

ORANGE COUNTY BAR ASSOCIATION

Formal Opinion 2003-02 (Attorney-Client Sexual Relations)

Capsule Summary

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Introduction

The California State Bar enacted Rule 3-120 to limit the extent to which attorney-client sexual relations could harm the client. California Rules of Professional Conduct Rule 3-120 (1995). Specifically, the rule precludes an attorney from continuing to represent a client with whom he or she has had sexual relations if such relations would cause the attorney to act incompetently. *Id.* The purpose of this opinion is to demonstrate that Rule 3-120 does not go far enough. Careful analysis of the many dangers associated with attorney-client sexual relations reveals that California should adopt Rule 1.8(j) of the Model Rules of Professional Conduct of the American Bar Association ("ABA"). Rule 1.8(j) creates an outright ban of sexual relations between attorney and client unless a consensual relationship existed between them when the client-lawyer relationship commenced. As demonstrated below, the ABA rule would better maintain the integrity of the attorney-client fiduciary relationship and thereby decrease the possibility of harm to the client.

California Rule of Professional Conduct 3-120

Adopted in September 1992, California's Rule 3-120 rejects an absolute prohibition of attorney-client sexual relations on the basis that a *per se* rule would be overly broad and unduly limit the free association rights of the attorney and client. Anthony E. Davis & Judith Grimaldi, Note, Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule, 7 *Notre Dame J.L. Ethics & Pub. Pol'y* 57, 91 (1993). Attempting to strike a balance between the interest of such free association and the concern that clients may be harmed as a result of such association, Rule 3-120 allows an attorney to continue representation of a client with whom the attorney has had sexual relations as long as such relations do not cause the attorney to act incompetently.¹ But, incompetence may be a difficult showing. Margit Livingston, When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations, 62 *Fordham L. Rev.* 5, 49 (1993). This is particularly the case given the pernicious, yet sometimes subtle, ways in which a client may be harmed by having sexual relations with his or her attorney.

¹ Rule 3-120 also prohibits sexual relations that are the result of duress or a condition of professional representation. These exceptions are not discussed herein as they constitute relatively minor exceptions to the general rule.

The Dangers of Attorney-Client Sexual Relations

There are at least four specific ways in which a client may be harmed by engaging in sexual relations with his or her attorney: 1) inability of the client to provide informed consent; 2) conflicts of interest; 3) impaired independent judgment; and 4) compromise of confidences. Each of these potential harms is discussed below.

1. Inability of the Client to Provide Informed Consent

Because of the specialized nature of the legal profession and the power that this specialization confers, the attorney-client power balance is inherently unequal. In re Disciplinary Proceeding Against Kraemer, 547 N.W.2d 186, 190 (Wis. 1996). When a client hires an attorney, the client often views the attorney as a virtual savior. Abed Awad, Note, Attorney-Client Sexual Relations, 22 *J. Legal Prof.* 131 (1998). The client depends upon the attorney to represent his or her best interests, placing a high degree of trust in the attorney. See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. No. 92-364 (1992) (stating 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”). This is particularly the case when the nature of the representation itself is extremely emotional, such as in divorce and custody cases. Yael Levy, Note, Attorneys, Clients, and Sex: Conflicting Interests in the California Rule, 5 *Geo. J. Legal Ethics* 649, 653 (1992). Divorce and custody clients are often especially vulnerable because of the emotionally charged nature of these cases. Parties to divorce cases experience a great deal of pain and often rely on others for emotional support and to help them make important decisions. Levy, supra at 650. They often turn to their attorneys for support, because the attorney is seen as the last refuge in a world that appears to be falling apart around them. Davis, supra at 85; see also ABA Comm. on Ethics and Prof. Responsibility, Formal Op. No. 92-364 (1992).

But client vulnerability is not limited to divorce and custody matters; vulnerable clients exist in all types of cases. Molly A. McQueen, Comment, Regulating Attorney-Client Sex: The Need for an Express Rule, 29 *Gonz. L. Rev.* 405, 420 (1994). For example, criminal defendants are unusually vulnerable because of the prospect of punishment that awaits a potential conviction, with the result that some defendants see their attorneys as the only barrier between themselves and a jail cell. See People v. Gibbons, 685 P.2d 168 (Colo. 1984). Indigent clients are often in a highly vulnerable position because they cannot easily replace their attorneys. Levy, supra at 657. Whether it is a criminal attorney and a desperate defendant, an estate attorney and a grieving widow or widower, or a bankruptcy attorney and a destitute client, the client in all of these cases may be no more emotionally fit than the divorce client. McQueen, supra at 420.

Given the inherent power imbalance of the attorney-client relationship, it has been suggested that genuine consent to sexual relations by the client is probably not possible, especially in emotionally charged cases. Awad, supra at 132. According to one court, “the professional relationship renders it impossible for the vulnerable layperson to be considered ‘consenting.’” Iowa Sup. Ct. Bd. of Prof’l Ethics and Conduct v. Hill, 540 N.W.2d 43, 44 (1995). Moreover, even if a client is deemed fit to consent to the sexual relations, it is quite difficult to imagine that the client would be fit to make an informed assessment of whether continued representation is appropriate given the potential dangers of such representation outlined in this

opinion.

2. Conflicts of Interest

A hallmark of the legal profession is the attorney's fiduciary duty to pursue the client's best interests. An attorney-client sexual relationship may hinder the attorney's ability to meet this obligation because of potential conflicts of interest. As stated by the ABA, "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." ABA Comm. on Ethics and Prof. Responsibility, Formal Op. No. 92-364 (1992).

In re Ridgeway, 462 N.W.2d 671 (Wis. 1990), graphically illustrates this danger. Attorney Ridgeway represented a woman charged with forgery. Ridgeway plea-bargained a three-year probation for her on the conditions that she serve six months in a halfway house, undergo treatment for alcoholism and refrain from any alcohol consumption. Ridgeway's client eventually abandoned the treatment program and contacted Ridgeway for legal advice. During one of the meetings, Ridgeway gave his client alcohol and had sexual contact with her. The client's probation was thereafter revoked, causing her to face a three-year jail sentence.

In the divorce context, an attorney involved in a sexual relationship with a client may not zealously pursue the client's interests out of fear that a final determination of the case might end the sexual relationship. Such an attorney might try to delay the legal proceedings or even thwart the possibility of reconciliation between the client and the spouse solely in order to maintain the sexual relationship. State Bar of California Standing Committee on Professional Responsibility & Conduct, Formal Opinion 1987-92 (1988). Similar problems might arise in a custody proceeding where, for example, an attorney who is living with the client or desirous of a serious personal relationship might prefer that the children move out and, therefore, not zealously pursue custody. Id.

Attorneys who have been rejected by their clients after engaging in sexual relations might retaliate and harm their client's legal interests out of spite. In Kentucky Bar Ass'n v. Meredith, 752 S.W.2d 786 (Ky. 1988), the client ended the sexual relationship. In retaliation, her attorney sought to have the client removed as her daughter's guardian. In Matter of Rudnick, 581 N.Y.S.2d 206 (App. Div. 1992), an attorney coerced his client into having sexual relations with him. When his client later ended their relationship, the attorney damaged her case by withdrawing his representation on the day of the divorce hearing.

3. Impaired Independent Judgment

One of the most important aspects of the attorney-client relationship is the attorney's duty to exercise independent professional judgment. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. No. 92-364 (1992). Fulfillment of this duty may be rendered impossible when attorney-client sexual relations develop. Id.

A good example of the corrosive effect that attorney-client sexual relations can have on an attorney's independent professional judgment is found in In re Frick, 694 S.W.2d 473 (Mo. 1985). Attorney Frick abandoned his wife to pursue sexual relations with a client. When Frick learned that the client was seeing other men, they separated and Frick began to harass the client. In addition to other bizarre behavior, he sent her threatening letters, vandalized her property and

shot a gun at security guards while spray-painting his client's name on a wall. Frick had previously enjoyed a long and distinguished legal career.

An attorney's desire to continue a sexual relationship with a client might prompt him or her to withhold critical information or render incompetent legal services. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. No. 92-364 (1992). The attorney might be deterred from giving candid or truthful advice, sacrificing the objectivity necessary to form an independent professional judgment. *Id.*

4. Compromise of Confidences

Recognizing confidentiality as another key facet of the attorney-client relationship, the ABA concludes that yet another risk of attorney-client sexual relations is the development of "unwarranted expectations regarding the preservation of confidences." ABA Comm. on Ethics and Prof. Responsibility, Formal Op. No. 92-364 (1992).

It is generally held that any information imparted to an attorney during the course of the professional relationship is confidential and protected as privileged. Awad, *supra* at 137. However, attorney-client sexual relations can blur the line between information obtained during the privileged professional relationship and the unprivileged sexual relationship. *Id.* An attorney may therefore be forced to become an adverse witness against his or her own client if it is found that confidences were divulged outside of the attorney-client relationship. See Matter of Rudnick, *supra*.

Criticism Rebutted

Critics of a *per se* rule assert that the State Bar does not have the right to pry into an attorney's bedroom, and that consenting adults have the right to direct their own sexual activities. Davis, *supra* at 89. There is a guarantee of freedom of association, as enshrined in the First Amendment and applied to the states by the Fourteenth Amendment. But, why should legal clients enjoy any less protection than medical patients? California currently bans sexual relations between physicians/psychotherapists and their patients, yet this strict rule has never been found to violate either the right to free association or general "privacy." California Business & Professions Code § 729. Moreover, there is no reason to believe that legal clients suffer less harm than medical patients when they are sexually exploited. Davis, *supra* at 100.

The argument that a *per se* prohibition of attorney-client sexual relations violates the right to association/privacy ignores the fact that no rights are absolute—they are all tempered by a reasonableness standard. See Barbara A. v. John G., 193 Cal. Rptr. 422, 433 (Cal. Ct. App. 1983) ("although the constitutional right to privacy normally shields sexual relations from judicial scrutiny, it does not do so where the right to privacy is used as a shield from liability at the expense of the other party"). Moreover, even assuming the right of unmarried persons to choose their sexual partners is a fundamental right, the state has the right to regulate attorney-client sexual relations if necessary to promote a compelling government interest. Livingston, *supra* at 62. Indeed, the California State Bar itself cited four compelling state interests in its original rule proposal to regulate attorney-client sexual relations. State Bar of California, *Request that the Supreme Court of California Approve Proposed Rule 3-120* (May, 1991). The Bar argued that California has a legitimate interest in regulating the practice of professions

operating within its jurisdiction; protecting the public welfare in relation to services provided by State-regulated professions; promoting competent legal representation through avoidance of emotional bias and loss of professional judgment resulting from attorney-client sexual contact; and promoting competent legal representation through avoidance of conflicts of interest resulting from attorney-client sexual contact. Id.

In sum, the state has compelling interests to promote the proper administration of justice and prevent abuse of the fiduciary obligations at the core of the attorney-client relationship. Davis, supra at 100. Given the California Bar's acknowledgment that such interests exist, it makes little sense to retain merely a partial ban on attorney-client sexual relations. The compelling interests involved, along with the multiple dangers of attorney-client sexual relations identified above, justify a per se ban.

Conclusion

California's enactment of Rule 3-120 was a positive step toward addressing the potential problem of attorney-client sexual relations, but it does not go far enough. Careful analysis of the many dangers to the client reveals that ABA Model Rule of Prof'l Conduct R. 1.8(j) is a far better approach. Moreover, in this era of lawsuits grounded in sexual exploitation and harassment, a *per se* ban might well inure to the benefit of the attorney. Even where sexual relations are consensual and have no impact on the professional representation, an unscrupulous client might well sue the attorney/lover. An outright ban enables attorneys to avoid this risk by complying with a bright-line rule. Attorneys who are inclined to undertake sexual relations with a client would know that they must complete the case or refer it to a competent associate *before* becoming romantically involved.

In sum, adoption of the ABA rule is the best and only way to ensure that the integrity of the attorney-client relationship is maintained, that the client's interests remain paramount, and that attorneys are properly placed on notice as to what they should and should not do.

[This opinion was prepared by current and former members of the OCBA Professionalism & Ethics Committee]