

1 (This opinion is a DRAFT Opinion and is subject to revision or withdrawal  
2 until it is finalized by the Ethics Committee – OCTOBER 14, 2009)

3  
4 LEGAL ETHICS OPINION 1853

5 SEXUAL RELATIONSHIP WITH A  
6 CLIENT

7 The Committee has been asked to address the issues involved when a lawyer  
8 enters into a sexual relationship with a client during the course of the representation. The  
9 underlying conundrum of issues does not involve the actual acts of the lawyer or what  
10 indeed defines a “sexual relationship.” The problems addressed arise from the  
11 impropriety and unfair exploitation of the lawyer’s fiduciary position as well as the  
12 lawyer’s untold influence and potential personal conflict. As the ABA’s Standing  
13 Committee on Legal Ethics identified in Formal Opinion No. 92-364 (1992), “[t]he roles  
14 of lawyer and lover are potentially conflicting ones as the emotional involvement that is  
15 fostered by a sexual relationship has the potential to undercut the objective detachment  
16 that is often demanded for adequate representation.”

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18 APPLICABLE RULES

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20 The Committee recognizes that no provision in the Virginia Rules of Professional  
21 Conduct specifically prohibits sexual relationships between lawyer and client,<sup>1</sup> however,  
22 the lawyer must determine whether in a specific circumstance such conduct: (1)  
23 jeopardizes the lawyer’s ability to competently represent the client (Rule 1.1), (2)  
24 involves exploitation of the lawyer’s fiduciary relationship with the client, (3) interferes  
25 with the lawyer’s independent professional judgment (Rule 2.1), (4) creates a conflict of  
26 interest between the lawyer and the client (Rule 1.7(a)(2), Rule 1.7 Comment [10] or  
27 Rule 1.8(b)), (5) jeopardizes the duty of confidentiality owed to the client (Rule 1.6(a)),

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<sup>1</sup> In response to growing concerns over breaches of fiduciary duty and exploitation of trust issues, prior to the development of ABA Model Rule 1.8(j), many states had developed their own specific rules regarding lawyer-client sexual relationships. By 2003, thirteen states had amended their model rules of professional ethics or disciplinary codes to include provisions regarding the propriety of consensual lawyer-client sexual relationships, ranging from absolute prohibition to limited restrictions to commentary advising about the possible negative consequences of such relationships. On April 2, 1992, California became the first state to enact a formal rule regarding attorney-client relationships when the state adopted Rule of Professional Conduct 3-120. Phillip R. Bower & Tanya E. Stern, “Conflict of Interest?: The Absolute Ban on Lawyer-Client Sexual Relationships Is Not Absolutely Necessary, 16 GEO. J. LEGAL ETHICS 535, 540 (2003) (explaining how a blanket rule prohibiting consensual lawyer-client sexual relations is both over-inclusive and under-inclusive). Currently, according to the American Bar Association, 27 states have addressed lawyer-client sexual relations in some form in their rules of professional conduct. Daniel Gilbert, “Virginia State Bar rules against adopting sexual misconduct regulation,” *Bristol Herald-Courier*, August 9, 2009 (“Gilbert article”). Critics of an unqualified ban acknowledge that a lawyer often holds a position of substantial power vis-a-vis a client, but both attorney and client have rights of privacy and freedom of association which should not lightly be restricted by the state. As one commentator notes, “any regulation by the bar of attorney client sexual relations must account for the complex variety of relationships that can and do exist between attorneys and their clients.” William K. Shirley, “Dealing With the Profession’s Dirty Little Secret: A Proposal for Regulating Attorney-Client Sexual Relationships,” 13 GEO. J. LEGAL ETHICS 131, 133 (1999).

28 or (6) potentially prejudices the client's matter (Rule 1.3(c)). Additionally, a lawyer who  
29 intentionally uses the fiduciary relationship of lawyer and client to coerce sexual favors  
30 from a client may be found to have violated Rule 8.4 (b)'s prohibition against a  
31 "deliberately wrongful act that reflects adversely on the lawyer's . . . fitness to practice  
32 law."<sup>2</sup>

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## 34 ANALYSIS

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36 *Competence and Diligence*

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38 Rule 1.1 states that "a lawyer must provide competent representation to a  
39 client...." While a sexual relationship with a client may not directly impede the ability of  
40 a lawyer to provide competent representation, the danger of indirect harm or prejudice to  
41 the client exists. Depending upon the circumstances of the client's matter, disclosure of  
42 the relationship may prejudice the client or compromise the competency of the  
43 representation thereby violating Rule 1.3(c)<sup>3</sup> of the Rules of Professional Conduct and the  
44 principles underlying the Rules outlined in the following sections as well. Accordingly,  
45 the lawyer's conduct may play a significant factor in denying the client the full benefit of  
46 the assistance normally available in a traditional attorney-client relationship.

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48 *Lawyer's Independent Judgment*

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50 A fundamental aspect of the attorney-client relationship is based upon the  
51 lawyer's duty to exercise independent professional judgment. Rule 2.1 states:

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53 In representing a client, a lawyer shall exercise independent professional  
54 judgment and render candid advice. In rendering advice, a lawyer may refer not  
55 only to law but to other considerations such as moral, economic, social and  
56 political factors that may be relevant to the client's situation.

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58 A lawyer involved in a sexual relationship with a client will likely become conflicted in  
59 providing the "straightforward advice" that "involves unpleasant facts and alternatives  
60 that a client may be disinclined to confront." Rule 2.1 Comment [1]. Additionally, the  
61 lawyer's ability to maintain independent objectivity free from emotion or bias is likely  
62 impaired because of the personal relationship. The lawyer risks losing the objectivity and  
63 reasonableness that form the basis of the lawyer's independent professional judgment.

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65 *Fiduciary Obligations*

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67 The attorney-client relationship is a fiduciary one in which the client places trust  
68 and confidence in the lawyer in return for the lawyer's placing the interest of the client

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<sup>2</sup> See *Virginia State Bar v. Wade Trent Compton*, infra at n.8.

<sup>3</sup> Rule 1.3 Diligence

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

69 ahead of any self-interest.<sup>4</sup> This fiduciary relationship imposes the highest standards of  
70 ethical conduct on the lawyer, which requires the lawyer to exercise and maintain the  
71 utmost good faith, honesty, integrity, fairness and fidelity. This fiduciary relationship  
72 precludes the lawyer from having personal interests antagonistic to those of the client.  
73 ABA Formal Op. 92-364.  
74

75 The lawyer's position of trust places the burden on the lawyer to ensure that all  
76 dealings between the lawyer and client are fair and reasonable. Rule 1.8 Comment [1].  
77 By nature, the attorney-client relationship is often inherently unequal: the client comes to  
78 the lawyer because he or she needs help with a problem and puts faith in the lawyer to  
79 respond reasonably and objectively on his or her behalf. Such reliance potentially places  
80 the lawyer in a position of dominance and the client in a position of vulnerability. While  
81 this dynamic might not exist in every situation, e.g., with corporate clients, many clients,  
82 such as those involved in divorce, criminal, probate, and immigration matters, often feel  
83 particularly dependent upon their lawyers. Such vulnerability may result from the  
84 client's emotional state, age, social status, educational level, or the nature of the matter  
85 being handled by the lawyer for the client. The more vulnerable the client is in his or her  
86 ability to make reasoned judgments regarding the matter, the more heightened becomes  
87 the lawyer's fiduciary obligation to avoid any improper relationship with the client. If  
88 the lawyer abuses the client's reliance and trust, the lawyer has violated Rule 1.3(c).  
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90 The principle of Rule 1.3(c)<sup>5</sup> rests on public policy and is a protection to the client  
91 that the lawyer will not take advantage of any confidence imparted by the client. Further,  
92 Rule 1.8(b)<sup>6</sup> supports the fundamental principle that a lawyer may not use client  
93 confidences to the disadvantage of the client, and Rule 1.7(a)(2)<sup>7</sup> prohibits a lawyer from

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<sup>4</sup> A fiduciary relationship arises from principles of common law. As stated by the Supreme Court in 1850: "There are few business relations of life involving a higher trust and confidence than those 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 detriment of prejudice of the rights of the party bestowing it." *Stockton v. Ford*, 52 U.S. (11. How) 232, 247 (1850); see also *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992) (citing *Stockton* with approval); *In re Education Law Center, Inc.*, 86 N.J. 124, 429 A.2d 1051 (1981) (same); 98 A.L.R. 2d 1235 (1964) (collecting cases).

<sup>5</sup> Rule 1.3 Diligence

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(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

<sup>6</sup> Rule 1.8 Conflict of Interest: Prohibited Transaction

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(b) A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

<sup>7</sup> Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

94 representing a client when the representation may be limited by the lawyer's own  
95 interests.

96  
97 Rules 1.3(c), 1.8(b), and 1.7(a)(2) reflect the fundamental fiduciary obligation of a  
98 lawyer not to exploit a client's trust for the lawyer's benefit, which implies that the  
99 lawyer should not abuse the client's trust by taking sexual or emotional advantage of a  
100 client. ABA Op. No. 92-364. The inherently unequal relationship may provide an  
101 opportunity for the lawyer to exploit the client either emotionally, sexually, or  
102 financially. Since the attorney-client relationship is based upon trust and confidence, a  
103 lawyer has a heightened duty to protect those obligations. A client may not feel free to  
104 rebuff a lawyer's unwanted advances for fear the rejection will reduce the lawyer's  
105 attention to the case or cause the client to find a new lawyer. Client vulnerability may be  
106 even more acute in legal aid or pro bono cases because the client may lack the resources  
107 necessary to change lawyers if unwanted advances occur. The client may feel obliged to  
108 provide sexual favors to the lawyer because he or she has no other means to compensate  
109 the lawyer for his or her work or out of fear that the lawyer will not continue to pursue  
110 their legal interests diligently.<sup>8</sup>

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#### 112 *Conflict of Interests*

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114 The independent professional judgment of a lawyer is based solely on behalf of  
115 the best interests of the client. A lawyer involved in a sexual relationship with a client  
116 risks compromising that judgment because of personal interests. Rule 1.7(a)(2).  
117 Lawyers, like any other person, have personal emotional factors that become intertwined  
118 when they engage in a sexual relationship. When that relationship involves a client, the  
119 lawyer's ability to be impartial and objective is impaired. When the lawyer's interests  
120 interfere with decisions that must be made for the client, the representation is impaired.  
121 See Rule 1.7 Comment [10].<sup>9</sup>

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123 While certainly not all situations would present such a problem, these conflicting  
124 situations are likely to arise in many attorney-client relationships. The typical  
125 problematic relationship is with the divorce client – not only does the lawyer risk  
126 becoming an adverse witness on issues of adultery or child custody, but the lawyer's

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(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

<sup>8</sup> See, e.g., Virginia State Bar v. Wade Trent Compton, CL08-172 (Cir. Ct. Dickenson Co. (2009) and related "Gilbert article," *supra* at n.1. Mr. Compton stipulated in an agreed disposition that he engaged in sexual conduct with clients while employed at a licensed legal aid society. On December 15, 2008, a three-judge panel of the Dickenson County Circuit Court suspended Wade Trent Compton's license to practice law for five years with terms for violating professional rules that govern conflict of interest and misconduct that involves a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

<sup>9</sup> Rule 1.7 Comment [10]: A lawyer may not allow business or personal interests to affect representation of a client..... A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.

127 behavior actually poses a threat of additional harm to the client.<sup>10</sup> However, a sexual  
128 relationship with a client in other situations, such as a corporate client, a criminal client,  
129 and even a real estate or estate planning client, may be just as problematic. The same  
130 ethical considerations may be raised when the client is an organization and the lawyer's  
131 relationship is with one of the organization's representatives.

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133 If there is a reasonable possibility that the client might be harmed or that client  
134 representation may be impaired by the lawyer's engaging in a sexual relationship with the  
135 client, the lawyer should withdraw from the representation.

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137 Additionally, a consensual sexual relationship that predates the attorney-client  
138 relationship is not per se improper, such as the representation of a spouse or significant  
139 other with whom the lawyer has had an ongoing romantic/sexual relationship; however  
140 such representation may raise the same ethical problems identified in this opinion.<sup>11</sup>

#### 141 142 *Preservation of Client Confidences*

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144 While the lawyer has a duty under Rule 1.6(a)<sup>12</sup> to protect client confidences, this  
145 duty may become difficult to ascertain when a sexual relationship exists between the  
146 lawyer and client. Client confidences are protected only when they are imparted in the  
147 context of the professional relationship. The blurred line that exists between the  
148 professional and personal relationship may make it difficult to predict if and when client  
149 confidences may be protected.

150  
151 Thus, a lawyer who uses confidential client information to pursue sexual relations  
152 with a client violates Rules 1.6(a) and 1.8(b), particularly in circumstances where the  
153 lawyer acts upon client vulnerabilities to manipulate the client to participate in sexual  
154 relations. Clients in domestic, child custody, criminal, and pro bono cases are especially  
155 prone to such manipulation.

#### 156 157 CONCLUSION

158  
159 It is apparent that a sexual relationship with a client during the course of  
160 representation can seriously harm the client's interests. It is the opinion of this  
161 Committee that a lawyer should refrain from entering into a sexual relationship with a  
162 client as client consent will rarely be sufficient to eliminate any potential ethical  
163 violation. In most situations of this type the client's ability to give meaningful and  
164 cogent consent is vitiated by the lawyer's potential undue influence and the client's

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<sup>10</sup> See Rule 3.7, which requires that a lawyer terminate representation if the lawyer is likely to be called as a witness against his client.

<sup>11</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 n.1 (July 6, 1992)

<sup>12</sup> Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

165 emotional vulnerability. If a problem arose, the lawyer would be called upon to show  
166 that the lawyer's conduct did not violate any of the aforementioned ethical concerns, in  
167 spite of the consent.

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This opinion is advisory only and not binding on any court or tribunal.

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