con-

flict "eventuates," the analysis moves to "whether [the conflict] will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." n181

On its face an attorney-client sexual relationship is likely to raise several conflict of interest issues. n182 For instance, the termination of the sexual relationship can result in the termination of the legal representation to the detriment of the client. n183 A sexual relationship may raise disagreement on lawyer's fees. n184 It is recognized that a sexual relationship may alter the lawyer's objectivity and detachment resulting in incompetent representation. n185 A sexual relationship will undoubtedly result in a [*174] change in attorney-client self-interest. n186 An attorney in a sexual relationship with a client may not pursue his client's interest 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/her spouse. n187 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. n188 Most importantly, sexual involvement with a client may lead a lawyer to commit other ethical violations such as disclosing confidential information n189 or becoming a potential adverse witness. n190 Generally, any information obtained by the attorney in the professional relationship is privileged. n191 When the lawyer is sexually involved with the client, it becomes difficult to determine whether informa [*175] tion 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. n192 Most significantly, the sexual relationship can prejudice or injure the client's case. n193 Even a preexisting sexual relationship with a divorce or custody client, for example, can prejudice the client's case. n194 Sex with several indigent defendants was also found to materially affect the attorney's professional judgment. n195 The emotional involvement characteristic of a sexual relationship, has the potential to compromise the "objective detachment" that is required for adequate representation. n196

Although the above discussion demonstrates that a sexual relationship with a client, in most cases, would lead to a conflict of interest, many commentators argue that the conflict of interest rules are not adequate to address sexual relations. n197 Where the sexual relationship did [*176] not adversely affect the attorney's legal representation, it is argued that the conflict of interest principles are not implicated. n198 The most lethal attack on the conflict of interest rule is that the rule can be waived by the consent of the client or full disclosure. n199

Phyllis Coleman, for example, contends that neither consent nor full disclosure could save the attorney from conflict of interest in an attorneyclient sexual relationship. n200 She argues that at the moment an attorney becomes sexually involved with a client, his detached and objective judgment become suspect; second, transference and possible coercion leave consent, problematic, at best; and third, it is highly unlikely that the client would understand the adverse consequences of the sexual relationship even if attorney disclosed them. n201 Clearly,a conflict of interest would likely arise when an attorney commences a sexual relationship with a client. The violation, however, is not clear cut. If the attorney shows that the legal representation was not undermined, the sexual relationship may pass professional responsibility scrutiny. The notion that a client may consent to the conflict of interest raises the question of whether there could re-

ally be effective consent in an attorney-client sexual relationship. n202 In most instances, it would appear unlikely. [*177]

Although an attorney-client sexual relationship would likely create a conflict of interest, and probably seriously harm the client, n203 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 done to client. Such inquiries are inadequate. An express rule stating that a sexual relationship is a per se conflict of interest would be more appropriate.

B. Misconduct

As is the case with conflict of interest, attorney-client sexual relations may implicate Model Rules dealing with Misconduct. Courts have applied Rule 8.4(c) and (d) to cases of attorney-client sexual relations. Rule 8.4 provides: It is professional misconduct for a lawyer to . . . : (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice. Similarly, DR 1-102(A) provides: "a lawyer shall not (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (5) Engage in conduct that is prejudicial to the administration of justice (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

These rules stand for the proposition that if a lawyer is involved in conduct that is untrustworthy or deceitful, it reflects negatively on the practice of law. The rules are an attempt to protect the reputation and integrity of the Bar. A lawyer must not be involved in conduct that will prejudice the administration of justice. Finally, a lawyer must ensure that his or her conduct does not suggest that he or she is not worthy of practicing law. The misconduct rule basically address the public policy position of the Bar with respect to the integrity and competence of the legal profession.

What constitutes a negative reflection on the practice of law is not clear. The determination is based on a vague and arbitrary case-by-case basis. Courts have given little guidance. However, commencing a sexual relationship with a divorce client during legal representation, n204 having a [*178] sexual relationship during a contested will action where the attorney revealed confidences obtained during the sexual relationship, n205 engaging in sexual intercourse with client in jail meeting room, n206 and oral sex in a Family Court conference room, n207 were found to reflect negatively on the practice of law.

It is easier to determine when a lawyer's conduct constitutes prejudice to the administration of justice. However, here again, the courts have not given much guidance. Courts have found that sexual relations with three clients in matrimonial matters, n208 sex in a jail room, n209 sex in a vacant military courtroom, n210 oral sex in a Family Court conference [*179] room, n211 a sexual relationship with a divorce client, n212 sexual relationship with clients, where the clients believed that their legal fees would be reduced due to sexual relationship, n213 sexual relationship with a client involved in a family law matter, n214 an attorney's affair with a client that resulted in the husband getting a divorce on the ground of adultery, n215 and a sexual relationship in general with a client n216 were found to be prejudicial to the administration of justice.

The misconduct principles are general and arbitrary. The courts have not given much guidance on how a 'consensual' sexual activity could [*180] reflect on the lawyer's unfitness to practice law. n217 The misconduct rule is not adequate to address the problem of sexual relations.

Most commentators agree. n218 One commentator correctly observes that the court misconduct rule lacks specificity and this leads to "inconsistent application" and "failure to provide notice" as to whether a sexual relationship is prohibited. n219 With the flaws inherent in the Rule regarding conflict of interest, conflict of interest provides a more reasoned approach to sexual relations than does misconduct. Nevertheless, both theories by analogy are inadequate in the attorney-client sexual relations scenario. A sexual relationship should be a per se violation of the misconduct rule, and/or a conflict of interest.

C. Fiduciary Duty

The fiduciary duty that an attorney owes his or her client has its origin in common law. This notion was best articulated in 1850 by the Supreme Court:

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the determent or prejudice of the rights of the party bestowing it. n220

The lawyer has a "duty to exercise and maintain the utmost good faith, honesty, integrity, fairness and fidelity." n221 The principles underlying a fiduciary duty are recognized in both the Model Rules and the Model Code. n222 A fiduciary duty is "a duty to act for someone else's [*181] benefit, while subordinating one's personal interests to that of the other person." n223 According to Professor Gillers, there are three reasons that strongly suggest a lawyer has a fiduciary obligation toward his client when the professional relationship commences: (1) "the client will likely have begun to depend on the attorney's integrity, fairness, and judgment;" (2) "the attorney may have acquired information about the client that gives the attorney an unfair advantage in negotiations between them" and (3) "the client will generally not be in a position where he or she is free to change attorneys, but will rather be economically or psychologically dependent on the attorney's continued representation." n224 Unquestionably, a lawyer owes his client a fiduciary duty. When an attorney commences a sexual relationship with a client he is more likely to place his personal interest in the sexual relationship above the client's interest in his case, thus, breaching his sacred fiduciary duty to his client. n225

In order for attorneys to fulfill their fiduciary duty to their clients, "lawyers are expected to provide emotionally detached, objective analysis of legal problems and issues for clients." The ABA, commentators and courts alike, 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." n226 Objective and detached analysis of the [*182] client's case becomes difficult when the attorney is involved sexually with the client.

Courts have found that using information obtained in the attorneyclient relationship to initiate a sexual relationship is a breach of the fiduciary duty. n227 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." n228 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." n229

The judicial trend is to recognize that an attorney-client sexual relationship during representation will likely result in a breach of the attorney's fiduciary duty; n230 though, like "misconduct" and "conflict of interest," "fiduciary duty" does not adequately address the attorney-client sexual relationship. The principles of conflict of interest, misconduct, and fiduciary duty have been employed by analogy which can be subjective, arbitrary and cause uncertainty. n231 Therefore, while fiduciary duty is relevant to sexual relations, the principle is always clear in application. An express rule stating that a sexual relationship is unethical per se, would be more effective and appropriate. [*183]

Part Three

A per se Prohibition of Attorney-Client Sex is Constitutional

Some commentators postulate that prohibiting attorney-client sexual relations violates the attorney's and client's right of privacy. n232 A right of privacy is not expressly provided under the United States Constitution. n233 Nonetheless, relying on the First Amendment, n234 Third Amend [*184] ment, n235 Fourth Amendment, n236 Fifth Amendment, n237 Ninth Amendment, n238 and Fourteenth Amendment, n239 the Supreme Court has consistently found that "a right of personal privacy" or "zones of privacy" n240 is covered under the Constitution. n241 The extent of this privacy right is not clear; but it is constantly, albeit slowly, evolving. In 1965, the Supreme Court in Griswold v. Connecticut, n242 struck down a Connecticut statute banning the sale of contraceptives, finding the statute violated a married couple's right of privacy. Several years later, in Eisenstadt v. Baird, n243 the Supreme Court broadened its notion of privacy rights by striking down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried people. The Court stated that the right to privacy for married or single people means "to be free from unwarranted govern [*185] mental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." n244 Soon thereafter, the Supreme Court, in Roe v. Wade, n245 expanded the right of privacy further to include a women's right to terminate her pregnancy. The progressive trend toward recognizing peoples' right of privacy and "to be let alone" was halted in Bowers v. Hardwick. n246 In Bowers, the respondent, Hardwick, in the privacy of his home, engaged in consensual homosexual intercourse in violation of a Georgia statute criminalizing sodomy. A sharply divided Supreme Court (5-4) upheld the Georgia statute holding that consensual homosexual sex was not a fundamental right asserting that "any claim" that prior Supreme Court precedent n247 "nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is insupportable." n248 The Supreme Court has refused to recognize a general right of privacy in sexual matters that would encompass homosexuality, adultery, fornication or other consensual sexual conduct which the State could prohibit. n249

Where does attorney-client sexual relations fit within this Supreme Court line of cases? The requisite State action necessary to trigger constitutional scrutiny of a per se rule prohibiting attorney-client sexual relations is satisfied by the adoption of Professional Rules of Responsibility by the supreme court of each State. n250 In view of Hardwick, it seems that attorneys may not have a fundamental right to engage in consensual heterosexual sex with their clients. Thus, prohibition of attorney-client sexual relations during representation would be subject to rational basis review, i.e., the regulation need only be "rationally related to a legitimate [*186] State interest." n251 Generally, the State has a legitimate interest to regulate the conduct of attorneys through the adoption of extensive and detailed rules of conduct. Specifically, the State has a le-

gitimate interest in protecting clients from attorney overreaching and sexual exploitation of clients. The state has a legitimate interest in preserving the integrity of the Bar and insuring that conflicts of interest are avoided and that the administration of justice is not undermined by attorney-client sexual relationships. n252 The State has a legitimate interest to ensure the public receives competent legal services not undermined by an attorney's personal interest in sexual relationships with clients. Such a minor regulation of attorney-client sexual relations during representation is related to the State's legitimate interests. Therefore, a per se prohibition of attorneyclient sexual relations during representation easily passes rational basis review.

Even if a consensual sexual relationship is considered a fundamental right, a per se prohibition of attorney-client sexual relations would withstand strict scrutiny, i.e., a compelling state interest that is narrowly tailored to serve that interest. n253 The State has a compelling interest in regulating the legal profession within its jurisdiction. n254 In fact, courts have consistently held that the practice of law is not a fundamental right. n255 The State has a compelling state interest to protect the general welfare of the public by regulating professions such as the medical and legal professions. The State has a compelling state interest to promote competent legal services, insure detached and objective legal representation, to avoid conflicts of interest, to curtail conduct that adversely reflects on the practice of law, and conduct that is prejudicial to administration of justice. [*187] The State has a compelling interest in preserving the integrity of the Bar and public image of the legal profession. n256 Prohibiting attorney-client sexual relations during legal representation is narrowly drawn and serves to achieve these compelling state interests. n257

An argument could be made that the right to freedom of association is implicated by a per se rule prohibiting attorney-client sexual relations. In Roberts v. United States Jaycees, n258 the Court recognized a constitutional right of freedom of association to "enter and maintain intimate human relationships." n259 These "certain . . . relationships" are afforded "a substantial measure of sanctuary from unjustified interference by the State." n260 The types of relationships that might deserve this constitutional protection are "those that attend the creation and sustenance of a family, [e.g.] the raising and education of children, and cohabitation with one's relatives." (footnotes omitted). This constitutional right "receives protection as a fundamental element of personal liberty." n261 Given that the Court has refused to recognize homosexual, adulterous, and consensual sexual relations as fundamental rights worthy of constitutional protection, a rule prohibiting an attorney from engaging in sexual relations with their clients does not qualify as a "certain" relationship worthy of "a substantial measure of sanctuary from unjustified" state intrusion. Thus, a per se rule prohibiting attorney-client sex during legal representation would be subject to rational basis review. As the earlier discussion illustrates, such a per se rule would withstand a rational basis review.

The Court in Robert v. United States Jaycees, also recognized that freedom of association includes "a right to associate for the purpose of engaging in those activities protected by the First Amendment - speech, assembly, petition for the redress of grievances, and the exercise of reli [*188] gion." n262 A state intrusion on the right "to associate for expressive purposes" would be upheld, if the state has a compelling state interest "unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." n263 It could be argued that prohibiting attorney-client sex infringes on the attorney's and client's right to sexual expression. The state, as illustrated earlier, has a compelling state interest in regulating attorneys in general, and attorney-client sexual relations in particular. The prohibition is not re-

lated to "the suppression of ideas." The prohibition is to protect clients from exploitative attorneys. Moreover, the prohibition of attorney-client sex is restricted to relations during legal representation. Attorneys can withdraw from legal representation and then commence a sexual or romantic relationship with a former client. Attorneys are not prohibited fromengaging in sexual relations with their spouse or a with a partner in a preexisting relationship. Prohibiting attorney-client sex during representation advances the state's legitimate concerns regarding the protection of the public from exploitative attorneys, and "abridges no more speech or associational freedom than is necessary to accomplish that purpose," n264 that is, the prohibition is least restrictive of associational freedoms.

A per se prohibition on attorney-client sexual relations is not unconstitutionally overbroad. n265 "Where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." n266 As Broadrick indicates, the overbreadth doctrine has little application outside challenges regarding an imposition on the First Amendment protection of pure speech. Attorney-client sexual relations, it could be argued, involve expressive associational conduct. The only arguably protected instance in an attorney-client sexual is where the client truly had consented to the sexual contact. Given the nature of the attorney-client relationship, consent is rare, and problematic at best. n267 Even [*189] where the client had truly 'consented,' the sexual relationship may implicate several rules of professional responsibility such as conflict of interest, reflect negatively on the legal profession, and prejudice the administration of justice, to name a few. n268 Moreover, the prohibition is limited only during legal representation. Considering the limited scope and the unlikelihood that other, constitutionally protected conduct might be swept with a per se prohibition of attorney-client sexual contact, it could hardly be argued to overbroad, much less substantially overbroad to warrant overbreadth protection. Therefore, an explicit rule prohibiting attorneyclient sexual relations would easily surmount an overbreadth challenge.

A per se ban would also have no effect on an attorney's private relationships outside of the attorney-client relationship. Furthermore, if an attorney is romantically interested in a client, he or she should withdraw from representation before considering pursuit of a sexual or romantic relationship. The attorney should also wait until the legal representation is concluded before commencing a romantic relationship. These actions would not violate any rules. Even an arguably 'consensual' relationship may end up with a client alleging she was coerced or manipulated into the relationship.

A client-initiated sexual relationship will also implicate the same problems and conflicts as an attorney initiated sexual contact. An express rule would protect the client from the attorney and the attorney from the client preserving the integrity of the legal profession; and most importantly an express rule affords attorneys clear notice that a sexual relationship is a per se ethical violation. An express rule prohibiting attorney-client sexual relations is a minor regulation of attorney's conduct and would pass constitutional scrutiny.

V. Conclusion

The judicial trend is unequivocally in the direction of prohibition of attorney-client sexual relations. The Roscoe Pound-American Trial Lawyers Foundation n269 and the American Academy of Matrimonial Lawyers, n270 both have express rules prohibiting attorney-client sexual relations. The medical profession has long prohibited sexual relations be [*190] tween doctor-patient. n271 The American Psychiatric Association also prohibits sexual relations be-

tween psychiatrist-patient. n272 More than twentyseven jurisdictions have Professional Rules or Ethics Opinions prohibiting sexual relations. At least another eight are considering a Rule or Ethics Opinion. In sum, the legal community believes that "attorneys owe the utmost duty of good faith and fidelity to clients." Sex with clients may undermine this "utmost duty." Most importantly, "while sex with clients was winked at in earlier eras, it no longer is ignored by modern disciplinary rules." n273 Thus, express rules regulating attorney-client sexual relations are welcome and warranted.

Almost every disciplinary opinion addressing attorney-client sex, and an overwhelming majority of commentators have proffered that a sexual relationship may, n274 probably, potentially, n275 likely, or possibly n276 im [*191] plicate numerous ethical rules. It is time to make things clear to attorneys: A sexual relationship with a client violates the Rules. States should adopt express rules that prohibit attorney-client sexual relations during representation. The rule must clearly define what are "sexual relations" and "clients." The rule should also provide that in-house attorney sexual relations with employees of the same entity should be governed by regular conflict of interest rules. Iowa, Minnesota, Wisconsin and North Carolina are among the best examples to follow. With such notice, an attorney will think twice before entering the attorney-client sexual twilight zone; and if they want to succumb to temptation, all they need do is to refer the client to a colleague or other attorney before commencing the romantic or sexual relationship.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of ChildrenElementsGovernmentsFiduciary ResponsibilitiesLegal EthicsProfessional ConductGeneral Overview

FOOTNOTES:

n1 See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992) [hereinafter ABA Opinion] (noting that the attorney-client relationship "is often inherently unequal" and recognizing that "the factors leading to the client's trust and reliance on the lawyer also have the potential for placing the lawyer in a position of dominance and the client in a position of vulnerability"). See, e.g., *Disciplinary Counsel v. Booher, 664 N.E.2d 522, 522 (1996)* (asserting that the "client's reliance on the ability of her counsel in a crisis situation has the effect of putting the lawyer in a position of dominance and the client in a position of dependence and vulnerability"); *People v. Good, 893 P.2d 101, 103 (1996)* ("Often the lawyer-client relationship is characterized by the dependence of the client on the lawyer's professional judgment, and a sexual relationship may well result from the lawyer's exploitation of the lawyer's dominant position."); *In re Disciplinary Proceedings Against Kraemer, 547 N.W.2d 186, 190 (1996)* (finding that attorney "impermissibly took advantage of the dominance that often characterized the lawyer's position in an attorney-client relationship" in order to engage in a sexual relationship with client.). See also Jennifer L. Myers, David Sonenshein & David N. Hofstein, To Regulate Or Not To Regulate Attorney-Client Sex? The Ethical Question In Pennsylvania, *69 Temp. L. Rev. 741, 768 (1996)* (stating that "power inequalities are largely a result of the perceived privileged

status held by attorneys. More importantly, client subordination is caused by the actual power the attorney wields in the legal world in relations to clients.").

n2 *In re Disciplinary Proceeding Against Kraemer, 547 N.W.2d 186, 190 (1996).*

n3 See, e.g., *In re Grimm, 674 N.E.2d 551, 554 (1996)* (explaining that "clients, especially those who are troubled or emotionally fragile, often place a great deal of trust in the lawyer and rely heavily on his or her agreement to provide professional assistance. Unfortunately, the lawyer's position of trust may provide opportunity to manipulate the client for the lawyer's sexual benefit."). See also ABA Opinion, supra note 1.

The nature of the matter can also affect the degree of dependence. An individual client, in particular, is likely to have retained a lawyer at a 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 clients may be trying to save a business or salvage a reputation.

Ethics Comm. of the Alaska Bar Ass'n, Op. 92-6 (1992) (lamenting that in "emotionally traumatic" cases such as divorce, child custody and criminal matters, clients' judgment during these emotional matters "can be expected to be impaired, making them more vulnerable to the advances of a lawyer or more likely to initiate advances of their own").

n4 See, e.g., ABA Opinion, supra note 1 ("In many cases, the client's ability to give meaningful consent is vitiated by the lawyer's potential undue influence or the emotional vulnerability of the client."); California State Bar Comm. Prof. Resp. Op. 1987-92 ("If the sexual relationship is ongoing, there may be an element of undue influence in obtaining the client's consent."); Kansas Bar Ass'n, Formal Op. No. 9413 (1995) (asserting that "the lawyer who pursues a sexual relationship with a client, even a consenting one, leaves most clients in a situation that is not truly consensual"); see also Caroline Forell, Oregon's "Hands-Off" Rule: Ethical And Liability Issues Presented By Attorney-Client Sexual Contact, *29 Willamette L. Rev. 711, 725-26 (1993)* ("The discrepancy in power between the attorney and the client makes exploitation probable and makes it highly unlikely that a client's consent to a sexual relationship is truly voluntary."); Phylis Coleman, Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex, *53 Alb. L. Rev. 95, 97, 138 (1988)* (lamenting that "'consent' may actually be transference masquerading as love" and that "voluntary consent is nearly impossible during the course of a power dependency relationship") (footnotes omitted).

n5 See Alaska Ethics Op. No 92-6, supra note 3 (insisting that sexual relationships with clients are harmful to the clients in "emotionally traumatic" cases, such as, "divorce, child custody or adoption disputes, or criminal matters involving the client, client's spouse or other family member"); see also *Disciplinary Counsel v. Booher, 664 N.E.2d 522 (1996)* (asserting that the attorney-client relationship "in a criminal matter is inherently unequal"); Coleman, supra note 4, at 127 (stating: "Divorce and criminal law clients appear to be most vulnerable to sexual exploitation.").

n6 Although courts have recognized that in psychiatrist-patient relationships the theory of transference exits, court have been reluctant to find that "transference" exists in the attorney-client relationship. See *Suppressed v. Suppressed, 565 N.E.2d 101, 105 (1990).* In Suppressed, the court noted that "the fiduciary duty owed by an attorney differs from the fiduciary duty owed by psychotherapist." The court explained further in a footnote that "it appears that, when imposing liability upon a psychotherapist for malpractice, courts have relied upon the fact that the psychological dependency of a patient undergoing therapy often results in a medically recognized phenomenon known as "transference," whereby the patient transfers feelings to the therapist. The mishandling of this phenomena by a trained therapist, resulting in sexual involvement with the patient, has been deemed malpractice." *Id. at 105 n.2;* but see Rhoda Feiberg & James Tom Greene, Transference and Countertransference issues in Professional Relationships, *29 Fam. L.Q. 111 (1995)* (discussing transference and counter transference phenomena in the legal and health profession, finding its presence in both); Jennifer L. Myers et al., To Regulate Or Not To Regulate Attorney-Client Sex? The Ethical Question In Pennsylvania, *69 Temp. L. Rev. 741, 778-785* (maintaining that transference exists within the attorney-client relationship and as such the authors contend that "there is a need to regulate sexual relations between attorneys and clients in order to prevent lawyers from mishandling the transference phenomenon by engaging in sexual relations with clients"); Nancy E. Goldberg, Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule, *26 Akron L. Rev. 44, 74 (1992)* ("The relationship between an attorney and client involves the phenomenon of transference . . . .")

n7 *Iowa Sup. Ct. Bd. of Professional Ethics and Conduct v. Hill, 540 N.W.2d 43, 44 (1995).*

n8 Even if the executive is in the position of dominance and has consented, the sexual relationship would likely raise a conflict of interest scenario. See generally infra part II.

n9 See Phyllis Coleman, Sex In Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex, *53 Alb. L. Rev. 95, 97 (1988)* (lamenting that in power dependency relationships, like attorney-client, "'consent' is suspect").

n10 See, e.g., *In re Liebowitz, 516 A.2d 246, 248 (N.J. 1985)* (finding that "sexual episodes with clients jeopardize the attorney-client relationship and have a strong potential to involve the attorney in a breach of one or more Disciplinary Rules") (emphasis added); see infra authorities cited in footnote 11; see generally parts I and II.

n11 See, e.g., John M. O'Connell, Note, Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule, *92 Colum. L. Rev. 887* (advocating a per se rule prohibiting attorney-client sexual relations); Lawrence Dubin, Sex and the Divorce Lawyer: Is the Client Off Limits? *1 Geo. J. Legal Ethics 585 (1988)* (proposing per se rule for divorce attorney); Lawrence Dubin, How the Michigan Supreme Court Can Better Protect the Public From Bad Lawyers: The Ball is in Their Court, *73 U. Det. Mercy L. Rev. 667 (1996)* (ad-

vocating that Michigan adopt a per se rule prohibiting attorney-client sexual relations as a conflict of interest); Jill M. Crumpacker, Note, Regulation of Lawyer-Client Sex: Codifying the "Cold Shower" or a "Fatal Attraction" per se? *32 Washburn L.J. 379 (1993)* (presenting both argument for and against prohibiting of attorney-client sexual relations); Caroline Forell, Oregon's "Hands-Off" Rule: Ethical and Liability Issues Presented By Attorney-Client Sexual Contact, *29 Willamette L.J. 711 (1993)* (advocating a per se rule prohibiting attorney-client sexual relations and allowing recovery for emotional injuries that were created from sexual relationship); Caroline Forell, Lawyer, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues, *22 Golden Gate U. L. Rev. 611 (1992)* (proposing a clear per se ethical rule prohibiting attorney-client sexual relations); Thomas Lyon, Sexual Exploitations of Divorce Clients: The Lawyer's Prerogative?, *10 Harv. Women's L.J. 159, 178 (1987)* ("Given the potential harm of attorney-client sexuality, divorce lawyers ought to be both ethically and legally obligated to resist the temptation to satisfy their personal desires in their professional capacity."); Molly A. McQueen, Regulating Attorney-Client Sex: The Need For An Express Rule, *29 Gonz. L. Rev. 405, 406* (1993-1994) (insisting that "a bright line rule is a valid and necessary means to protect clients against coercive sexual advances from their attorneys"); Nancy E. Goldberg, Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule, *26 Akron L. Rev. 45 (1992)* (advocating an express prohibition of sexual relationship between an attorney and client); Anthony E. Davis & Judith Grimaldi, Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule, 7 Notre Dame J.L. Ethics & Pub. Pol'y 57 (1993) (stressing the need for a specific rule prohibiting attorney-client sexual relations); Linda Mabus Jorgenson & Pamela K. Sutherland, Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact, *45 Ark. L. Rev. 459 (1992)* (noting that there should be a rebuttable presumption that the attorney breaches his fiduciary duty to client when engaged in sex and proposing a ban); David H. Pincus, Note, Lawyers in Lust: Does New York's New Rule Addressing Attorney-Client Sexual Relations Do Enough? *2 J.L. & Pol'y 249 (1994)* (encouraging New York to expand its prohibition of attorney-client sex further than domestic relations); Marvin H. Firestone & Robert I. Simon, Intimacy Versus Advocacy: Attorney-Client Sex, *27 Tort & Ins. L.J. 679 (1992)* (suggesting the need for clear ethical guidelines in attorney-client sexual relationships and arguing that divorce and probate matters are most vulnerable for the client and should not be exploited; Jennifer L. Myers et al., To Regulate Or Not to Regulate Attorney-Client Sex? The Ethical Question In Pennsylvania, *69 Temp. L. Rev. 741 (1996)* (advocating a per se prohibition in Pennsylvania and all over); Margit Livingston, When Libido Subverts Credo: Regulation Of Attorney-Client Sexual Relations, *62 Fordham L. Rev. 5 (1993)* (advocating a per se rule prohibiting attorney-client sexual relationship); Yael Levy, Attorneys, Clients and Sex: Conflicting Interests in the California Rule, *5 Geo. J. Legal Ethics 649 (1992)* (proposing a prohibiting of attorney-client sex in divorce case, custody cases, criminal cases and pro bono cases); Linda Fitts Mischler, Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex, *10 Geo. J. Legal Ethics 209 (1997)* (arguing that a ban on sexual relations is unconstitutional intrusion in attorney and client right to privacy and proposes education of bar and client rather than treating women as vulnerable sexual objects); Phyllis Coleman, Sex in Power Dependency Relationships: Taking Unfair Advantage Of the "Fair" Sex, *53 Alb. L. Rev. 95, 128 (1988)* (stating that "a sexual relationship during any legal representation should be prohibited");

Joanne Pelton Pitulla, LawyerClient Sex-Incompatible Roles?, Professional Law., 6 No. 2 Prof. Law 14 (1995) (finding that attorney-client sexual conduct violates the existing rules of professional conduct); Robert H. Muriel, Suppressed v. Suppressed: A Court's Refusal To Remedy the Legal Profession's "Dirty Little Secret," Attorney-Client Sexual Exploitation, *23 Loy. U. Chi. L.J. 309, 313 (1992)* (predicting that per se rules prohibiting attorneyclient sexual relations will be adopted by many states and that courts will likely allow clients to recover monetary damages for malpractice when an attorney induced or coerces client into sexual relations); Howard W. Brill, Sex and the Client: Ten Reasons To Say "No!," *33 Santa Clara L. Rev. 651 (1993)* (listing ten reasons why a lawyer should not engage in sexual contact with clients); Melissa M. Eckhause, Note, A Chastity Belt for Lawyers: Proposed MRPC 1.8(k) and the Regulation of Attorney-Client Sexual Relationships, *75 U. Det. Mercy L. Rev. 115 (1997)* (supporting Michigan's proposed rule prohibiting attorney-client sex).

n12 "Consensual' is placed in inverted comma due to its problematic nature in an attorney-client sexual relationship. The Article focuses on sexual relationships, be it intercourse or not, that were arguably consensual.

n13 See infra part I(A).

n14 See infra part I(B).

n15 See infra part I(C).

n16 See infra part I(D).

n17 See infra part III.

n18 Cal. Rules of Professional Conduct Rule 3-120(A) (1987). "For purposes of this rule, 'sexual relations' mean sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse." Id.

n19 California State Bar Comm. Prof. Resp., Formal Op. No. 1987-92 (1987).

n20 Cal. Rules of Professional Conduct Rule 3-120 cmt (1997).

n21 Id. Rule 3-120(B)(1).

n22 Id. Rule 3-120(B)(2).

n23 Id. Rule 3-120(B)(3).

n24 Cal. Rules of Professional Conduct Rule 3-120(C) (1997).

n25 Id. Rule 3-120(D).

n26 *Cal. Bus. & Prof. Code ß 6106.9* (1993).

n27 Id. ß 6106.9(3).

n28 Florida Rules of Professional Conduct Rule 4-8.4. (1997).

n29 Id. Rule 4-8.4(i).

n30 Id. Rule 4-8.4(i) cmt.

n31 Id.

n32 Id.

n33 For Iowa cases on attorney-client sexual relations see, e.g., *Iowa State Bar Ass'n v. Hill, 436 N.W.2d 57 (Iowa 1989)* (suspending attorney for three months finding that attorney commencing a sexual relationship with client he was representing in divorce and custody matter was unethical as it adversely reflected on attorney's fitness to practice law and was conduct involving moral turpitude and had great potential of prejudicing the clients case). Mr. Hill did not learn his lesson. Not long after this decision, Hill went on to make "unwelcomed sexual advances toward another female client." This time, Hill's license was suspended for twelve months. *Iowa Supreme Court Board of Professional Ethics and Conduct v. Hill, 540 N.W.2d 43 (Iowa 1995).*

n34 Iowa Code of Professional Responsibility DR 5-101 (1997).

n35 Iowa Code of Professional Responsibility DR 5-101(B).

n36 Id. DR 5-101.

n37 Minnesota Rules of Professional Conduct Rule 1.8 (1997).

n38 "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate part of the lawyer. Id. 1.8(k)(1)

n39 Id. 1.8(k).

n40 Id.

n41 Id. 1.8(k)(3).

n42 Id. 1.8(k)(2) stating: "In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7(b) rather than by this rule with respect to sexual relations with other employees of the entity they represent.").

n43 For New York cases addressing attorney-client sexual relations see, e.g., *In re Rudnick, 581 N.Y.S.2d 206 (App. Div. 1992)* (suspending an attorney for two and one half years for a sexual relationship with a divorce client, finding that attorney threatened to abandon case if client terminated sexual relationship and that such conduct was a conflict of interest, and that attorney became a potential witness against his client); *In re Gould, 620 N.Y.S.2d 491 (App. Div. 1995)* (suspending an attorney for engaging in sexual relationship with client while he represented both client and husband in custody matter, and wife in uncontested divorce, finding such conduct as a conflict of interest and conduct involving dishonesty, fraud, deceit or misrepresentation); *In re Weinstock, 1998 WL 105494* (N.Y. App.Div. Mar. 9, 1998) (suspending an attorney for two years for having oral sex in the Family Court conference room with assigned indigent client, finding such conduct prejudicial to the administration of justice and adversely reflecting on the fitness to practice law); *In re Bowen, 542 N.Y.S.2d 45 (App. Div. 1989)* (suspending an attorney for two years for filing a false document in a family court proceeding, engaging in sexual affairs or making improper advances to female matrimonial clients). But see *Edwards v. Edwards, 567 N.Y.S.2d 645 (App. Div. 1991)* (holding that an attorney, who was sexually involved with client in a divorce matter, did not take advantage of client, or the attorney-client relationship, nor was his legal representation deficient; however, once attorney was named in the complaint and became a potential witness for adultery, the attorney had to withdraw, which he voluntarily did). For an examination of New York's Rule, see generally David H. Pincus, Lawyers In Lust: Does New York's New Rule Addressing Attorney-Client Sexual Relations Do Enough? *2 J.L. & Pol'y 249 (1994)* (advocating the expanding of the attorney-client sexual relations prohibition in New York to other areas of law).

n44 This may soon change. Among the recently proposed amendments to the New York Code of Professional Responsibility is an amendment dealing with sexual relations. The proposed rule prohibits "pernicious sexual relationships incident to attorney-client relationships." This language indicates that lawyers in non-domestic matters may become subject to attorney-client sexual prohibition. See Daniel N. Davidson, Proposed Changes To Code Will Get Lawyer Straight On Professional Responsibility, 24 Capital District Bus. Rev., Albany, Apr. 28, 1997. A draft rule on sexual relations was adopted by the N.Y.S.B.A. House of Delegates on Jan. 24, 1997. The draft rule must be adopted by the Appellate Division of the Supreme Court of the State of New York before the Rule be-

comes binding on attorneys. See Proposed Amendments to the New York Lawyers' Code of Professional Responsibility (visited Apr. 9, 1998) <http://www.nysba.org>: Draft DR 5-111-Sexual Relation with Clients provides:

A. "Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse.

B. A lawyer shall not:

1. Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation.

2. Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.

3. Continue representation of a client with whom the lawyer has sexual relations unless a disinterested lawyer would conclude that the representation will not be adversely affected.

4. In domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

C. DR 5-111(B) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that 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.

n45 N.Y. Code of Professional Responsibility DR 1-102(7) (1993).

n46 See *In re Rudnick, 581 N.Y.S.2d 206 (App. Div. 1992).* Attorney had a two and one half year sexual relationship with client. The Appellate Division found that attorney "abused his position as the [client's] retained counsel and coerced her into having sexual intercourse with him." Id. The court indicated that the attorney failed to advise the client that "his personal interest as her sexual partner conflicted with his professional responsibility as her attorney and that by maintaining a sexual relationship with her he became a potential witness against her in the matrimonial action." *Id. at 207.* The court also found that attorney "allowed his professional judgment to become impaired by his own financial, business, property, or personal interest such that he intentionally damaged the client during the course of their professional relationship." Id. Pointing out that attorney threatened to abandon his representation of client if she terminated the relationship, the court held that attorney "abused his position as [client's] attorney." The court concluded that attorney's conduct "inflicted emotional damage upon her and prejudiced her legal rights." Id. The attorney was suspended for two years.

The Rudnick court indicated that the attorney's sexual relationship with client resulted in his personal interest conflicting with his professional interest. Although the case involved a matrimonial matter, if the same facts were to arise in a nondomestic matter, it is

likely that the court would hold the attorney-client sexual relationship as a conflict of interest.

n47 N.C. Rules of Professional Conduct Rule 1.18 (1997).

n48 Id. Rule 1.18(a).

n49 Id. 1.18(b).

n50 Id. 1.18(c).

n51 Id. 1.18(e).

n52 Id. 1.18(e) cmt.

n53 Id.

n54 Id.

n55 For Oregon cases on attorney-client sexual relations see, e.g., *In re Hassenstab, 934 P.2d 1110 (Or. 1997)* (disbarring attorney for a series of sexual contacts with more that fifteen clients, finding that his interest in the sexual relationships affected his professional judgment in his clients' behalf i.e., was a conflict of interest). For an in-depth historical and analytical examination of the Oregon Rule, and to a certain extent the California Rule, see generally Caroline Forell, Oregon's "Hands-Off" Rule: Ethical And Liability Issues Presented By Attorney-Client Sexual Contact, *29 Willamette L. Rev. 711 (1993);* Caroline Forell, Hands-Off Rule Is Unique (noting Oregon's pioneering role in prohibiting attorney client sexual relations).

n56 For purposes of DR 5-110 "sexual relations" means: (1) Sexual intercourse; or (2) Any touching of the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

n57 Or. Code of Professional Responsibility DR 5-110 (1992).

n58 Id. DR 5-110(B).

n59 Id. DR 5-110(D).

n60 Or. St. Bar Ass'n, Formal Op. 140 (1995).

n61 Id.

n62 Or. Code of Professional Responsibility DR 5-101(A) provides, in pertinent part: "Except with the consent of the lawyer's client after full disclosure, a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interest."

n63 Id. DR 10-101(B) provides: "(1) 'Full disclosure' means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent. (2) As used in DR 5-101 . . . , 'full disclosure' shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing."

n64 For West Virginia attorney-client sexual relations cases see, e.g., *Musick v. Musick, 453 S.E.2d 361 (W. Va. 1994)* (holding that an attorney-client sexual relationship may violate rules of conduct).

n65 West Va. Rules of Professional Conduct Rule 8.4 (1989). "For purposes of this rule, 'sexual relations' means sexual intercourse or any touching of the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or as a means of abuse." Id. 8.4(g).

n66 Id.

n67 Utah Rules of Professional Conduct Rule 8.4(g)(1) (amended 1997). "'Sexual relations' means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse." Id.

n68 Id. 8.4(g)(2).

n69 Id. 8.4(g) cmt.

n70 Id.

n71 Id.

n72 For Wisconsin cases on sexual relations see, e.g., In re Disciplinary Proceedings against *Kraemer, 547 N.W.2d 186 (Wis. 1996)* (suspending attorney for commencing a sexual relationship with paternity client, holding that such conduct violated professional

rules on conflict of interest and misconduct, and that attorney exploited his client and breached his fiduciary duty by furthering his own interest in the sexual relations).

n73 Wis. Rules of Professional Conduct Rule 1.8(k)(2) (1988). "In this paragraph: (i) 'Sexual relations' means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate part of the lawyer." Id. But see, *In re Disciplinary Proceedings Against Kraemer, 547 N.W.2d 186 (Wis. 1996)* (holding that, although 1.8(k) only applies prospectively, an attorney-client sexual relationship violates other professional rules of conduct).

n74 Wis. Rules of Professional Conduct Rule 1.8(k)(3) (1988).

n75 For other Colorado attorney-client sexual relations cases see, e.g., *People v. Barr, 929 P.2d 1325, 1326 (Colo. 1996)* (asserting that a sexual relationship is suspect and may implicate many rules of professional conduct at the least the "potential that the client will be injured by the lawyer's conduct," court suspended attorney for three months for engaging in a sexual relationship with client that he was representing in dissolution of marriage matter); *People v. Zeilinger, 814 P.2d 808 (Colo. 1991)* (holding that attorney's sexual relationship with a client he was representing in dissolution and custody matter adversely reflected on the practice of law and that attorney's professional judgment was affected by the attorney personal interest in the sexual relationship, warranting a public reprimand) *People v. Good, 893 P.2d 101 (Colo. 1995)* (suspending attorney for one year and one day for engaging in sexual relationship with client he represented in a criminal matter, holding that numerous professional responsibility rules may be implicated in attorney-client sexual relations, especially such relationships reflect adversely on the fitness to practice law).

n76 *934 P.2d 1361 (Colo. 1997).*

n77 *Id. at 1362.*

n78 Id.

n79 Id.

n80 *Id. at 1363* (citation omitted).

n81 *Id. at 1364.*

n82 Georgia, like many states, has criminal statutes prohibiting doctors, psychiatrists, and parole officers from engaging in sexual relationships with their patients/parolees. Some Georgia State Legislators have proposed a bill that would include attorneys in the list of professionals prohibited from engaging in sexual relationship with their clients.

House Bill 352 provides that "a person commits sexual assault when, as an attorney who is a member of the State Bar of Georgia, he or she engages in sexual contact with another person whom the actor knew or should have known was a client for the attorney's professional services at the time of such sexual contact by the actor and the attorney-client relationship was used to facilitate such sexual contact between the actor and said person." Proposed 16-6-5.1(d)(1). The proposed bill further provides that consent of the client is not a defense "if the attorney-client relationship has impaired the person's ability to give consent." Proposed 16-6-5.1(d)(2). Violation of this statute would be a misdemeanor. Proposed 166-5.1(d)(3). For responses to the proposed bill, see generally Jonathan Ringel, Bill Would Ban Lawyers' Exploiting Clients for Sex, Fulton County Daily Rep., Feb. 11, 1997. Although unlikely to pass as worded, the Georgia bill may signify a new strategy for proponents of explicit rules prohibiting attorney-client sexual relationships.

n83 *415 S.E.2d 173, 174-75 (Ga. 1992).* The attorney maintained that he was involved sexually with the client three years prior to representing her in divorce and custody matter. The court held that whether the relationship was pre-existing is immaterial. Id.

n84 *Id. at 175.* Georgia Standard 30 provides: "Except with the written consent or written notice to his client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." *Id. at 174.*

n85 In Lewis, three judges dissented recommending that Lewis be disbarred. *Id. at 175.*

n86 Id.

n87 Id.

n88 Letter from Geoffrey M. Kam, Staff Attorney, Hawaii Office of Disciplinary Counsel, to author (August 18, 1997) (on file with author).

n89 The Rinella case, discussed below, has caused much debate in Illinois regarding attorney-client sexual relations. In September, 1996, a Petition to Amend the Illinois Rules of Professional Conduct to include an explicit rule prohibiting attorneyclient sexual relations was submitted to the Supreme Court of Illinois. Proposed Rule 1.18(A) provides: "A lawyer shall not engage in sexual relations with a current client unless there was a sexual relationship existing between them when the lawyerclient relationship commenced." For other Illinois attorney-client sexual relations cases see, e.g. *Doe v. Roe, 681 N.E.2d 640 (Ill. App. Ct. 1997)* (finding that the attorney used the clients' dependence on him to gain sexual favors, and holding that such conduct was a breach of a fiduciary duty and the court allowed client to pursue damages for mental distress); *Suppressed v. Suppressed, 565*

N.E.2d 101, 105 (Ill. App. Ct. 1990) (finding that although it may have been unethical for an attorney to have a sexual relationship with a client he was representing in a divorce and custody matter, such conduct does not amount to legal malpractice).

n90 *677 N.E.2d 909 (Ill. 1997).*

n91 *Id. at 915.*

n92 *Id. at 913.*

n93 *Id. at 915.*

n94 Id.

n95 *Id. at 916.*

n96 An express rule prohibiting attorney-client sexual relations is being considered in Indiana. Two years ago the House of Delegates passed a recommended Rule 1.18 that prohibits attorney-client sexual relations to the Indiana Supreme Court. See Mike Magan, ISBA House of Delegates Meeting Agenda Full, Ind. Law., Apr. 2, 1997. For other Indiana attorney-client sexual relations cases see, e.g., *In re Manson, 676 N.E.2d 347,348 (Ind. 1997)* (holding that an attorney's consensual sexual intercourse in vacant military courtroom with client he was representing in divorce and custody matter was prejudicial to the administration of justice (8.4(d)) and suspending the attorney for six months).

n97 *674 N.E.2d 551 (Ind. 1996).*

n98 *Id. at 552-53.*

n99 *Id. at 553.*

n100 *Id. at 554.*

n101 *Id. at 554.*

n102 Id.

n103 *Id. at 555.*

n104 Id.

n105 In 1995, the Kansas Bar Association released an Ethical Opinion examining attorney-client sexual relations. Although the Opinion deals with the duty to report professional misconduct, the Kansas opinion cautions lawyers that a sexual relationship usually results in "conflict of interest allegations later leveled to object to a lawyer's position in a fee dispute, and even expensive malpractice litigation." Additionally, the Committee cautions, sexual exploitation of a client might prejudice the case and as such subject the attorney to discipline under Rule 8.4(d) of the Model Rules of Professional Conduct. See Kansas Bar Ass'n Ethics Op. No. 94-13 (1995). The Committee correctly observes that whether a sexual relationship with a client violates conflict of interest rules depends on whether the relationship commenced prior to representation or after. In sum, the Kansas Opinion stands for the proposition that lawyers beware, sexual relations with a client is suspect and may be cause for discipline. In addition to the Ethics Opinion, the Kansas Bar Association Ethics Advisory Committee has recommended a proposed rule to the Board of Governors. See KBA Board of Governors, Board Seeks Comments on Sex with Clients Proposal, 66 J. Kan. B. Ass'n 3 (Oct. 1997). Proposed Rule 1.17, Lawyer-Client Sexual Conduct provides:

(a) A lawyer shall not engage in sexual conduct with a current client of the lawyer unless:

(1) the client is the spouse of the lawyer or a consensual sexual relationship existed between the lawyer and client before the lawyer-client relationship commenced; or

(2) the client is represented by the lawyer's firm and the lawyer has no involvement in the legal work performed for the client.

(b) A lawyer shall not engage in sexual conduct with a representative of an organizational client if the conduct is coerced, the product of undue influence, or would likely damage or prejudice the client in the representation.

(c) Sexual conduct means sexual intercourse or any touching of the sexual or other intimate part of a person, causing such person to touch the sexual or intimate part of the lawyer for the purpose of sexual arousal, gratification or abuse, or the request or demand for sexual conduct.

(d) Even if the sexual conduct is permissible under the exceptions in (a) and (b) above, a lawyer shall not represent a client or continue representing a client with whom the lawyer has engaged in sexual conduct if such conduct:

(1) breaches the lawyer's duty to competently represent the client;

(2) breaches the lawyer's duty of confidentiality to the client;

(3) deprives the lawyer of independent professional judgment;

(4) creates a conflict of interest between the lawyer's and the client's interests; or

(5) violates any other rule of professional conduct.

Id.

n106 *In re Berg, No.79816, 1998 WL 95313* (Kan. Mar. 6, 1998). Kansas Ethics Op. No. 94-13 (1995) was not raised in this case probably because the case arose prior to the opinion's adoption.

n107 Id. at *2.

n108 Id. at *3.

n109 Id.

n110 Id. at *4.

n111 Id.

n112 Id. at *5.

n113 Id. at *8,* 11.

n114 Id. at *8.

n115 Id.

n116 Id. at *8-9.

n117 *752 S.W.2d 786 (Ky. 1988).*

n118 *Id. at 787.*

n119 Id.

n120 Id.

n121 *Id. at 788.*

n122 Id.

n123 Id.

n124 Id.

n125 Id.

n126 Although 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 against attorney-client sexual relations, no rule has been recommended. The New Hampshire bar feels that an explicit rule may infringe on an attorney's privacy rights and that an express rule poses several drafting problems, such as the definition of a 'client' and what constitutes 'sex.' See Ethical Sex? N.H. Bar News, May 19, 1993, at 15. See also Richard Y. Uchida, A Case For An Impractical Rule, N.H. Bar News, Aug. 18, 1993 at 6 (arguing that an explicit rule prohibiting attorney-client sexual relations is unnecessary and problematic); William L. Chapman, Lawyer-Client Sex: A per se Violation of Rule 1.7(b), N.H. Bar News, Aug. 18, 1993, at 6 (arguing that a per se rule is necessary to preserve the professionalism of attorneys).

n127 *577 A.2d 1198 (N.H. 1990).*

n128 *Id. at 1202* (citation omitted).

n129 Id.

n130 Id.

n131 Id.

n132 Id.

n133 Id.

n134 On April 9, 1996, the New Jersey Supreme Court appointed a Special Committee on Matrimonial Litigation to examine all aspects of Matrimonial Practice including ethical issues. See *Honorable Linda R. Feinberg, A.J.S.C. & Lee M. Hymerling, Esq., Co-Chairs, Supreme Court of New Jersey Special Committee on Martimonial Litigation, Final Report, 7 N.J. Law 25* (col. 1) (Feb. 23, 1998). The Special Committee on Matrimonial Litigation recommended the prohibition of attorney-client sex during representation. Recommendation #13 strongly recommended that the issues of attorney-client sex be addressed by the Professional Responsibility Rules Committee. However, the Special Committee made no "specific recommendation as to whether . . . the proposed restriction should be global rather than simply confined to matrimonial practice." Id.

n135 *516 A.2d 246 (N.J. 1985).*

n136 *Id. at 247.*

n137 *Id. at 248.*

n138 *Id. at 249.*

n139 Id.

n140 For other Ohio cases addressing attorney-client sexual relations see, e.g., *Office of Disciplinary Counsel v. Ressing, 559 N.E.2d 1359 (Ohio 1990)* (publicly reprimanding an attorney for engaging in a sexual relationship with a divorce client, although the attorney had not charged the client for legal services, such conduct adversely reflects on the attorney's fitness to practice law); *Office of Disciplinary Counsel v. Praxton, 610 N.E.2d 979 (Ohio 1993)* (reprimanding an attorney for engaging in a consensual, romantic relationship with a divorce client during representation and finding such conduct violated disciplinary rule prohibiting personal and financial interests from affecting professional judgment).

n141 *664 N.E.2d 522 (Ohio 1996).*

n142 *Id. at 522.*

n143 Id.

n144 Id.

n145 *Id. at 522-23.*

n146 For other cases addressing attorney-client sexual relations in Rhode Island see, e.g., *In re DiPippo, 678 A.2d 454 (R.I. 1996)* (suspending attorney for three months for consensual sexual relationship with a divorce client on the grounds that said relationship was a conflict of interest and jeopardized the client's rights).

n147 *680 A.2d 73 (R.I. 1996).*

n148 *Id. at 74.*

n149 Id. Rule 5-101(A) provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest." R.I. Code of Professional Responsibility 5-101(A) (1997). Rule 1.7(b) provides that "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." R.I. Rules of Professional Conduct Rule 1.7(b) (1997).

n150 *Id. at 75.*

n151 Id.

n152 *Id. at 75.* The court indicated that if an adverse effect had prejudiced the outcome of the case the attorney would have been disciplined more severely. Id. In addition to the disciplinary complaint, the client in this case sued her former attorney and his law firm for legal malpractice, intentional infliction of emotional distress, battery, deceit, and negligence. *Vallinoto v. DiSandro, 688 A.2d 830 (R.I. 1997).* She recovered a jury verdict. On appeal the Supreme Court ordered a new trial holding that client failed to show that attorney's legal services departed from the standard of care, nor that the inappropriate sexual relationship had damaged her legal position in the divorce and custody case. *Id. at 835-836.* One justice strongly dissented from the Vallinoto majority opinion asserting:

An attorney's foremost obligation to the client must be loyalty and trustnot the attorney's personal sexual gratification at the client's expense. Thus, a client who is damaged monetarily, physically, or emotionally by the attorney's breach of his or her fiduciary duties through sexual exploitation of the client should be able to recover for legal malpractice regardless of whether the attorney's legal efforts were performed well and successfully.

Id. at 847 (J. Flanders, dissenting).

n153 For other South Carolina attorney-client sexual relations cases see, e.g., *In re McBratney, 465 S.E.2d 733 (S.C. 1996)* (holding that an attorney who engaged in a sexual relationship with a client he was representing in divorce and custody matters violated ethical rules in that his conduct reflected adversely on his fitness to practice law, was prejudicial to the administration of justice, and his representation was materially limited by his own interests); *In re Keitt, 468 S.E.2d 875 (S.C. 1996)* (holding sexual relationship of an attorney with a client he represented in a family related matter, was prejudicial to the administration of justice and brought the legal profession into disrepute).

n154 *478 S.E.2d 253 (S.C. 1996).*

n155 *Id. at 254.*

n156 Id.

n157 *455 N.W.2d 856 (S.D. 1990).*

n158 *Id. at 857.*

n159 Id.

n160 Id.

n161 In 1994, a draft rule expressly prohibiting attorney-client sexual relations was approved by the Texas Disciplinary Rules of Professional Conduct Committee. See Nancy Goldberg Wilks, Sex in Texas: An Argument for a Bright-Line Rule Prohibiting Attorney-Client Sexual Relations, 33 Houston Law. 26 May/June 1996. Rule 5.07 provides, in pertinent part, "A lawyer shall not condition or threaten to condition the delivery of legal services on the lawyer's having sexual relations with any person." Id. at 27 (quoting draft rule, as of Mar. 20, 1996). The comment to the proposed rule states:

1. This Rule forbids a lawyer from conditioning or threatening to condition such matters as the timeliness, rendition or quality of legal services on any person's submission to sexual relations with the lawyer. As used in the Rule, "person" is not limited to the individual seeking representation from the lawyer.

2. A violation of this Rule also could be a violation of disciplinary rules governing conflicts of interest, as could other instances of sexual relations between a lawyer and persons invalid in the lawyer's rendering of legal services not addressed by this Rule.

Id. at 30 n.14 (quoting committee comments). Wilks argues that a bright line rule is necessary and criticizes the proposed rule by Texas as "so weak" that "instead of sending a clear message that sexual relationships with clients will not be tolerated, this rule impliedly condones all such relationships that do not reach the level of extortion". Id. at 27; see also Brenda Sapino Jeffreys, Suit Aimed at Convincing Bar to Ban Sex with Clients, Texas Law., July 22, 1996, at 6.

n162 Telephone Interview with staff attorney from Texas Bar Association (Oct. 1997). For media coverage of the case see generally Lawyer Must Pay Client 1.6 million/ San Antonio Attorney Had Affair with Man's Wife During Child Custody Lawsuit, Austin Am. Statesman, July 5, 1997; Gloria Padilla, Verdict against Lawyer Who Had Affair Overturned, San Antonio Express-News, Aug. 21, 1997.

n163 Telephone Interview with staff attorney from Texas Bar Association (Oct. 1997). The client also sued for malpractice and won a jury award for 1.6 million dollars. The jury verdict was overturned and the case is pending appeal. Id.

n164 In 1988 the Alaska Bar Association released an Ethics Opinion holding that attorney-client sexual relations during legal representation of a client is a violation of the Code of Professional Responsibility under, but not limited to, the following circumstances:

1. The relationship is initiated by the attorney under circumstances which may have deprived the client of the ability to exercise free choice;

2. The attorney exchanges legal services for sexual favors from a client;

3. The sexual relationship has an adverse affect on the lawyer's ability to protect his client's interest, or is otherwise prejudicial or damaging to the client's case; or

4. Where the client is in an emotionally fragile condition, and the sexual relationship may have an adverse affect on the client's emotional stability;

5. Where the sexual conduct is illegal.

Alaska Bar Ass'n Ethics Op., 88-1 (1988).

In 1992 the Alaska Bar held that the 1988 Ethics Opinion was applicable to a law firm. The 1992 Ethics Opinion, however, expanded and clarified the 1988 Opinion. Thus a sexual relationship with a client is unethical if:

(1) The sexual relationship has an adverse affect on the lawyer's ability to protect the client's interests, or is otherwise prejudicial or damaging to the client's case;

(2) The sexual relationship creates the potential that the attorney will be called as a witness on behalf of the client or to testify on issues prejudicial to the client;

(3) The client is involved in a legal matter of the type generally recognized to be emotionally charged; or

(4) The sexual conduct is exchanged for legal services, non-consensual, coerces, or illegal.

Alaska Bar Ass'n Ethics Op. 92-6 (1992).

The 1992 Alaska Ethics Opinion is very elaborate and encompasses some interesting situations. The basic policy consideration underlying the Opinion is that an attorney-client relationship "should not be exploited by the attorney." Unlike most jurisdictions where a law firm is not held subject to the Rule prohibiting sexual relations unless the firm's lawyers assisted in the representation, the Alaska rule does not distinguish between lawyer and law firm.

The Alaska Bar recognizes that sexual relations with a client may have a detrimental effect on the outcome of the case. Using the example of a divorce matter, the Opinion illustrates how a sexual relationship with a client may affect the outcome of the case in two ways: (1) threaten a reasonable settlement if the sexual relation is discovered by the other spouse and (2) the fear of discovery might cause the attorney "to curb effective and aggressive representation." In addition, the Opinion notes that the sexual relations might affect the merits of the case. For example, in a child custody matter any revelation of a sexual relation with the attorney might be the determinative factor in a custody matter. Moreover, the attorney may become a material witness in the case. In short, the Opinion advises that a sexual relationship "should be avoided" because it will likely implicate the Disciplinary Rule "which prohibits a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship." Id.

The Alaska Bar Committee points out that a sexual relationship with a client risks that the attorney would be called as a witness either on behalf of the client or the opposing party. The Committee asserts that in divorce, custody, adoption, wrongful death, personal injury and criminal cases "the risk of becoming a witness is particularly great." As such, the Committee strongly advises that "such risk is unacceptable because the potential of harm

to the client is too great." Id. Recognizing that cases involving emotional and sensitive issues tend to impair the client's judgment, the Alaska Committee asserts that the client in these situations is "more vulnerable to the advances of a lawyer or more likely to initiate advances of their own." As a result, the Committee expects that attorneys are aware of this vulnerability and that they have a duty "to refrain from sexual relationships for the duration of representation." Id.

n165 Effective July 1, 1997, the comments to Rule 1.7 include a prohibition of attorney-client sexual relations. The Comment states that "a sexual relationship with a client, whether or not in violation of criminal law, will create an impermissible conflict between the interests of the client and those of the lawyer if (1) the representation of the client would be materially limited by the sexual relationship and (2) it is unreasonable for the lawyer to believe otherwise. Under those circumstances, client consent after consultation is ineffective." Rule 1.7 cmt. The use of "coercion or undue influence is used to obtain sexual favor in exploitation" of the attorneyclient relationship violates Rule 1.7. Rule 1.7 cmt. For commentary opposing and favoring Maryland approach to attorney-client sexual relations see generally Saundra Torry, Dancing Around Issues of Sex With Clients, Wash. Post, Oct. 21, 1996.

In 1983, a Maryland attorney was retained by a client to advise her on sale of jointly owned real property, transfer of property from husband to client, and a possible divorce. The attorney became sexually involved with client. The attorney requested an ethics opinion on this matter. The Maryland Ethics Committee held that the attorney should withdraw from representing client. The Ethics Committee stated that the attorney sexual involvement with client "fell short of the higher standards of professional conduct required of attorneys and tend to reflect negatively upon the integrity of the profession." Md. Bar Ass'n Ethics Op., 84-9 (Sept. 7, 1983). Noting that the attorney's judgment will likely be affected by his sexual relationship, the Ethics Committee asserted that disclosure in this situation "is insufficient" and that the attorney would be "less effective." Moreover, the Committee held that the attorney's continued representation of client "could very well jeopardize" the client case. The Committee also found that an attorney-client sexual relationship was a violation of the Disciplinary Rules in that the marital infidelity would likely be detrimental to the client's case. The Committee concluded that the attorney had a fiduciary duty toward client's husband under the power of attorney, and as such attorney should withdraw from the case.

n166 For an in-depth examination of Pennsylvania's brush with the issue of sexual relations see generally Jennifer L. Myers et al., To Regulate or not to Regulate Attorney-Client Sex? The Ethical Question in Pennsylvania, *69 Temp. L. Rev. 741, 742 (1996)* (arguing that regulating attorney-client sexual relations in Pennsylvania, not limited to domestic lawyers, is "imperative" and would insure lawyers fiduciary duty toward client, avoid conflict of interest and remain professionally objective and detached). In May 1996, the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility completed the drafting of proposed Rule of Professional Conduct 1.18 which prohibits attorney-client sexual relations during representation. Letter from Louise Lamoreaux, Pennsylvania Bar Association Ethics Coordinator, to author (July 24, 1997)

(on file with author). Apparently, this rule is "on hold" pending the distribution of Formal Opinion 97-100 which concluded that it may be appropriate to prohibit attorney-client sexual relations. Id. On Sept. 26, 1997 the PBA Committee unanimously approved Pennsylvania Bar Ass'n Comm. Leg. Ethics & Prof. Resp. Op., 97-100 (1997). The Pennsylvania Opinion concluded that an attorney-client sexual relationship "presents grave ethical concerns" and recommended the adoption of an explicit rule prohibiting attorney-client sexual relations, unless the relationship was with a spouse or predated the legal representation. Noting that the trend among the jurisdictions is toward prohibiting attorney-client sexual relations, the PBA Committee concluded that "sexual contact between attorneys and clients should be prohibited via a bright line rule because of the fiduciary nature of the attorney-client relationship, the transference phenomenon, the potential for a conflict of interest and an impact on an attorney's ability to independently assess the client's best interest, and the negative effect on the public's perception of the profession." In the main, the Pennsylvania Bar Opinion proposed a draft express rule prohibiting attorney-client sexual relations. Proposed Rule 1.18 provides:

(A) During the course of the lawyer-client relationship, a lawyer shall not:

(1) engage in sexual contact with client, or a representative of a client not a spouse;

(2) demand that a client or a representative of a client engage in sexual contact with the attorney, or

(3) attempt to coerce a client or a representative of a client into engaging in sexual contact with the attorney.

(B) This rule does not apply to consensual sexual relationships which predate the lawyer-client relationship, or where the client is represented by the lawyer's law firm and the lawyer has no involvement in the legal work performed for the client.

(C) For purpose of this rule only, when the client is an organization, the "client" representative refers to any person who oversees the representation or gives instructions to the lawyer on behalf of the organization.

Id.

n167 The Alabama State Bar presently has a committee that is considering a separate rule for attorney-client sexual relations. As of the writing of this Article, no drafts were available. Letter from Tony McLain, General Counsel, Ala. St. B. Ass'n, to author (July 21, 1997) (on file with author).

n168 See Petition to Adopt E.R. 1.17 and Memorandum from the State Bar of Arizona to the Supreme Court of the State of Arizona (1993). This proposal was rejected. See Nancy G. Wilks, Sex and the ABA: Impotent Standing Committee Or the Proverbial Fox?, *6 Md. J. Contemp Legal Issues 205 (1995)* (proposed ER 1.17: Sexual Relations with a Client provides in pertinent part:

(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 lawyer shall not:

(1) Request, require, or demand sexual relations with a client or representative of a client, incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into or requesting sexual relations with a client or representative of a client; or

(3) Initiate or continue representation of a client with whom the lawyer has sexual relations, or with whose representative the lawyer has sexual relations, if such sexual relations cause the lawyer to violate this or any other ethical rule.

(c) For purposes of this rule, a "representative of a client" means a principal, an employee, an officer or director of a client:

(1) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as principal employee, officer, or director, and is provided to the lawyer for the purpose of obtaining for the client the legal advice or other legal services of the lawyer; or

(2) Who as part of such person's relationship with the client as principal, employee, officer, or director seeks, receives or applies legal advice from the client's lawyer; or

(3) Who participates in retaining that lawyer's services; or

(4) Who has responsibility for reviewing or overseeing the lawyer or the law firm's services.

(D) Except as provided for in paragraph B, this rule shall not apply to sexual relations between lawyers and their spouses, or to ongoing consensual sexual relationships.

Id.

It appears that Arizona is not presently considering an explicit rule. However, Lunda C. Shely of the Arizona State Bar stated that such a relationship "is probably a violation of our version of ER 1.7(b), as well as a problem under ER 3.7, if the representation pertains to custody issues because the lawyer may be called as a fact witness." She further noted that 1.7 was used recently to censure one lawyer for such conduct. Letter from Lunda C. Shely of the Arizona State Bar Association, to author (Aug. 20, 1997) (on file with author).

n169 On December 9, 1994, the Board of Governors of the Oklahoma Bar Association approved and adopted Ethics Opinion No. 308. The Opinion points out that sexual relations with clients implicates rule 1.8's prohibition against lawyer's "use of information relating to representation of a client to the disadvantage of the client unless the client consents after consultation . . . ." In addition, rule 1.7(b)(2) on conflict of interest also may be implicated. Opinion 308 held that an attorney-client sexual relationship, except with pre-existing or a spouse, is unethical. On March 17, 1995, the Board of Governors withdrew Ethics Opinion No. 308. See The Okla. B.J., Mar. 25, 1995, at 1009. Opinion No. 308 was withdrawn without comment or explanation. Presently there are no prohibitions against attorney-client sexual relations in Oklahoma. Telephone Interview with Mr. Brad Heckenkemper, Past Chairman of Oklahoma Bar Association Legal Ethics Committee and

presently head of the team researching and presenting a recommendation regarding attorney-client sexual relations to the Board of Governors. The team is considering whether to propose, or resubmit, or modify Op. 308.

n170 In Washington, the Bar Association responded to the escalating controversy over attorney-client sexual relations by proposing an amendment to the Washington Rules of Professional Conduct that would expressly prohibit attorney-client sex. See Vickie Norris, The Profession Hits the Skids: Lawyer-Client Sex, Why We Should Ban It, Wash. St. B. News, May 1993 at 17, 21. See generally Molly A. McQueen, Comment, Regulating Attorney-Client Sex: The Need for an Express Rule, *29 Gonz. L. Rev. 405, 406* (1993/1994) (recommending that the Washington State Supreme Court adopt a bright line rule regulating attorney-client sexual relations as "a valid and necessary means to protect clients against coercive sexual advances from their attorneys"). The Washington State Supreme Court recently rejected the proposed amendment stating that a bright line rule is not necessary because other sections of the Rules of Professional Conduct cover such behavior. See Supreme Court Declines to Publish Proposed Modification to RPC 8.4(h) Prohibiting Sexual Relations With Clients, Wash. St. B. Ass'n., Jan. 18, 1994, 1. The rejected Model Rule 8.4 provided:

It is professional misconduct for a lawyer to . . .

(1) Have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer/client relationship commenced; or

(2) Have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(proposed rule on file with author).

Washington currently is not considering an explicit rule. However, a sexual relations case is under litigation in Washington. Letter from Barrie Althoff, Director of Lawyer Discipline & Chief Disciplinary Counsel, Washington State Bar Association, to author (July 28, 1997) (on file with author). The outcome of the pending attorney-client sexual case may resurrect the debate.

n171 In September, 1997, the Michigan State Bar's Representative Assembly voted in favor of a rule that would prohibit attorneys from engaging in sexual relations with clients during representation, unless the relationship preexisted the legal representation. See Marcia M. McBrien, Assembly Votes 'Yes' On Attorney-Client Sex Ban, Mich. Law. Wkly., Sept. 22, 1997. The proposed rule provides that "a lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced." Id. The proposed rule must be approved by the Michigan Supreme Court before it would become effective. For an analysis of Michigan's proposed rule, see generally, Melissa M. Eckhause, Note, A Chastity Belt for Lawyers: Proposed MRPC 1.8(k) and the Regulation of Attorney-Client Sexual Relationships, 75 Det. Mercy L. Rev. 115 (1997).

Interestingly, in 1995 the Supreme Court of Michigan rejected a similar explicit rule banning attorney-client sexual relations as too encompassing. Letter from Tom Byerley,

Regulation Counsel, State Bar of Michigan, to author (July 22, 1997) (on file with author). The Michigan Bar is also presently considering an Ethics Opinion on attorney-client sexual relations. Id. See also Officials Look at Ban on Attorney Client Sex, The Grand Rapids Press, Feb. 27, 1997, at B4. For a sharp critique of the proposed revision see generally, John W. Allen, Developing A New Rule of Professional Conduct Regarding Attorney-Client Sexual Relations-The Pros and Cons, 76 Mich. Bar. J. 200 (Feb. 1997) (where author feels that the present Professional Conduct Rules are "adequate").

Most recently, a Michigan attorney's sexual relationship with a client was considered an aggravating factor in his discipline. The attorney in question engaged in a sexual relationship with a client he was representing in a sexual harassment case. His legal representation in this and three other cases was found to violate numerous ethical rules. Affirming the Discipline Hearing Panel's conclusion "that the proofs did not establish that the consensual sexual relationship itself constituted grounds for professional discipline in this case," the Discipline Board noted that it was the limited scope of the rules charged in the case that supported their decision, and not that an attorney-client sexual relationship did not violate the rules of professional conduct. Moreover, the Discipline Board emphasized, "'this is not to say that [the client's] vulnerability or the resulting prejudice to her case were not properly considered' as aggravating factors." Grievance Administrator v. Steven (Law. Wkly. No. 29696--14 pages). See Sexual Relationship: Properly Considered--Aggravating Factor, Mich. Law. Wkly., July 14, 1997, at 34. The attorney was suspended for two years. Mich. Law. Wkly., Aug. 25, 1997, at 21.

n172 Although no draft rules as of yet have been proposed, the Massachusetts Lawyer Weekly has carried several stories on attorney-client sexual relations. In fact, in a 1993 editorial the Weekly, noting that "all editorials are written as a collaborative effort by our Board of Editors, which is made up of a broad cross-section of lawyer practicing in Massachusetts," stated that they "support the prophylactic rule of no sex with any client promulgated by the American Academy of Matrimonial Lawyers." Editorial, A Problem That Must Be Faced, Mass. Law. Wkly., Jan. 11, 1993. Moreover, the Editorial recognized and recommended that attorney-client sexual relations "is worthy of discussion and consideration" by the Massachusetts bench and bar. See id.

In June 1997, Massachusetts adopted the ABA Model Rules of Professional Conduct. They will go into effect on January 1, 1998. Thus, ABA Op. 92-364 will surely be extremely persuasive. Interestingly, the Drafting Committee considered a suggested rule but decided that there was no need for an explicit rule covering attorney-client sexual relations. According to the committee, the present rules of professional conduct are adequate to cover the situation. Telephone Interview with Mr. Robert Bloom, Supreme Judicial Court of the State of Massachusetts. See also letter from Stacy M. Shunk, staff attorney, Massachusetts Bar Association, to author (Aug. 4, 1997) (on file with author).

n173 Arkansas; Connecticut; Delaware; District of Columbia; Louisiana; Main; Mississippi; Missouri; Montana; Nebraska; Nevada; New Mexico; North Dakota; Tennessee; Wyoming.

n174 The Vermont Supreme Court presently is considering adopting the ABA Model Rules. The Chair of the Committee on Professional Responsibility of the Vermont Bar expects the ABA Rules to be adopted within the next few months. He also noted that the Annotated Model Rules of Professional Conduct would then be applicable in Vermont. If a sexual issue arises prior to the adoption of the ABA, "I believe that the Professional Responsibility Committee would accept the conclusions set forth in ABA Opinion 92-364." Letter from Clarke A. Gravel, Chair of the Committee on Professional Responsibility of the Vermont Bar Association, to author. (Aug. 19, 1997) (on file with author).

n175 For an interesting discussion of conflict of interest in the attorney-client sexual relationship arena see generally John M. O'Connell, Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule, *92 Colum. L. Rev. 887, 896-904 (1992)* (identifying two approaches to the conflict of interest rule: (1) holding that an attorney may represent a client despite their sexual relationship, "if the attorney reasonably believes the sexual activity will not adversely affect the representation, the client is fully informed of the conflict, and the client consents;" and (2) holding that "sexual activity between an attorney and client represents a conflict of interest regardless of the lawyer's belief about the activity's effects and the client's willful consent, because the attorney's independent professional judgment is automatically compromised.). See also Margit Livingston, When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations, *62 Fordham L. Rev. 5, 15-21 (1993);* Myers et al., supra note 6, at 799 (identifying six categories that give rise to conflict of interest: (1) likely to affect attorney's objectivity (2) the sexual relations not in the best interest of client due to vulnerability (3) attorney may be called as an adverse witness (4) attorney-client privileges which protect confidentiality may be compromised (5) depending on the success of the sexual relationship, the attorney would either want to prolong or expedite the representation; (6) sexual relationship "interferes with the designated roles and boundaries of the professional relationship").

n176 Model Rules of Professional Conduct Rule 1.7(b) (1983) (emphasis added).

n177 Model Code of Professional Conduct DR 5-101(A) (1983) (emphasis added).

n178 Model Rules of Professional Conduct Rule 1.7 cmt. (1983).

n179 Many commentators posit that this is the main flaw of the conflict of interest Rule, that is, the Professional Rules focus on the legal representation rather than on the personal harm done to client in case of violations. See Thomas Lyon, Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative? *10 Harv. Women's L.J. 161 (1987)* ("When courts do recognize the wrongfulness of sexual relationship, they limit their critique to the quality of the legal representation, and ignore the emotional harm to the client").

n180 Model Rules of Professional Conduct Rule 1.7 (1983).

n181 Id.

n182 See ABA Formal Op. 92-364 (1992) (noting that "there are several provisions of the Model Rules that may be implicated by a sexual relationship" and that "the lawyers engaging in a sexual relationship with a client may create a prohibited conflict between the interests of the lawyer and those of the client"). The ABA Ethics Opinion clearly holds that a sexual relationship is suspect. The ABA asserted that "it cannot be proper for a lawyer to represent a client when the lawyer's own interest may tempt him to temper his efforts to promote to the utmost his client's interest." Id. "Certainly," emphasizes the opinion, "the lawyer's interest in preserving the sexual relationship can rise to this level." Id. See also *In re Rudnick, 581 N.Y.S.2d 206, 207 (App. Div. 1992)* (finding that an attorney sexual relationship with divorce client was unethical because attorney failed to advise the client that "his personal interest as her sexual partner conflicted with his professional responsibility as her attorney").

n183 *In re Rudnick, 581 N.Y.S.2d 206, 207 (App. Div. 1992)* (pointing out that attorney threatened to abandon his representation of client if she terminated the relationship, holding that attorney "abused his position as [client's] attorney").

n184 *In re Grimm, 674 N.E.2d 551, 554 (Ind. 1996)* (holding that by failing to inform the client of the status of her attorney fees during the period of their personal involvement, the attorney "deprived her of notice that his legal bill was growing beyond his initial communicated estimation" thus his representation was "materially limited" by his own interests).

n185 *In re Rudnick, 581 N.Y.S.2d 206, 207 (App. Div. 1992)* (finding that attorney "allowed his professional judgment to become impaired by his own financial, business, property, or personal interest, such that he intentionally damaged the [client] during the course of their professional relationship"); see also *In re Grimm, 674 N.E. 2d 551, 555 (Ind. 1996)* (holding that the attorney's "intimate involvement with his client ultimately damaged his professional objectivity, poisoned their professional relationship, and led him to other professional misconduct"); *In re Disndro, 680 A.2d 73, 75 (R.I. 1996)* (finding that "lawyer's own interest in maintaining the sexual relationship creates an inherent conflict with the obligation to represent the client properly"); ABA Formal Op. 92-364 (1992) supra note 1 ("If the lawyer's interests in the relationship interferes with decisions that must be made for the client, the representation will have been impaired.").

n186 See Margit Livingston, When Libido Subverts Credo: Regulation of AttorneyClient Sexual Relations, *62 Fordham L. Rev. 5, 16 (1993).*

n187 See, e.g., *People v. Zeilinger, 814 P.2d 808, 809-810 (Colo. 1991)* ("Engaging in a sexual relationship with a client undergoing divorce may destroy chances of reconciliation, and blind the attorney to the proper exercise of independent judgment. There is also significant danger that when the division of property or the custody of minor children is

contested, the attorney himself may become the focus of the dissolution or custody proceedings, be called as a witness, and thereby inflict great harm on the client").

n188 See, e.g., *Bourdon's Case, 565 A.2d 1052, 1054 (N.H. 1989)* (requesting contested hearing for his client's divorce without her knowledge or approval).

n189 See, e.g., *Kentucky Bar Ass'n v. Meredith, 752 S.W.2d 786, 788 (Ky. 1988)* (finding attorney violated Code of Professional Responsibility by becoming sexually involved with client he represented in probate and guardianship matter and disclosing that client's confidences without her consent).

n190 See, e.g., *In re Rudnick, 581 N.Y.S.2d 206, 207 (App. Div. 1992)* (finding attorney's "personal interest as her sexual partner conflicted with his professional responsibility as her attorney and that by maintaining a sexual relationship with her, he became a potential witness against her in the matrimonial action"); see also ABA Formal Op. 92-364 (1992) ("A related danger resulting from the blurring of relationships and one where the lover becomes a participant adverse to the client is presented in divorce cases where the attorney engaging in a sexual relationship with a client may risk becoming an adverse witness to the client on issues of adultery and child custody.").

n191 See 1 MCCormick on Evidence ß 88 at 322-326 (4th ed. 1992).

n192 See, e.g., *In re Marriage of Kantar, 581 N.E.2d 6, 13 (Ill. App. Ct. 1991)* (Greiman, J., specially concurring).

n193 See, e.g., *People of Colorado v. Barr, 929 P.2d 1325, 1326 (Colo. 1996)* ("A sexual relationship between lawyer and client during the course of the professional relationship presents significant dangers, including, at the least, the potential that the client will be injured by the lawyer's conduct." (quoting *People v. Good, 893 P.2d 101, 103 (Colo. 1995)); Drucker's Case, 577 A.2d 1198, 1201 (N.H. 1990)* (suspending attorney for two years for failing to warn client that their sexual relationship will affect her case); *In re DiSandro, 680 A.2d 73, 75 (R.I. 1996)* ("An attorney who engages in sexual relations with his or her divorce client places that client's rights in jeopardy."); *In re DiPippo, 678 A.2d 454, 457 (R.I. 1996)* (suspending attorney for three months for sexual relationship with client in matrimonial matter because it jeopardized client's case); *In re McDow, 354 S.E.2d 383-84 (S.C. 1987)* (granting husband a divorce on the grounds of adultery because of attorney's sexual involvement with client).

n194 See, e.g., *In re Lewis, 415 S.E.2d 173 (Ga. 1992)* (holding that even if attorney was engaged in a sexual relationship with client prior to taking on her divorce matter his professional judgment was affected by his own personal interests).

n195 See e.g., *In re Hassenstab, 934 P.2d 1110 (Or. 1997)* (disbarring attorney for a series of sexual relationships ranging from 'consensual' sexual relations to sexual abuse with indigent criminal clients, holding that attorney's personal interest in the sexual relationship affected his professional judgment).

n196 See ABA Formal Op. 92-364 (1992).

n197 See, e.g., O'Connel, supra note 175, at 900 (lamenting that conflict of interest methodology is inadequate to address sexual relations pointing out that under a conflict of interest analysis "it is left to the attorney who wants to have sexual relations with a client to determine whether a reasonable lawyer would believe a potential conflict of interest exists). O'Connel maintains that conflict of interest "does not offer much protection for client who is reluctant to spurn an attorney's advances for fear that rejection will impair the legal representation, or who is awed by the attorney's status or power." Myers et al., supra note 166 (arguing that "potential conflict of interest" analysis is inherently flawed because under this approach the decision of whether it is permissible to have a sexual relationship is left to the attorney."

n198 See, e.g., *Edwards v Edwards, 567 N.Y.S.2d 645 (1991).* In Edwards, an attorney was sexually involved with a client in a divorce matter. The court held that he did not take advantage of his client or the attorney-client relationship nor was his legal representation deficient. Once the attorney was named in the complaint and became a potential witness for adultery, then the attorney had to withdraw, which he voluntarily did. Id.

n199 The problematic nature of consent in an attorney-client relationship was discussed in part one. Basically, the power imbalance in the relationship indicates that 'consent' is nearly impossible.

n200 Coleman, supra note 4, at 133.

n201 Id. See also *In re Lewis, 415 S.E.2d 173, 175 n.1 (Ga. 1992)* ("A literal reading of Standard 30 might be interpreted to authorize similar conduct upon the written notice to or consent of a client. Nothing in the record intimates the existence of such a writing. We need not concern ourselves with a bizarre hypothesis that leads to the absurd").

n202 See supra notes 6-14 and accompanying text.

n203 See, e.g., *People v. Boyer, 934 P.2d 1361, 1367 (Colo. 1997)* (holding, despite no evidence of harm to female client from the sexual relationship, "a sexual relationship between lawyer and client during the course of the professional relationship is inherently and insidiously harmful. The relationship can undermine the lawyer's professional integrity and judgment and dishonor the client's trust.").

n204 See, e.g., *Committee on Professional Ethics and Conduct of the State Bar Ass'n of Iowa v. Hill, 436 N.W.2d 57, 59 (Iowa 1989)* (suspending attorney for a sexual relationship with a divorce client and finding that such conduct was contrary to the requirement that "lawyers to maintain high standard of ethical conduct and to avoid conduct which would reflect negatively upon the integrity and honor of the profession").

n205 See, e.g., *Kentucky Bar Ass'n v. Meredith, 752 S.W.2d 786 (Ky. 1988)*. In Meredith, the attorney had a sexual relationship with the client in a contested will action. *Id. at 787.* After being discharged, the attorney filed an affidavit with the court to have his client, the mother, removed as guardian of her daughter. The Supreme Court of Kentucky held that the attorney violated DR- 102(A), which provides that a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law. The court also found that "the relationship between . . . [the attorney and the client] could also affect her credibility as a witness and that counsel should have been aware of this factor." *Id. at 788.*

n206 See, e.g., *Disciplinary Counsel v. Booher, 664 N.E.2d 522 (Ohio 1996)* (suspending attorney for engaging in sexual intercourse with client in jail meeting room finding such conduct prejudicial to the administration of justice and adversely reflected his fitness to practice law); *Committee on Prof. Ethics and Conduct of the Iowa State Bar Ass'n v. Durham 279 N.W.2d 280, 284 (Iowa 1979)* (holding that a female attorney engaging in sexual activity with an incarcerated male client in jail was "well outside that which could be termed temperate and dignified").

n207 *In re Weinstock, 1998 WL 105494* (N.Y. App. Div. Mar. 9, 1998) (finding that oral sex in a Family Court conference room between an attorney and an assigned indigent client adversely reflected upon the attorney's fitness to practice law).

n208 See, e.g., *In re Rinella, 677 N.E.2d 909 (Ill. 1997)* (suspending attorney for three years for engaging in sexual relations with three clients while he represented them in matrimonial matters, finding that such conduct is prejudicial to the administration of justice and brings the courts or the legal profession into disrepute).

n209 See, e.g., *Booher, 664 N.E.2d at 523.*

n210 See, e.g., *In re Manson, 676 N.E.2d 347, 348 (Ind. 1997)* (suspending attorney for six months for engaging in sexual intercourse with divorce and custody client in a military courtroom finding such conduct as prejudicial to the administration of justice).

n211 *In re Weinstock, 1998 WL 105494* (N.Y. App. Div. Mar. 9, 1998) (finding that oral sex in a Family Court conference room between an attorney and an assigned indigent client was conduct prejudicial to the administration of justice).

n212 See, e.g., *In re Bilbro, 478 S.E.2d 253, 254 (S.C. 1996)*. (suspending attorney for engaging in sexual relationship with divorce client, finding that the attorney took advantage of his superior position as the client's lawyer concluding "that respondent engaged in sexual activity with client and thereby knowingly jeopardized client's right to alimony, and could have prejudiced her custody of her children.").

n213 See, e.g., *In re the Discipline of Bergren, 455 N.W.2d 856 (S.D. 1990)*. In Bergren, an attorney was suspended for one year for a sexual relationship with a client and a similar relationship with another client. The South Dakota Supreme Court found that both clients believed that their fees would be reduced or not billed if they gave sexual favors. The court held that "by violating the attorney-client relationship and taking advantage of his relationship, [the attorney] engaged in conduct that is prejudicial to the administration of justice. Such conduct demonstrates an unfitness to practice law." Id. Moreover, the court held that having sexual relationships with clients violates Canon I, Disciplinary Rule 1-102(A)(5) and (6) of the Code of Professional Responsibility. This Disciplinary Rule defines "misconduct" as conduct which is prejudicial to the administration of justice and conduct that adversely reflects on fitness to practice law. *Id. at 857.*

n214 *In re Keitt, 468 S.E.2d 875, 876 (S.C. 1996)* (engaging in sexual relationship with client in family law matter was "conduct prejudicial to the administration of justice (Rule 8.4(e))."

n215 See, e.g., *In re McDow, 354 S.E.2d 383 (S.C. 1987)* (per curiam) (holding that sexual activity with divorce clients resulting in unfavorable decision and precluding a favorable financial settlement for the client was engaging in conduct that was prejudicial to the administration of justice).

n216 See, e.g., *In re Discipline of Bergren, 455 N.W.2d 856, 857 (S.D. 1990)* ("We hold that having sexual relationships with client . . . is prejudicial to the administration of justice and conduct that adversely reflects on fitness to practice law."); *In re McBratney, 465 S.E.2d 733, 734 (S.C. 1996)* (holding that attorney's sexual relationship with client was prejudicial to the administration of justice and reflected negatively on his fitness to practice law when the sexual relationship caused a favorable divorce settlement to be changed by husband after discovering attorney's sexual affair with his wife).

n217 O'Connel, supra note 175.

n218 Id. at 905 (proffering that "misconduct analysis is inadequate to deal with the problem generated by sexual activity between attorneys and clients").

n219 Id.

n220 *Stockton v. Ford, 52 US (11 How.) 232, 247 (1850).*

n221 ABA Formal Op. 92-364 (1992).

n222 See id. (citing Rules 1.7(b), 1.8(b), DR 4-101(B)(2) and DR 5-101 as rules implying a fiduciary duty); Myer et al., supra note 155, at 787 (citing the following Ethical rules that may implicate the principle of a fiduciary duty: Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4 (Communication), Rule 1.6 (Confidentiality of information), Rule 1.7 (Conflict of Interest: General Rule), Rule 1.7 cmt. (Loyalty to Client), and Rule 1.8 (Conflict of Interest: Prohibited Transactions), Rule 3.7 (Lawyer as Witness), Rule 3.7 cmt.)).

n223 Black's L. Dictionary 432 (6th ed. 1991). See also Pennsylvania Bar Ass'n Comm. Leg. Ethics Professional Responsibility, Formal Op. 97-100 (1997) ("A fiduciary relationship exists when: confidence on one side results in superiority and influence on the other side . . . .").

n224 See Stephen Gillers, 61-62 Regulation of Lawyers: Problems of L. & Ethics (4th ed. 1995). See also Penn. Bar Ass'n, Formal Op. 97-100 (1997) (concluding that the attorney-client relationship is a fiduciary one).

n225 See, e.g., *Doe v. Roe, 681 N.E.2d 640, 645 (Ill. App. Ct. 1997)* ("When, in the course of his professional dealings with a client, an attorney places personal interests above the interests of the client, the attorney is in breach of his fiduciary duty by reason of the conflict.").

n226 ABA Formal Op. 92-364 (1992). See also Linda Mabus Jorgenson & Pamela K. Sutherland, Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact, *45 Ark. L. Rev. 459 (1992);* Myers et al., supra note 155, at 791 (stating that "sexual relations between attorneys and clients would compromise the attorney's fiduciary responsibility to maintain the client's confidences"); O'Connel supra note 164, at 914 (stating that "sexual relations between an attorney and client will usually represent a breach of that duty").

n227 See, e.g., *In re Tante, 453 S.E.2d 688, 690* (suspending attorney for breaching his fiduciary duty by using the client's psychological and medical evaluations to commence a sexual relationship with a mentally and emotionally impaired client).

n228 *In re Grimm, 674 N.E.2d 551, 554 (Ind. 1996).*

n229 *In re Disciplinary Proceedings Against Kraemer, 547 N.W.2d 186, 189-190 (Wis. 1996).*

n230 See generally authorities cited Part I. See also Robert H. Muriel, Suppressed v Suppressed: A Court's Refusal To Remedy the Legal Profession's "Dirty Little Secret," Attorney-Client Sexual Exploitation, *23 Loy. U. Chi. L.J. 309, 313 (1992)* (stating, "In sum, courts are beginning to recognize that an attorney may breach the fiduciary duty to a client by engaging in sexual relations during the course of representation.").

n231 See, e.g., Pennsylvania Bar Ass'n, Formal Op., 97-100 (1997) (lamenting that "in situations where there are no express rules addressing the conduct at issue, and determinations are dependent upon implied proscriptions, the results are often factdependent and finders-of-fact are left to wrestle with concepts such as breach of fiduciary duty, transference, and conflicts of interest in this context"); Molly A. McQueen, Comment, Regulating Attorney-Client Sex: The Need for an Express Rule, *29 Gonz. L. Rev. 405, 421* (1993/1994) ("This type of conduct is only inferentially forbidden, in limited contexts, through loose interpretations of numerous provisions of the Rules of Professional Conduct. An express provision is clearly necessary.").

n232 For a cogent feminist article arguing that an express rule prohibiting attorneyclient sexual relations is paternalistic and violates the constitution see generally Linda Fitts Mischler, Reconciling Rapture, Representation, and Responsibility: An Argument Against per se Bans on Attorney-Client Sex, *10 Geo. J. Legal Ethics 209 (1997)*. For the view that an express rule prohibiting attorney-client sexual relations does not violate the Constitution see, e.g., Symposium, Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rules, 7 Notre Dame J.L. Ethics & Pub. Pol'y 57, 90-97 (1993) (positing that prohibiting attorney-client sexual relationship during legal representation is constitutional); Caroline Forell, Oregon's "Hands-Off" Rule: Ethical and Liability Issues Presented by Attorney-Client Sexual Contact, *29 Willamette L. Rev. 711, 732-735 (1993)* (arguing that an express rule prohibiting attorney-client sexual relations during representation does not violate attorney's right to privacy under the Constitution; John M. O'Connel, Note, Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule, *92 Colum. L. Rev. 887, 914-919 (1992)* ("The privacy argument fails on two grounds. The proposed rule [prohibiting attorney-client sexual relations] does not restrict with whom an attorney may engage in consensual sexual activity; the rule, like other professional rules, merely regulates whom the attorney may represent."); Margit Livingston, When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations, *62 Fordham L. Rev. 5, 56-63 (1993)* (concluding that whether the attorney's right to engage in consensual sexual relations is considered a fundamental right (strict scrutiny) or not (rational basis), regulating said conduct would not violate the attorney's privacy rights); Jill Crumpacker, Note Regulation of Lawyer-Client Sex: Codifying the "Cold Shower" or a "Fatal Attraction" per se?, *32 Washburn L.J. 379, 395-398 (1993)* (discussing both sides of the constitutional argument); Yael Levy, Note, Attorneys, Clients and Sex: Conflicting Interests in the California Rule, *5 Geo. J. Legal Ethics 649 (1992)* (examining the constitutional implications of the California rule prohibiting attorney-client sexual relations).

n233 See, e.g., *Roe v. Wade, 410 U.S. 113 (1973)* ("The Constitution does not explicitly mention any right of privacy."); *Carey v. Population Services International, 431 U.S. 678, 684 (1977).*

n234 See, e.g., *Griswold v. Connecticut, 381 U.S. 479, 483 (1965)* ("The First Amendment has a penumbra where privacy is protected from governmental intrusion.").

n235 See *id. at 484* ("The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy.").

n236 See id. (stating that a right to privacy is implicit in the Fourth Amendment because it "explicitly affirms the 'right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures'").

n237 See, e.g., *id. at 483* (The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.").

n238 See, e.g., id. (stating that a right to privacy is supported in the Ninth Amendment which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people").

n239 See *Roe v. Wade, 410 U.S. 113, 152 (1973)* ("In varying texts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, . . . ; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights, . . . ; in the Ninth Amendment . . . ; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.").

n240 *Griswold, 381 U.S. at 483-484.*

n241 See, e.g., *Meyer v. Nebraska, 262 U.S. 390 (1923)* (right to teach one's child a foreign language); *Pierce v. Society of Sisters, 268 U.S. 510 (1925)* (right to educate one's child in a private school); *Skinner v. Oklahoma, 316 U.S. 535 (1942)* (procreation and marriage); *Prince v. Massachusetts, 321 U.S. 158 (1944)* (family relationship); *Griswold v. Connecticut, 381 U.S. 479 (1965)* (right to use contraceptives); *Loving v. Virginia, 388 U.S. 1 (1967)* (right to choose one's spouse); *Stanley v Georgia, 394 U.S. 557 (1969)* (right to private possession of obscene material); *Eisenstadt v. Baird, 405 U.S. 438 (1972)* (right of unmarried person access to contraceptives); *Roe v. Wade, 410 U.S. 113 (1973)* (abortion; since *Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992),* a lesser standard of review has been adopted--"undue burden").

n242 *381 U.S. 479 (1965).*

n243 *405 U.S. 438 (1972).*

n244 *Id. at 453.*

n245 *410 U.S. 113 (1973).*

n246 *478 U.S. 186 (1986).*

n247 *Skinner v. Oklahoma, 316 U.S. 535 (1942); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).*

n248 *Bowers, 478 U.S. at 191.*

n249 See cases cited supra note 241.

n250 See, e.g., *Leis v. Flynt, 439 U.S. 438, 442 (1979)* ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."); *Tolchin v. Supreme Court of New Jersey, 111 F.3d 1099, 1114 (3d Cir. 1997)* (stating that "judiciary-approved rules fall within the ambit of the Equal Protection Clause").

n251 *New Orleans v. Dukes, 427 U.S. 297, 303 (1976)* ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinction such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

n252 See supra Part I(B).

n253 See, e.g., *Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977)* (explaining that legislation that burdens a fundamental right is justified only if there are "compelling State interests, and must be narrowly drawn to express only those interests").

n254 See, e.g., *Leis v. Flynt, 439 U.S. 438, 442 (1979)* ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.").

n255 See, e.g., *Tolchin v. Supreme Court of New Jersey, 111 F.3d 1099, 11131114 (1997)* (citing numerous decisions to that effect).

n256 See generally, supra Part I(B) for case law examining compelling interests.

n257 See id.

n258 *468 U.S. 609 (1984).*

n259 *Id. at 617.*

n260 *Id. at 618.*

n261 Id. (Justice Brennan explained that between family oriented relationships as "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation and seclusion of others in critical aspects of the relationship," and those lacking such a basis, are other relationships that may deserve constitutional protection. However, a sexual relationship with a client during representation is unlikely to qualify as a "sustenance of a family" type of relationship. Thus, a rule prohibiting attorney-client sex during representation would probably lie in the middle of Justice Brennan's spectrum. deserving nothing more than rational basis review.

n262 Id.

n263 *Id. at 623.*

n264 *Id. at 629* (citing *City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)).*

n265 See, e.g., *NAACP v. Alabama, 377 U.S. 288, 307 (1964)* (stating that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms").

n266 *Broadrick v. Oklahoma, 431 U.S. 601, 615 (1973).*

n267 See supra notes 2-12 and accompanying text.

n268 See generally supra Part I and II.

n269 American L. Code of Conduct Rule 8.8 (1980).

n270 Bounds of Advocacy Standard 2.16 (Am. Academy of Matrimonial Lawyers 1991) (cited in Livingston, supra note 175).

n271 The Hippocratic Oath expressly prohibits sexual relations between doctor and patient: "Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female or male person, be they free or slaves." See also American Medical Association Code of Medical Ethics and Current Opinions of the Council of Ethical and Judicial Affairs 8.14 (1994) reprinted in Codes of Professional Responsibility (ed. Rena A. Gorlin) (1994) (noting the vulnerability of patients, the transference characteristic in a physician-patient relationship, the high probability of physician exploitation of patient, and the detrimental effect the sexual relationship can have on the patient and concluding that "sexual contact that occurs concurrent with the physician-patient relationship constitutes sexual misconduct"); 117 Annals of Internal Medicine (1992) reprinted in Codes of Professional Responsibility (ed. Rena A. Gorlin) (1994) ("It is unethical for a physician to become sexually involved with a current patient even if the patient initiates or consents to the contact. Issues of dependency, trust, transference, and inequalities of power lead to increased vulnerability of the patient and requires that a physician not cross the boundary."). See generally H. Russel Searight & David C. Campbel, Physician-Patient Sexual Contact: Ethical and Legal Issues and Clinical Guidelines, 36 J. Fam. Prac. 647 (1993); Note, Catherine S. Leffler, Sexual Conduct Within the Physician-Patient Relationship: A Statutory Framework for Disciplining this Breach of Fiduciary Duty, 1 Widener L. Symposium J. 501 (1996) (advocating a statutory framework to discipline physicians for engaging in sexual contact and criticizing licensing statutes for lack of clarity in making known that physician-patient sex is an unethical breach of fiduciary duty, and harm patients).

n272 American Psychiatrist Association Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry ß 2 (1994) (stating that "the inherent inequality in the doctor-patient relationship may lead to exploitation of the patient . . . concluding that sexual activity with a current or former patient is unethical").

n273 Kansas Bar Ass'n Ethical Op. No. 94-13 (1995).

n274 See, e.g., *Suppressed v. Suppressed, 565 N.E.2d 101, 105 (Ill. App. Ct. 1990)* (finding that attorney sexual relationship with client "may have been unethical"); *People v. Good, 893 P.2d 101 (Colo. 1995)* (engaging in sexual relationship with client attorney represented in a criminal matter may implicate numerous rules of conduct).

n275 See, e.g., *In re Hassenstab, 934 P.2d 1110, 1114 (Or. 1997)* (stating that an attorney-client sexual relationship is "a potential conflict of interest"); *People v. Barr, 929 P.2d 1325, 1326 (Colo. 1996)* (stating that an attorney-client sexual relationship, at the least, has the "potential that the client will be injured by the lawyer's conduct").

n276 See, e.g., *People v. Good, 893 P.2d 101, 104* ("A sexual relationship also presents the strong possibility of a conflict between the lawyer's personal interests and the best interests of the client . . . .").