

The Committee has been asked to address the numerous issues involved when a lawyer enters into a sexual relationship with a client during the course of the representation. The manifold ethical issues that arise from these circumstances do not require the Committee to describe the actual acts of the lawyer nor what indeed defines a “sexual relationship.” Many problems addressed arise from the impropriety and unfair exploitation of the lawyer’s fiduciary position as well as the lawyer’s untold influence and potential personal conflict. As the ABA’s Standing Committee on Legal Ethics identified in Formal Opinion No. 92-364 (1992), “[t]he roles of lawyer and lover are potentially conflicting ones as the emotional involvement that is fostered by a sexual relationship has the potential to undercut the objective detachment that is often demanded for adequate representation.” While distinctions may be drawn between sexual relationships that predate the formation of the attorney/client relationship and those that begin during the attorney-client relationship, the lawyer must always be mindful of the ethical considerations involved. Clearly, the situation where the sexual relationship develops during the attorney-client relationship risks more probable ethical breaches and in most instances forms the basis for lawyer discipline. This opinion outlines the host of ethical problems a lawyer faces in having a sexual relationship with a client during the course of a professional engagement.

APPLICABLE RULES

The Committee recognizes that no provision in the Virginia Rules of Professional Conduct specifically prohibits sexual relationships between lawyer and client;¹ however, the lawyer must consider that such conduct could: (1) jeopardize the lawyer’s ability to competently represent the client (Rule 1.1), (2) wrongfully exploit the lawyer’s fiduciary relationship with the client, (3) interfere with the lawyer’s independent professional judgment (Rule 2.1), (4) create a conflict of interest between the lawyer and the client (Rule 1.7, Rule 1.7 Comment [10], Rule 1.8(b) and Rule 1.10(a)), (5) jeopardize the duty of confidentiality owed to the client (Rule 1.6(a)), or (6) potentially prejudice the client’s matter (Rule 1.3(c)). Additionally, a lawyer who intentionally uses the fiduciary relationship of lawyer and client to coerce sexual favors from a client may be found to

¹ 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-à-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).

have violated Rule 8.4(b)'s prohibition against a "deliberately wrongful act that reflects adversely on the lawyer's . . . fitness to practice law."² Also, when a lawyer solicits sexual favors in lieu of charging the client legal fees, the lawyer will have violated Rule 8.4(b).³

ANALYSIS

Competence and Diligence

Rule 1.1 states that "a lawyer must provide competent representation to a client" While a sexual relationship with a client may not directly impede the ability of a lawyer to provide competent representation, the danger of indirect harm or prejudice to the client nonetheless exists. Depending upon the circumstances of the client's matter, disclosure of the relationship may prejudice the client or compromise the competency of the representation thereby violating Rule 1.3(c)⁴ of the Rules of Professional Conduct and the principles underlying the Rules outlined in the following sections as well. Accordingly, the lawyer's conduct may play a significant factor in denying the client the full benefit of the assistance normally available in a traditional attorney-client relationship. A sexual relationship with the client creates a grave risk that the lawyer's duties of competence and diligence will be breached.

Lawyer's Independent Judgment

A lawyer is required to exercise detached and independent professional judgment when representing a client. Rule 2.1 states:

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

A lawyer involved in a sexual relationship with a client, especially one that arose during the attorney-client relationship, could become conflicted in providing the "straightforward advice" that "involves unpleasant facts and alternatives that a client may be disinclined to confront." Rule 2.1 Comment [1].⁵ Additionally, the lawyer's ability to

² See *Virginia State Bar v. Wade Trent Compton*, *infra* at n.11, *infra*.

³ The facts of reported disciplinary cases also provide support for the position that the client's purported "consent" may be illusory in this context. *In the Matter of Sterling Weaver, Sr.*, VA Disp. Op. 97-010-0846, 1997 WL 873025 (Va.St.Bar.Disp.Bd., Nov. 17, 1997) (lawyer testified that sexual intercourse with client was consensual; public reprimand); *Disciplinary Counsel v. Sturgeon*, Ohio, No. 2006-1209 (Nov. 15, 2006) (permanent disbarment of lawyer for repeatedly pressuring financially vulnerable female clients to trade sexual favors for reduced legal fees, exposing himself, using crude language, and falsely denying fault); *Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath*, Iowa, No. 113/05-0575 (April 21, 2006) (three-year suspension of lawyer who pressed three vulnerable female clients to have sex with him in lieu of paying his fees); *In re Gamino*, Wis., No. 2003AP2422-D (Dec. 20, 2005) (two-year suspension for sex with two vulnerable female clients and repeated misrepresentations about the relationships).

⁴ 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.

⁵ A lawyer may be disinclined to provide bad news to a client about their legal matter while the lawyer is having a sexual relationship for fear of losing the personal sexual relationship. In that situation, the lawyer's personal interests in continuing the sexual relationship could materially limit the legal

maintain independent objectivity free from emotion or bias could be impaired because of the personal relationship. The lawyer risks losing the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment.

Fiduciary Obligations

The attorney-client relationship is a fiduciary one in which the client places trust and confidence in the lawyer in return for the lawyer's placing the interest of the client ahead of any self-interest.⁶ This fiduciary relationship imposes the highest standards of ethical conduct on the lawyer, which requires the lawyer to exercise and maintain the utmost good faith, honesty, integrity, fairness, and fidelity. This fiduciary relationship precludes the lawyer from having personal interests antagonistic to those of the client. ABA Formal Op. 92-364.

The lawyer's position of trust places the burden on the lawyer to ensure that all dealings between the lawyer and client are fair and reasonable. Rule 1.8 Comment [1]. By nature, the attorney-client relationship is often inherently unequal: the client comes to the lawyer because he or she needs help with a problem and puts faith in the lawyer to respond reasonably and objectively on his or her behalf. Such reliance potentially places the lawyer in a position of dominance and the client in a position of vulnerability. While this dynamic might not exist in every situation, e.g., with corporate clients, clients involved in divorce, criminal, probate, and immigration matters often feel particularly dependent upon their lawyers. Such vulnerability may result from the client's emotional state, age, social status, educational level, or the nature of the matter being handled by the lawyer for the client.⁷ The more vulnerable the client is in his or her ability to make reasoned judgments regarding the matter, the more heightened becomes the lawyer's fiduciary obligation to avoid any improper relationship with the client. If the lawyer abuses the client's reliance and trust, the lawyer has violated Rule 1.3(c).

The principle of Rule 1.3(c)⁸ rests on public policy and is a protection to the client that the lawyer will not take advantage of any confidence imparted by the client. Further, Rule 1.8(b)⁹ supports the fundamental principle that a lawyer may not use client

representation and create a conflict of interest under Rule 1.7 (a)(2). See the discussion of conflicts of interest beginning at p.5 of this opinion.

⁶ 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).

⁷ See ABA Formal Op. 92-364, *supra*, noting that 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 fear deportation; a client may be trying to save a business or salvage a reputation; the corporate employee's job may be on the line, depending on the outcome of the transaction or litigation.

⁸ See note 4, *supra*.

⁹ Rule 1.8 Conflict of Interest: Prohibited Transaction

confidences to the disadvantage of the client, and Rule 1.7(a)(2)¹⁰ prohibits a lawyer from representing a client when the representation may be limited by the lawyer's own interests.

Rules 1.3(c), 1.8(b), and 1.7(a)(2) reflect the fundamental fiduciary obligation of a lawyer not to exploit a client's trust for the lawyer's benefit, which implies that the lawyer should not abuse the client's trust by taking sexual or emotional advantage of a client. ABA Op. No. 92-364. The inherently unequal relationship, which is much more problematic in the sexual relationship that arises during the course of the attorney-client relationship, may provide an opportunity for the lawyer to exploit the client either emotionally, sexually, or financially. Since the attorney-client relationship is based upon trust and confidence, a lawyer has a heightened duty to protect those obligations. There are scenarios too numerous to mention in which a lawyer's sexual conduct with a client presents ethical problems for the lawyer. Client vulnerability may be even more acute in legal aid or pro bono cases because the client may lack the resources necessary to change lawyers if unwanted advances occur.¹¹ The client may feel obliged to provide sexual favors to the lawyer because he or she has no other means to compensate the lawyer for his or her work or out of fear that the lawyer will not continue to pursue his or her legal interests diligently.¹²

Conflict of Interests

(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.

¹⁰ 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:

(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.

¹¹ See note 12, *infra*.

¹² A client may not feel free to rebuff a lawyer's unwanted advances for fear the rejection will reduce the lawyer's attention to the case or cause the client to find a new lawyer. 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. Clients in emotionally traumatic domestic relations and criminal cases may be psychologically distressed, weakened and vulnerable, and the lawyer can become a powerful figure who can victimize the client by exploiting the weakness. See *Matter of Berg*, 955 P.2d 1240 (Kan. 1998) (attorney disbarred). See *also* *In re Landry, M.R.* 14025, 95 CH 446 (Ill. Nov. 25, 1997) (lawyer took advantage of emotionally troubled divorce client the day before a hearing by having sexual relations with the client); *Otis' Case*, 609 A.2d 1199, 1203 (N.H. 1992) (attorney disbarred); *Alaska Bar Ass'n Ethics Op.* 92-6 (October 30, 1992).

The independent professional judgment of a lawyer is based solely on behalf of the best interests of the client. A lawyer involved in a sexual relationship with a client risks compromising that judgment because of personal interests. Rule 1.7(a)(2). Lawyers, like any other person, have personal emotional factors that become intertwined when they engage in a sexual relationship. When that relationship with a client begins during the attorney-client relationship, the lawyer's ability to be impartial and objective is impaired. When the lawyer's interests interfere with decisions that must be made for the client, the representation is impaired. *See* Rule 1.7 Comment [10].¹³

While certainly not all situations would present such a problem, these conflicting situations are likely to arise when the lawyer develops a sexual relationship with the client during the attorney-client relationship. A typical conflict arises when a lawyer has a sexual relationship with a divorce client—not only does the lawyer risk becoming an adverse witness on issues of adultery or child custody, but the lawyer's behavior actually poses a threat of additional harm to the client.¹⁴ Likewise, a sexual relationship with a client in other situations, such as a corporate client, a criminal client, and even a real estate or estate planning client, may, under some circumstances, present ethical problems for the lawyer. The same ethical considerations may be raised when the client is an organization and the lawyer's relationship is with one of the organization's representatives. If there is a reasonable possibility that the client might be harmed or that client representation may be impaired by the lawyer's engaging in a sexual relationship with the client, the lawyer should withdraw from the representation.

While Rule 1.7(b)¹⁵ provides that client consent may cure an existing conflict of interest, in these types of situations the client's ability to give informed consent is suspect because of his or her potentially impaired objectivity and emotional stability. Due to the significant danger of harm to client interests, Rule 1.7(b) provides no assistance in curing the lawyer's conflict in most situations because the client's own emotional involvement renders it unlikely that the client can give *informed* consent.¹⁶ Additionally, Rule 1.10(a)¹⁷ imputes the lawyer's conflict and disqualification to all lawyers in that lawyer's firm.

¹³ 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.

¹⁴ *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.

¹⁵ Rule 1.7 Conflict of Interest: General Rule

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) the consent from the client is memorialized in writing.

¹⁶ *See* cases cited at n. 3, *supra*.

¹⁷ Rule 1.10 Imputed Disqualification: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

However, a consensual sexual relationship that predates the attorney-client relationship is not *per se* improper, such as the representation of a spouse or significant other with whom the lawyer has had an ongoing romantic/sexual relationship. While such representation may warrant consideration of some of the ethical problems identified in this opinion, clearly there are circumstances where a conflict may not exist or may be waived pursuant to Rule 1.7(b); by way of example and not limitation, representation of a spouse in a real estate closing, traffic matter or contract review.¹⁸

Preservation of Client Confidences

While the lawyer has a duty under Rule 1.6(a)¹⁹ to protect client confidences, this duty may become difficult to ascertain when a sexual relationship exists between the lawyer and client. Client confidences are protected only when they are imparted in the context of the professional relationship. An intimate sexual relationship with a client blurs the line that exists between the professional and personal relationship, which in turn may make it difficult to predict if and when client confidences may be protected.

In addition, a lawyer who uses confidential client information to pursue sexual relations with a client violates Rules 1.6(a) and 1.8(b), particularly in circumstances where the lawyer acts upon client vulnerabilities to manipulate the client to participate in sexual relations. Clients in domestic, child custody, criminal, and pro bono cases are especially prone to such manipulation.²⁰

CONCLUSION

It is apparent that entering into a sexual relationship with a client during the course of representation can seriously harm the client's interests. The numerous ethical obligations of a lawyer to a client are so fundamental to the attorney-client relationship that obtaining the client's purported consent to entering into a sexual relationship with the lawyer will rarely be sufficient to eliminate any potential ethical violation. Therefore, it is the opinion of this Committee that a lawyer should refrain from entering into a sexual relationship with a client. In most situations, the client's ability to give the informed consent required by Rule 1.7(b) is overwhelmed by the lawyer's position of power and influence in the relationship and the client's emotional vulnerability.

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

Committee Opinion
December 29, 2009

¹⁸ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 n.1 (July 6, 1992).

¹⁹ 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).

²⁰ See cases cited in notes 3 and 12, *supra*.