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Cover Page Footnote
Professor of Law, DePaul University College of Law; B.A. Augsburg College, 1971; M.A. 1976, J.D. 1975, University of Minnesota; LL.M., University of Illinois, 1979. The author gratefully acknowledges the financial assistance of the DePaul University College of Law Summer Research Fund and the invaluable research assistance of law students Dana Simaitis and Christina Riewer in the preparation of this Article.

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ARTICLES

WHEN LIBIDO SUBVERTS CREDO: REGULATION OF ATTORNEY-CLIENT SEXUAL RELATIONS

MARGIT LIVINGSTON*

Recent calls for increased regulation of attorney-client sexual relations have led several state courts, legislatures, and bar associations to consider specific rules restricting such practices. Advocates of enhanced regulation seek institutional recognition of the power differential inherent in the lawyer-client relationship. Critics prefer to rely on existing ethics rules governing attorney misconduct. In this Article Professor Livingston first reviews the judicial and administrative response to clients who accuse their attorneys of sexual impropriety. She next examines recently enacted state rules regulating attorney sexual misconduct and discusses pending legislative proposals. Professor Livingston then recommends a ban on all attorney-client sexual relations where the client is an individual, except where the parties had a pre-existing relationship. Finally, she discusses her proposal as compared to current rules governing the psychiatrist-patient relationship and in light of relevant constitutional considerations.

INTRODUCTION

FOR several years the professional associations for psychiatrists, psychoanalysts, and psychologists have had specific rules forbidding therapists from engaging in sexual relations with their patients during the time of treatment. These rules recognize that sexual relationships between therapists and patients may interfere with therapists' objectivity and injure patients. Within the last three years members of the legal profession have called for a similar prohibition on sexual relations be-

* Professor of Law, DePaul University College of Law; B.A. Augsburg College, 1971; M.A. 1976, J.D. 1975, University of Minnesota; LL.M., University of Illinois, 1979. The author gratefully acknowledges the financial assistance of the DePaul University College of Law Summer Research Fund and the invaluable research assistance of law students Dana Simaitis and Christina Riewer in the preparation of this Article.


between attorneys and their clients during the period of representation.\textsuperscript{3}

Such a prohibition is necessary, it is thought, because some attorneys have abused their fiduciary role by attempting to have a social as well as a professional relationship with their clients. The image of the randy male divorce lawyer, à la Arnie Becker,\textsuperscript{4} attempting to date attractive female clients has received wider recognition among both practitioners and the public.\textsuperscript{5} Many feel that this image adds fuel to the public perception of lawyers as unethical and self-seeking.\textsuperscript{6} In addition, civil suits by disgruntled clients in several states reveal that the so-called "Arnie Becker syndrome" is more than merely some scriptwriter's fantasy.\textsuperscript{7}

Increased sensitivity to the possible abuses inherent in attorney-client relationships has led members of the legal community and state legislatures to call for specific restrictions on attorney-client sexual relations. These proposals range from a prohibition on relations where the client is too vulnerable to give informed consent to a ban on all sexual relations between attorneys and clients during the course of representation.\textsuperscript{8}

This Article begins with a discussion of the problems raised by attor-

\textsuperscript{3} California was the first state to take official action on this issue. In 1989 the California legislature passed a law requiring the state bar association to adopt a specific "rule of professional conduct governing sexual relations between attorneys and their clients in cases involving, but not limited to, probate matters and domestic relations." Cal. Bus. & Prof. Code § 6106.8(b) (West 1990) [hereinafter Cal. Bar Act].

\textsuperscript{4} Arnie Becker, a character on the popular television series, L.A. Law (NBC television broadcast), is notorious for his pursuit and seduction of his female clients.

\textsuperscript{5} Available statistics show that in cases of sexual misconduct by professionals against their clients, the professional is likely to be male and the client female. See Peter Rutter, M.D., Sex in the Forbidden Zone 38-41 (1989); Nanette Gartrell et al., Prevalence of Psychiatrist-Patient Sexual Contact, in Sexual Exploitation in Professional Relationships 3, 7 (Glen O. Gabbard ed., 1989). To reflect this reality, the masculine pronoun may be used to refer to attorneys throughout this Article whereas the feminine pronoun may be used to refer to clients. Although misconduct by a female professional against a male client and same sex misconduct do occur, gendered pronouns where necessary will reflect the most common gender identities of the parties.


\textsuperscript{7} See infra part II.B.

ATTORNEY-CLIENT SEXUAL RELATIONS

Part II reviews both administrative censure by the bar and civil suits by aggrieved clients. Part III examines the recently enacted California and Oregon rules regulating attorney sexual misconduct as well as proposals under consideration in other states such as Illinois. Part IV suggests that regulation is needed and proposes a modified ban that would prohibit all attorney-client sexual relations where the client is an individual. This suggested rule contains exceptions for situations in which attorneys and their clients have an ongoing sexual relationship immediately before the period of representation and for situations in which the client is a corporation or other entity. Finally, this Article explores the policies favoring a specific new rule in light of suggestions that the present bar rules are adequate to address injurious behavior.

I. THE NATURE OF THE PROBLEM

A common scenario in which attorney-client sexual relations often arise involves a female client contemplating a divorce who contacts a male attorney for legal advice. After an initial consultation, the attorney suggests that they meet later to continue their discussion. The client confides her disappointment at the failure of her marriage and her concern over financial matters and the custody of her children. She confesses that her husband is having an affair with another woman causing her to feel unloved and unattractive. The attorney appears kind, attentive, and understanding. Whether the attorney and the client have one such intimate tete-à-tete or several, eventually, the attorney may attempt to initiate a sexual relationship with the client. The client may refuse, fire the attorney, and seek representation elsewhere. On the other hand, the client may accede to the attorney’s wishes, and the two may continue their liaison throughout the pending divorce proceedings and beyond.

Under this scenario it is questionable whether a sexual relationship, even one appearing fully consensual, is so inherently injurious to the client or to public confidence in the legal profession that ethical rules should prohibit it. Courts and disciplinary committees have identified several types of potential injury to clients who engage in sexual relationships with their attorneys. These include possible inadequate representation of the clients, harm to the clients’ interests in pending divorce or

9. See infra text accompanying notes 14-16.
10. See infra text accompanying notes 17-254.
11. See infra text accompanying notes 255-308.
12. See infra text accompanying notes 309-23.
13. See infra text accompanying notes 324-74.
14. See Dubin, supra note 8, at 595-97. Professor Dubin uses a similar hypothetical situation to illustrate the potential conflict of interest problems. See id. Obviously, matrimonial clients are not the only ones who may be receptive or vulnerable to the advances of their lawyers. Clients seeking representation in probate, criminal, bankruptcy, or immigration matters may be at a low ebb in their lives and may be drawn to the seeming concern and authority of their attorneys.
custody proceedings, and the possibility that the attorneys could be called as witnesses against their clients. While current ethical codes provide some checks on these types of harmful results, it is debatable whether they adequately prevent any but the most egregious instances of attorney sexual misconduct.

II. PAST ADMINISTRATIVE AND JUDICIAL RESPONSES

There have been a number of ethics opinions, disciplinary proceedings, and civil suits addressing the issue of attorney-client sexual relations. A survey of these materials reveals the difficulty in formulating a workable prophylactic rule. Past efforts aimed at regulation have been most effective only in cases of serious and repeated sexual misconduct toward clients.

A. Administrative Regulation

State bar associations and tribunals have struggled for several years to delineate the circumstances under which attorneys should refrain from engaging in a sexual relationship with their clients. The reported ethical opinions and disciplinary decisions reach various conclusions, largely because of an attempt to apply existing bar rules to a given situation. In cases involving sexual assaults and other criminal actions, courts and bar associations have had little difficulty in finding sanctions appropriate. With respect to apparently consensual attorney-client sexual relationships commenced during representation, however, disciplinary bodies are torn between a perceived need to protect the public from abuse and an

15. See infra part II.A.2-3.
20. The Alaska Bar Association noted its concern that "the attorney-client relationship, once established, should not be exploited by the attorney. The attorneys' foremost duty must be loyalty to the client, not personal gratification." Alaska Bar Ass'n, Ethics Op. 92-6 (1992).
unwillingness to interfere in what may be essentially private matters.\textsuperscript{21}

1. Integrity and General Moral Fitness

Many clients who bring disciplinary actions against their attorneys for sexual misconduct rely on DR 1-102 of the Model Code of Professional Responsibility ("Model Code")\textsuperscript{22} or its counterpart, Rule 8.4, of the Model Rules of Professional Conduct ("Model Rules").\textsuperscript{23} These rules address attorney misconduct generally and seek to create broad normative standards by which attorneys should conduct their professional, and sometimes personal, affairs.

DR 1-102(A)(3) of the Model Code forbids lawyers from "[e]ngag[ing] in illegal conduct involving moral turpitude."\textsuperscript{24} Courts have disciplined several attorneys under this rule for engaging in sexual misconduct affecting their clients.\textsuperscript{25} These cases have involved sexual assaults on a client, prostitution, or other illegal actions. In \textit{In re Adams},\textsuperscript{26} for example, a divorce client came to Adams' office to pay her bill.\textsuperscript{27} Adams grabbed her and began kissing her and raising her blouse.\textsuperscript{28} The Indiana Supreme Court publicly reprimanded the lawyer, affirming the disciplinary commission's finding that he had engaged in illegal conduct involving moral turpitude.\textsuperscript{29}

In some of these cases the sexual assault of the client produced lasting injury. In a disciplinary proceeding, for example, the Wisconsin Supreme Court found that an attorney representing a divorce client had

\textsuperscript{21} The Standing Committee on Professional Responsibility and Conduct of the State Bar of California refused to recommend a ban on sexual relationships between attorneys and their clients on the basis that it "appears overly broad and unnecessary." State Bar of Cal. Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1987-92 (1988). The Committee wished "to respect the division, however unclear, between the private and professional lives of lawyers." \textit{Id.}

\textsuperscript{22} \textit{See}, \textit{e.g.}, \textit{In re Adams}, 428 N.E.2d 786, 787 (Ind. 1981) (publicly reprimanding attorney for sexually improper conduct in violation of Model Code of Professional Responsibility DR 1-102).

\textsuperscript{23} \textit{See}, \textit{e.g.}, Florida Bar v. McHenry, 605 So. 2d 459, 460 (Fla. 1992) (disbarred attorney under Florida's adopted version of Rule 8.4 of Model Rules of Professional Conduct).

\textsuperscript{24} Model Code, \textit{supra} note 16, DR 1-102(A)(3).

\textsuperscript{25} \textit{See} \textit{e.g.}, \textit{In re Littleton}, 719 S.W.2d 772, 774-76, 778 (Mo. 1986) (en banc) (suspending attorney indefinitely with leave to apply for reinstatement in six months for improper sexual advances toward client in prison and after release); \textit{In re Stanton}, 708 P.2d 325, 327 (N.M. 1985) (disbarred attorney based on his conviction for attempted criminal sexual contact with female client); \textit{In re Bowen}, 542 N.Y.S.2d 45, 46-48 (N.Y. App. Div.), \textit{appeal denied}, 545 N.E.2d 868 (N.Y. 1989) (suspension attorney for two years for making sexual advances and engaging in sexual relations with divorce clients); \textit{In re Gould}, 164 N.Y.S.2d 48, 49 (N.Y. App. Div.), \textit{appeal denied}, 4 A.D.2d 174 (N.Y. 1957) (disbarred attorney for luring young women to his office and making sexual advances to them).

\textsuperscript{26} 428 N.E.2d 786 (Ind. 1981).

\textsuperscript{27} \textit{Id.} at 787.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.} It is not clear whether Adams was ever criminally prosecuted for his actions.
assaulted her in her home by pushing her onto her bed and attempting to remove her clothes. A jury later convicted the attorney of fourth degree sexual assault. As a result of the incident, as well as her marital and other problems, the client became severely depressed and even suicidal, requiring hospitalization and extensive psychiatric treatment. The court suspended the attorney for three years for engaging in illegal conduct involving moral turpitude.

Quid pro quo arrangements between attorneys and their clients have led several courts to discipline lawyers under DR 1-102's provision prohibiting illegal conduct involving moral turpitude. In these cases attorneys agreed to accept clients' sexual services in lieu of payment of fees. For example, in In re Conduct of Howard, a jury earlier had convicted the lawyer of prostitution for having sexual relations with a client as a substitute for his fee for legal services. In reprimanding Howard, the Oregon Supreme Court noted that he had admitted to the conviction of a misdemeanor involving moral turpitude.

In In re Frick, the fallout from a sexual affair with a client prompted the attorney to commit a series of criminal acts which the Missouri Supreme Court ultimately found constituted illegal conduct involving moral turpitude. Frick left his wife to live with a divorce client with whom he had become romantically involved. When he discovered that she was seeing other men, they separated and the jealous lawyer began to harass his former client. His behavior became increasingly bizarre over a period of months as he wrote threatening letters to her and vandalized her property. Frick was finally arrested after he discharged a handgun at security guards when caught spray painting the woman's name on a

31. See id. at 96.
32. See id.
33. See id. The court provided that the lawyer could apply for reinstatement two years or more after the beginning of the suspension. See id.
34. See, e.g., In re Wood, 489 N.E.2d 1189, 1190-91 (Ind. 1986) (disbarring attorney for having client and her aunt pose nude and perform oral sex in exchange for reduction of fee); In re Wood, 358 N.E.2d 128, 133 (Ind. 1976) (suspension attorney for at least one year for attempting to exchange legal services for sexual favors); Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Hill, 436 N.W.2d 57, 59 (Iowa 1989) (suspending attorney indefinitely for having sex with client he represented in divorce action involving child custody); In re Discipline of Bergren, 455 N.W.2d 856, 857 (S.D. 1990) (suspension attorney for having sexual relationship with clients, providing alcohol to minor, and kissing minor).
35. 681 P.2d 775 (Or. 1984).
36. See id.
37. See id. at 776.
38. 694 S.W.2d 473 (Mo. 1985) (en banc).
39. See id. at 478-79.
40. See id. at 475.
41. See id.
42. See id. at 476-77.
wall near a university campus. Despite Frick's long and distinguished legal career and despite the signatures of 142 members of the public and 68 attorneys on so-called "amicus curiae briefs" urging leniency or acquittal, the Missouri Supreme Court ultimately affirmed his disbarment. Frick illustrates the total loss of objectivity by some attorneys who have sexual liaisons with their clients.

In some cases where attorney misconduct has constituted a crime, the disciplinary bodies have relied on the more general subsection of the misconduct rule, DR 1-102(A)(6), which bans "conduct that adversely reflects on [an attorney's] fitness to practice law." Obviously, serious crimes of moral turpitude generally cast doubt upon a lawyer's fitness to practice law. As officers of the court, lawyers, even more than average citizens, should demonstrate respect for the law. Lawyers who commit serious crimes may lack the requisite moral fiber and emotional stability to occupy positions of trust and responsibility.

In cases in which clients have consented to sexual relations with their lawyers, the "adversely reflects" standard in DR 1-102(A)(6) arguably may be the sole basis for sanctions. Presumably, initiating a consensual sexual relationship with a client would not constitute illegal conduct in most cases. Despite its open-endedness, most courts have been reluctant to discipline attorneys based solely on a violation of the "adversely reflects" standard. In almost all disciplinary cases, courts have found that the attorney also violated some other provision of the ethics rules, such as those involving conflicts of interest, disclosure of confidential information, or the likelihood that the attorney might be a witness against his client.

In Kentucky Bar Ass'n v. Meredith, a lawyer entered into an apparently consensual sexual relationship with a client he represented in a pro-

43. See id. at 477.
44. See id. at 480-81.
45. Model Code, supra note 16, DR 1-102(A)(6).
46. For cases in which the court relied on both DR 1-102(A)(3) and (6), see In re Adams, 428 N.E.2d 786 (Ind. 1981); Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Hill, 436 N.W.2d 57 (Iowa 1989); In re Frick, 694 S.W.2d 473 (Mo. 1985) (en banc); Cincinnati Bar Ass'n v. Fettner, 455 N.E.2d 1288 (Ohio 1983); In re Discipline of Bergren, 455 N.W.2d 856 (S.D. 1990). In one case the court relied only on DR 1-102(A)(6) even though the lawyer had been convicted of fourth degree criminal sexual assault arising indirectly from a lawyer-client relationship but not related to the practice of law. See In re Addonizio, 469 A.2d 492, 492-93 (N.J. 1984).
47. "To lawyers especially, respect for the law should be more than a platitude." Model Code, supra note 16, EC 1-5.
48. See, e.g., People v. Zeilinger, 814 P.2d 808 (Colo. 1991) (publicly reprimanding attorney for engaging in sexual relations with client he represented in matrimonial matter in part because that attorney may be called as witness); Kentucky Bar Ass'n v. Meredith, 752 S.W.2d 786 (Ky. 1988) (publicly reprimanding attorney for professional misconduct for his sexual involvement with client in part because that attorney disclosed confidential information); In re Bowen, 542 N.Y.S.2d 45 (N.Y. App. Div.), appeal denied, 545 N.E.2d 858 (N.Y. 1989) (suspending attorney for engaging in sexual relations or making sexual advances to female clients in part because that attorney created conflict of interest).
49. 752 S.W.2d 786 (Ky. 1988).
bate matter.\textsuperscript{50} Later the client discharged him and, in retaliation, the lawyer sought to have the court remove her as guardian of her daughter.\textsuperscript{51} In the process he revealed to the court information that his client had imparted to him in confidence.\textsuperscript{52} Finding that his conduct adversely reflected on his fitness to practice law and also violated the provisions on conflicts of interest and client confidences, the Kentucky Supreme Court reprimanded the lawyer for "his lack of professional judgment."\textsuperscript{53}

The courts' reluctance to rely solely on the "adversely reflects" rule to discipline attorneys follows from the amorphous nature of the rule.\textsuperscript{54} Severe dereliction of duty clearly reflects adversely on any lawyer's fitness to practice law, but beyond that, it is difficult to know the parameters of the concept. Fifty years ago some courts disciplined lawyers who engaged in adulterous affairs with anyone, not simply with their clients.\textsuperscript{55} Under contemporary standards such behavior would not be deemed a violation of professional ethics unless it directly impacted on the lawyer's practice.\textsuperscript{56} An Iowa case similarly illustrates the difficulty of relying solely on the

\textsuperscript{50} See id.
\textsuperscript{51} See id. at 787.
\textsuperscript{52} See id.
\textsuperscript{53} Id. at 788.
\textsuperscript{54} In Wisconsin, rather than relying on the ethics rules, the referee in a disciplinary proceeding sanctioned a lawyer who had made sexual advances toward his female clients based on a violation of that state's Attorney's Oath, "by which an attorney swears to 'abstain from all offensive personality.'" In re Disciplinary Proceedings against Heilprin, 482 N.W.2d 908, 908 (Wis. 1992), cert. denied, 113 S. Ct. 461 (1992). The Wisconsin Supreme Court ultimately found it unnecessary to address the attorney's challenge that the "offensive personality" language was unconstitutionally vague and overbroad. See id. at 909. Instead the court sanctioned him based on a prior case in which the court disciplined the same attorney for rude behavior and sexual advances toward clients. See id. (referring to State v. Heilprin, 207 N.W.2d 878 (Wis. 1973)). Ironically, in the 1973 Heilprin case the court did not make the basis for discipline clear, but rather seemed to rely on a general standard of unprofessional conduct. See State v. Heilprin, 207 N.W.2d 878, 882-83 (Wis. 1973).

Similarly, a panel from the Grievance Commission of the Maine Bar Association publicly reprimanded a lawyer for "conduct unworthy of an attorney" for his having suggested, supposedly jokingly, to a client filing for bankruptcy that she take her clothes off. See Board of Overseers of the Bar v. Shankman, No. GV-91-S-277 (Me. Grievance Comm'n, Feb. 22, 1993) (reprimanding attorney after public hearing held in Probate Court). The board imposed discipline notwithstanding its finding that the conduct was "minor" and did not injure the client's legal interests in any way. See id. at 7-8. The board felt that the psychic injury to the client, who was frightened and distressed by the lawyer's "joke," was significant and justified a reprimand of the lawyer. See id. at 9.

For cases in which the court applied the "adversely reflects" standard under DR 1-102(A)(6) with little or no explanation, see In re Kiley, 572 N.Y.S.2d 601, 601 (N.Y. App. Div. 1991) and Office of Disciplinary Counsel v. Ressing, 559 N.E.2d 1359, 1359 (Ohio 1990).

\textsuperscript{55} See, e.g., Grievance Comm. of Hartford County Bar v. Broder, 152 A. 292 (Conn. 1930) (disciplining unmarried lawyer for having adulterous relationship with married non-client even though they married following her divorce).

\textsuperscript{56} See, e.g., In re Dalessandro, 397 A.2d 743, 758-59 (Pa. 1979) (refusing to discipline married judge for having affair with married woman despite its allegedly "open and notorious" nature).
"adversely reflects" standard. In Committee on Professional Ethics & Conduct of State Bar Ass'n v. Durham, the court reprimanded a female attorney for fondling an incarcerated male client in the prison visitation room. In disciplining the attorney, the Iowa Supreme Court relied on DR 1-102(A)(6) and on two ethical considerations—one urging attorneys to be "temperate and dignified" and another prohibiting professional impropriety or the appearance thereof. The attorney attacked these provisions as unduly vague under due process standards. The court first found that the disciplinary rules were to be judged by the standard of the "reasonable attorney"—that is, whether the reasonable attorney, as a learned professional, would understand what behavior was prohibited. Applying that standard, the court held that a reasonable attorney would understand that sexual contact with a client in this situation was intemperate, undignified, and professionally improper.

Interestingly, the court struggled more with the constitutionality of DR 1-102(A)(6) than with the ethical considerations. The court noted bluntly that "[t]o state that an attorney should not do anything which adversely reflects on his or her ability to practice does not provide a great deal of guidance." The court found, however, that the applicable Ethical Considerations fleshed out the insubstantial nature of DR 1-102(A)(6) and, therefore, the attorney had sufficient warning of what behavior violated the rule. The court also made the blanket statement that "[a]ny violation of the Code of Professional Responsibility necessarily reflects adversely on the fitness of an attorney to practice law."

The flaw in the Durham court's analysis was its failure to recognize that aspirational nature of the Ethical Considerations of the Model Code of Professional Responsibility which, theoretically, do not serve as a direct basis for discipline. The Code does not make clear that the court must incorporate the entire body of Ethical Considerations into the "adversely reflects" provision. It is therefore questionable whether due

57. 279 N.W.2d 280 (Iowa 1979).
58. See id. at 281, 285-86.
59. See id. at 286 (relying on Model Code of Professional Responsibility EC 1-5).
60. See id. (relying on Model Code of Professional Responsibility EC 9-6).
61. See id. at 283.
62. The court reasoned that a less stringent "vagueness" standard than that applied to criminal statutes was warranted because the ethics rules govern a more sophisticated body of individuals than the general public. See id. at 283-84.
63. See id. at 284.
64. Id.
65. See id.
66. Id. at 285.
67. The Preliminary Statement of the Model Code of Professional Responsibility states that "[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive . . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Model Code, supra note 16, Preliminary Statement.
68. See Model Code, supra note 16, DR 1-102(A)(6).
The process was in fact satisfied where the court bootstrapped itself into DR 1-102(A)(6) by way of the Ethical Considerations regarding temperate and proper behavior.

A Minnesota case further illustrates the lack of clarity in the "adversely reflects" standard. In *In re Discipline of Peters*, the court found that a law school dean created a "hostile" working and educational environment by having made physical advances toward two female employees and two female students. The court publicly reprimanded the dean for conduct that adversely reflected on his fitness to practice law under DR 1-102(A)(6). The court imposed discipline despite the fact that the dean's conduct did not stem from an attorney-client relationship and despite his protests that none of his actions were overtly sexual in nature.

Finally, courts have occasionally used Rule 8.4(d) of the Model Rules, which prohibits "conduct that is prejudicial to the administration of justice," or its counterpart under the Model Code, DR 1-102(A)(5) to discipline lawyers who have attempted sexual relationships with their clients. In *In re Liebowitz*, the attorney's law firm had been assigned to represent a pro bono client in custody litigation. When the client arrived at the lawyer's office late one afternoon, the attorney invited her to dinner and then to his apartment. The client accepted these invitations so that she could discuss her case with the attorney. While at his apartment, the attorney attempted to seduce his client and touched her sexually. After she protested several times, he allowed her to leave.

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69. 428 N.W.2d 375 (Minn. 1988).
70. See id. at 376-79.
71. See id. at 376.
72. See id. at 382. The dean argued that the complainants misconstrued his conduct, which was neither sexually motivated nor wrongful. See id. His touches consisted largely of putting his arm around the women's rib cages or shoulders or stroking their hair. See id. at 376-78. He claimed that he was a "tactile" person and that the complainants had misunderstood his gestures. See id. at 382 (Popovich, J., concurring).
76. 516 A.2d 246 (N.J. 1983).
77. See id. at 247.
78. See id.
79. See id.
80. See id.
81. See id.
New Jersey Disciplinary Review Board concluded that the lawyer violated DR 1-102(A)(5) by engaging in conduct prejudicial to the administration of justice. The Board found that the attorney's behavior had "brought the pro bono matrimonial counsel program into disrepute." As a consequence, the administration of justice would be hampered.

2. Conflict of Interest

Where attorneys press unwilling clients for sexual favors, enter into quid pro quo arrangements, or physically assault their clients, either DR 1-102 of the Model Code of Professional Responsibility or Rule 8.4 of the Model Rules of Professional Conduct may provide an adequate basis upon which to sanction such unprofessional behavior. But when sexual relationships are apparently consensual, it is doubtful whether courts can discipline attorneys under the general misconduct rules.

In such cases state bar associations have resorted to the rules on conflict of interest to sanction attorneys on the theory that their personal interest in their clients conflicts with their professional duty. Model Code DR 5-101(A) provides that an attorney "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 . . . personal inter-

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82. See id. at 249. The Board emphasized the client's vulnerability and dependence on the attorney, noting that she could easily have concluded that he would not adequately represent her unless she acceded to his sexual demands. See id. Because of her poverty, she did not have the option to seek representation elsewhere. See id.

83. Id. In other words, prospective clients of the legal assistance program might lose confidence in the program as a result of this incident and be reluctant to seek representation through it.

84. See id.

85. The Model Rules, by combining the "adversely reflects" provision of the Model Code with the provision on illegal acts involving moral turpitude, are arguably less comprehensive than the Model Code, which forbids both illegal conduct involving moral turpitude and any conduct that adversely reflects on the lawyer's ability to practice law. Compare Model Code, supra note 16, DR 1-102(A)(3) and DR 1-102(A)(6) with Model Rules, supra note 73, Rule 8.4(b). Under the Model Rules the attorney's behavior must constitute a criminal act "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Model Rules, supra note 73, Rule 8.4(b). This language certainly covers actual or attempted sexual assault of a client or quid pro quo arrangements, but might not include either the lawyer's attempts to gain sexual favors from an unwilling client without a physical assault or the lawyer's use of inappropriate sexual language or innuendo toward a client.

In In re Wolf, 826 P.2d 628 (Or. 1992) (en banc), the court suspended an attorney for eighteen months for committing a criminal act reflecting adversely on his fitness to practice law when he engaged in sexual intercourse with an underage client and served alcohol to her. See id. He was later indicted on three criminal charges, and the Oregon Supreme Court found that his conduct "show[ed] disrespect for the law, which the lawyer has sworn to support . . . and [bore] on the trustworthiness of a lawyer who is retained to assist a vulnerable person." Id. at 630. See also Florida Bar v. McHenry, 605 So. 2d 459, 460-61 (Fla. 1992) (disbarring attorney with prior record of discipline under Model Rule 8.4(b) for masturbating in front of two clients).

86. See infra notes 96-99.
ests."\(^{87}\) The counterpart under the Model Rules, Rule 1.7, contains similar language except that it requires that representation of the client be "materially limited" by the lawyer's own interests.\(^{88}\) Both rules allow clients to waive the conflict by consent after disclosure, but Rule 1.7 allows waiver only if, additionally, "the lawyer reasonably believes the representation will not be adversely affected . . . ."\(^{89}\)

Ideally, the interests of both attorneys and clients in the normal professional relationship are compatible, if not congruent. Clients' basic interests are to have their legal difficulties resolved as favorably and as expeditiously as possible. In a strictly professional relationship attorneys' interests are to represent their clients vigorously and to ensure payment of fees. When attorneys develop amatory relationships with clients, their self-interest potentially changes.\(^{90}\) Lawyers in that position may not pursue their clients' interests vigorously out of fear that conclusion of the legal matter would precipitate the end of their affair. In divorce cases an attorney may be reluctant to support a possible reconciliation between the client and his or her spouse.\(^{91}\) In custody matters a lawyer who ends up living with his client may urge her not to seek child custody.\(^{92}\)

A Maryland State Bar Ethics Opinion posited the following scenario: a client married to a man incapacitated by a stroke considered selling certain jointly-owned real property, transferring property from her husband to herself, and ultimately obtaining a divorce.\(^{93}\) The husband had given the wife a power of attorney and had executed a will leaving all of his assets to his wife.\(^{94}\) The children of the husband's first marriage were likely to challenge the validity of the will.\(^{95}\) The possibilities for conflict of interest if the attorney becomes sexually involved with the client are rife in this situation. The attorney might encourage the client to transfer property from her husband to herself in the hopes that he ultimately might be the indirect beneficiary of such a transfer. The client's affair with the attorney might cause her to obtain a divorce that she might not have sought otherwise.

The conflict between attorneys' personal interests and clients' legal in-

\(^{87}\) Model Code, supra note 16, DR 5-101(A).
\(^{88}\) See Model Rules, supra note 73, Rule 1.7(b).
\(^{89}\) Id. at Rule 1.7(b)(1).
\(^{90}\) A lawyer's romantic involvement with a client may cloud his professional judgment. Rule 2.1 of the Model Rules supplements the basic conflict of interest provisions by requiring that a lawyer "exercise independent professional judgment" in representing a client. Model Rules, supra note 73, Rule 2.1. In one case the court held that a lawyer who had a sexual liaison with a divorce client violated that rule by being unduly aggressive in the divorce proceedings against the client's husband to the detriment of the client's interests. See Bourdon's Case, 565 A.2d 1052, 1056 (N.H. 1989).
\(^{92}\) See id.
\(^{93}\) See Maryland State Bar Ass'n, Ethics Op. 84-9 (1983).
\(^{94}\) See id.
\(^{95}\) See id.
ATTORNEY-CLIENT SEXUAL RELATIONS

Interests can be expressed in a number of different ways. Lawyers may consciously pursue an unwise course of action on behalf of clients with whom they are sexually involved. Sexual affairs with clients may affect lawyers' judgment, directly impacting on the legal representation provided. Sexual involvement with clients may lead lawyers to commit other ethical violations, such as disclosing confidential information or testifying as a witness against the client.

Some courts have recognized potential conflicts between attorneys' personal interests and clients' personal interests. In other words, lawyers who initiate affairs or terminate them in an untimely manner may injure emotionally-fragile clients. Married clients who consent to affairs of which their spouses are unaware may later feel guilt and remorse. Clients having affairs with their lawyers conceivably could become emotionally dependent on them leading to depression, anxiety, and lowered self-esteem if the lawyers end the affair. In Drucker's Case, a lawyer abruptly terminated an affair with a client filing for divorce who suffered from an anxiety disorder. As a result, the client "felt that it was another rejection in her life, but remained hopeful that [the lawyer's] feelings for her would change and that he would be attracted to her once again."

96. See, e.g., Bourdon's Case, 565 A.2d 1052, 1054 (N.H. 1989) (attorney requested contested hearing for his client's divorce without her knowledge or approval).
97. See e.g., In re Bowen, 542 N.Y.S.2d 45, 48 (N.Y. App. Div.), appeal denied, 545 N.E.2d 868 (N.Y. 1989) (suspension attorney for two years for sexual advances toward matrimonial client seeking child custody); In re Ridgeway, 462 N.W.2d 671, 673 (Wis. 1990) (suspension attorney for attempting to seduce client he represented in probation matter and for offering her beer knowing that consumption of alcohol violated her probation conditions).

An actual compromise of the attorney's professional judgment in representing the client is not necessary to create a conflict of interest. Rather, it is sufficient if "the exercise of his professional judgment on his clients' behalf reasonably might have been affected by his personal interest." In re Wolf, 826 P.2d 628, 631 (Or. 1992) (en banc) (emphasis added).

98. 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 by disclosing that client's confidences).
99. See, e.g., People v. Zeilinger, 814 P.2d 808, 810 (Colo. 1991) (en banc) (expressing concern that sexual relations with client being represented in dissolution or custody proceeding could lead to attorney being called as witness against client).
100. One author has explored the deep psychic injuries experienced by women who have affairs with trusted authority figures:

Although it may take decades for [the woman] to appreciate fully the betrayal, loss, and damage emanating from the moment of sexual contact in the forbidden zone, she has in that moment been returned to the state of woundedness in which she entered this man's presence. Furthermore, she has been returned to it with hope itself destroyed. Many women never recover.

Rutter, supra note 5, at 155 (1989).
102. See id. at 1199.
103. Id. In addition to the conflict of interest provisions, the court found that the attorney violated Model Rule 1.8(b) by using the confidential information imparted by
Clients can waive the conflict of interest by consenting to the representation after full disclosure of the conflict. The Model Rules require additionally that the attorney "reasonably [believe] the representation will not be adversely affected." It is possible, therefore, that lawyers could explain to their clients the potentially adverse consequences of combining a personal and professional relationship and then could obtain consent to the arrangement. Under the Model Rules lawyers would also have to believe in their ability to represent their clients' best interests despite their personal involvement. One court considered the waiver possibility rather far-fetched, noting, "[w]e need not concern ourselves with a bizarre hypothesis that leads to the absurd." In other words, it is unrealistic to expect that a lawyer and a client in the thrall of sexual passion would be able to sit down and discuss the possible conflict of interest problems engendered by their sexual affair, ultimately reducing the client's waiver to writing.

Related to the basic conflict of interest provision is the rule mandating withdrawal as counsel in anticipated or pending litigation when it appears likely that the lawyer will be called as a witness in the proceeding. Lawyers who may be called as witnesses on behalf of their clients may not continue their representation except in certain limited circumstances where their testimony relates to an uncontested matter or where their services are uniquely valuable in the particular case. Attorneys who may be called as witnesses other than on behalf of their clients may

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1. See, e.g., Bourdon's Case, 565 A.2d 1052, 1057 (N.H. 1989) (noting that attorney-client sexual relations may be permissible with client's consent if attorney reasonably believes representation will not be affected).
2. See Model Rules, supra note 73, Rule 1.7(b)(1).
4. See Model Rules, supra note 73, Rule 3.7.
5. See Model Code, supra note 16, DR 5-101(B); Model Rules, supra note 73, Rule 3.7(a). The Model Code provides:
   
   If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

Model Code, supra note 16, DR 5-102(A).

The Code identifies the circumstances under which attorneys can accept employment in contemplated or pending litigation where it is likely that they or a lawyer in their firm may be called as a witness as follows:

1. If the testimony will relate solely to an uncontested matter.
2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
continue the representation "until it is apparent that [their] testimony is or may be prejudicial to [their] client."

State bar disciplinary and ethics boards have recognized that attorneys who have affairs with clients that they represent in divorce actions might be called as witnesses in their clients' cases, often on behalf of the opposing party. The husband in a contested divorce may seek to prove his wife's extramarital affair in order to limit his responsibility for alimony or to affect property division, child custody, or visitation rights. In some states the existence of an extramarital liaison is not relevant to the divorce itself or to these collateral issues, but in many states it is. Even where the affair by itself would not be relevant to child custody, it might demonstrate, coupled with other facts, an undesirable home environment.

Any information conveyed to lawyers by their clients as part of the professional relationship is protected by the attorney-client privilege.

A party in a marital dispute, however, could subpoena the opposing at-

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(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Model Code, supra note 16, DR 5-101(B).

The Model Rules of Professional Responsibility treat this issue in substantially similar fashion. The "substantial hardship" exception may be asserted for any reason, however, not merely the "distinctive value" of the legal services. Model Rules, supra note 73, Rule 3.7(a)(3).

111. Model Code, supra note 16, DR 5-102(B). Rule 3.7(b) of the Model Rules also supports this proposition. See Model Rules, supra note 73, Rule 3.7(b).


113. See, e.g., In re Lewis, 415 S.E.2d 173, 175 (Ga. 1992) (per curiam) (suspending attorney for three years for engaging in sexual relations with client while representing her in divorce and custody proceedings even if sexual relationship pre-existed professional relationship); Bourdon's Case, 565 A.2d 1052, 1057 (N.H. 1989) (disbarring attorney for having sexual relationship with client, soliciting intimate details of her sexual life, and manipulating her while representing her in divorce proceeding).

114. Several state statutes specify that the courts must consider the parties' misconduct in deciding matters such as property division and alimony. See, e.g., Ala. Code § 30-2-52 (1989) (providing allowance upon grant of divorce for misconduct); Md. Code Ann., Fam. Law §§ 8-205(4), 11-106 (1991) (both provisions allowing consideration of circumstances of estrangement); Va. Code Ann. §§ 20-107.1, 3 (Michie 1990) (§ 20-107.1 allowing consideration of circumstances of divorce in determining award of support and maintenance and § 20-107.3 allowing same in determining property division). For cases considering a nonmarital affair as adversely affecting child custody, see, e.g., Bell v. Bell, 267 S.E.2d 894 (Ga. Ct. App. 1980) (awarding custody to father because mother was living with man to whom she was not married); Shanklin v. Shanklin, 376 So. 2d 1036 (La. Ct. App. 1979) (allowing court to deny custody to mother who consistently engaged in open and public sexual conduct contrary to generally accepted moral principles).


Attorney to testify regarding any matter arising out of his personal relationship with his client relevant to the divorce and related issues.\textsuperscript{117} Under existing ethics rules the attorney could not continue to represent his client because of the "obviously embarrassing predicament of testifying and then having to argue the credibility and effect of his own testimony."\textsuperscript{118} Thus the client would be left suddenly without representation at the same time she had to endure hearing testimony of her former attorney about the details of their personal life.

3. Prejudice or Injury to the Client

Model Code DR 7-101(A)(3) prohibits lawyers from intentionally prejudicing or damaging their clients during the course of the professional relationship.\textsuperscript{119} Although the Model Rules do not have a precise counterpart to this provision, several related provisions can be read collectively to prohibit attorneys from intentionally harming their clients.\textsuperscript{120} Disciplinary boards in some states have found that attorneys involved in sexual relationships with their clients have violated these rules by harming the clients' legal interests or psychological well-being.\textsuperscript{121}

Attorneys' amatory relationships with their clients can prejudice the clients' legal interests in at least two ways: first, the mere existence of the relationship may affect the clients' legal position, as in a divorce action; second, attorneys who are rebuffed by their clients may retaliate in a manner that harms the clients' legal interests. In \textit{In re McDow},\textsuperscript{122} counsel began an adulterous affair with a client seeking a divorce.\textsuperscript{123} As a


\textsuperscript{118} Model Code, \textit{supra} note 16, DR 5-102 n.31 (quoting Galarowicz v. Ward, 230 P.2d 576, 580 (Utah 1951)).

\textsuperscript{119} See Model Code, \textit{supra} note 16, DR 7-101(A)(3). The only exception to this rule is where clients have perpetrated frauds upon a person or tribunal. If clients refuse or are unable to reveal the fraud themselves, then their attorneys must do so, "except when the information is protected as a privileged communication." \textit{Id.} DR 7-102(D)(1).

\textsuperscript{120} For example, attorneys whose poor judgment or retaliatory motives resulted in harm to their clients' legal interests would violate the Model Rules which require lawyers to provide "competent representation to a client." Model Rules, \textit{supra} note 73, Rule 1.1. \textit{Cf.} Model Code, \textit{supra} note 16, DR 6-101(A)(3) (prohibiting "[n]eglect of a legal matter"). Similarly, Rule 1.3 of the Model Rules requires attorneys to "act with reasonable diligence and promptness in representing a client." Model Rules, \textit{supra} note 73, Rule 1.3.

\textsuperscript{121} The Model Rules place additional restrictions on actions that might harm clients' interests, providing 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 . . ." Model Rules, \textit{supra} note 73, Rule 1.8(b). \textit{Cf.} Model Code, \textit{supra} note 16, DR 4-101(B)(2) (containing similar language). In Bourdon's Case, 565 A.2d 1052 (N.H. 1989), the court found that the lawyer had used the confidences imparted by a client he represented in a divorce proceeding about her marital difficulties and his consequent knowledge of her vulnerability to seduce her in violation of Rule 1.8(b). \textit{See id.} at 1056; \textit{see also} Otis' Case, 609 A.2d 1199, 1204 (N.H. 1992) (disbarring attorney for attempting to seduce emotionally and financially vulnerable divorce client).

\textsuperscript{122} 354 S.E.2d 383 (S.C. 1987).

\textsuperscript{123} \textit{See id.}
result, the family court judge granted her husband a divorce on the ground of adultery. Conceivably, the client's "fault" in the divorce action adversely affected the property division, the award of alimony, or the granting of child custody. The South Carolina Supreme Court reprimanded the attorney for prejudicing and damaging his client during the representation.

The attorney in *McDow* probably did not intend the adverse consequences to his client, but in other cases lawyers have deliberately acted against their client's legal interests or have threatened to do so. In *Kentucky Bar Ass'n v. Meredith*, for example, the lawyer, after his client-lover discharged him, filed an affidavit with the court seeking removal of the client as guardian of her daughter. Similarly, in a New York case a lawyer threatened to abandon his client's case if she terminated their sexual affair and suggested that she might lose custody of her son.

In addition to damaging their legal interests, actual or attempted sexual relationships with attorneys potentially harm clients' emotional well-being. An unwanted sexual advance, even if successfully rebuffed, can cause clients to lose confidence in their attorneys, to feel betrayed by someone expected to protect their interests, and to experience emotional turmoil. Clients may submit to the sexual demands of their lawyers because of fear and, subsequently, feel humiliated and disgusted with themselves and with their lawyers. Finally, clients who consciously desire affairs with their attorneys may be acting out of vulnerability and need rather than free choice.

124. See id. at 383-84.
125. See id. at 384.
126. 752 S.W.2d 786 (Ky. 1988).
127. See id. at 787.
129. An Alaska Bar Association Ethics Opinion states that an attorney should not initiate a sexual relationship with a client "[w]here the client is in an emotionally fragile condition, and the sexual relationship may have an adverse affect [sic] on the client's emotional stability." Alaska Bar Ass'n, Ethics Op. 88-1 (1988). In a subsequent formal opinion the Alaska Bar Association extended the prohibition to situations in which the "client is involved in a legal matter of the type that is generally recognized to be emotionally charged." Alaska Bar Ass'n, Ethics Op. 92-6 (1992). Both opinions enumerate additional circumstances, such as coercion or the possibility that the attorney would be called as a witness in the client's case, in which an intimate relationship with the client would be unethical.

130. See, e.g., *In re Disciplinary Proceeding Against Woodmansee*, 434 N.W.2d 94 (Wis. 1989) (per curiam) (suspending attorney for sexual advances made toward client who became suicidally depressed as a result).
131. See, e.g., People v. Gibbons, 685 P.2d 168, 175 (Colo. 1984) (en banc) (disbarring attorney who "blackmailed" client into having sexual relations as condition of representing her and her husband in criminal proceedings); see also *Woman Victorious in Client-Sex Case*, N.Y. Times, Nov. 29, 1992, at A38 (describing client who submitted to sexual advances out of fear that otherwise lawyer would intentionally lose her case).
132. See, e.g., Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Hill, 436 N.W.2d 57, 58 (Iowa 1989) (suspending attorney for agreeing to *quid pro quo* arrangement with client who was drug addicted, emotionally unstable, and financially strapped).
4. Penalties

Disciplinary bodies impose penalties on attorneys who engage in sexual misconduct toward their clients that run the gamut from slight to severe,\(^{133}\) ranging from a public reprimand\(^{134}\) to suspensions of varying lengths\(^{135}\) to disbarment.\(^{136}\) Differences in the severity of misconduct, the presence of mitigating or aggravating factors, and the lawyer's prior ethical history as a member of the bar may account for some of this variation in punishment. But, in many cases, members of disciplinary bodies may simply hold widely divergent views concerning the seriousness of attorney sexual misconduct.

Although some variation in penalties is unavoidable, and not necessarily undesirable, it is clear that some state courts and bar associations regard sexual misconduct by attorneys toward their clients more seriously than others. In Indiana, counsel received only a public reprimand for physically assaulting a client by grabbing her, kissing her, and raising her blouse.\(^{137}\) In New Mexico, however, the court disbarred an attorney after he pleaded nolo contendere to the charge of attempted criminal sexual contact with a client.\(^{138}\)

Although almost all disciplinary boards and ethics boards agree that quid pro quo arrangements, either actual or attempted, are improper and embarrassing to the profession, the choice of sanction betrays a curiously schizophrenic attitude. In *In re Conduct of Howard*,\(^{139}\) the Oregon Disciplinary Review Board recommended dismissal of charges against a law-

\(^{133}\) The American Bar Association, in developing its standards for imposing lawyer discipline, observed that inconsistent and inappropriate sanctions against attorney misconduct have great potential to undermine confidence in the efficiency and fairness of the disciplinary system. See *Standards for Imposing Lawyer Sanctions*, Laws. Man. on Prof. Conduct (ABA/BNA) No. 119, at 01:801 (June 17, 1992).

\(^{134}\) See, e.g., *In re Adams*, 428 N.E.2d 786, 787 (Ind. 1981) (publicly reprimanding attorney for physically assaulting client). According to one source, those cases in which the discipline board issues a private reprimand will not be in the public records unless the attorney appeals the decision. See Interview with Vincent F. Vitullo, Special Counsel for Adjudication, Attorney Registration & Disciplinary Comm’n of the Supreme Court of Illinois, in Chicago, Ill. (Sept. 14, 1993).

\(^{135}\) See, e.g., *In re Lewis*, 415 S.E.2d 173, 176 (Ga. 1992) (per curiam) (suspended attorney for three years); *Hill*, 436 N.W.2d at 59 (suspended attorney for three months); *In re Littleton*, 719 S.W.2d 772, 778 (Mo. 1986) (en banc) (suspended attorney for six months); *In re Bowen*, 542 N.Y.S.2d 45 (N.Y. App. Div.), appeal denied, 545 N.E.2d 868 (N.Y. 1989) (suspended attorney for two years); *Carter v. Kritz*, 560 A.2d 360, 361 (R.I. 1989) (per curiam) (suspended attorney for one year); *In re Disciplinary Proceedings Against Wood*, 363 N.W.2d 220 (Wis. 1985) (suspended attorney for 60 days).


\(^{137}\) See *Adams*, 428 N.E.2d at 787.

\(^{138}\) See *In re Stanton*, 708 P.2d at 326. Although the court did not provide the details of the crime in the second case, the court referred to similar "sexual advances" made to another client. See *id.*

\(^{139}\) 681 P.2d 775 (Or. 1984) (en banc).
yer who had engaged in sexual intercourse with a prostitute in lieu of a fee. Noting that the lawyer himself had actually been convicted of prostitution because of this incident, the Oregon Supreme Court assessed a public reprimand. Similarly, a lawyer in Iowa received only a three-month suspension for agreeing to have sexual intercourse with a client who could not pay the fee. By contrast, the court in In re Wood first suspended the lawyer for one year for exchanging services for sex and then ultimately disbarred him after a second offense ten years later.

Consensual sexual relationships between lawyers and their clients, as one might anticipate, have resulted in a wide range of sanctions reflecting the deep division within the profession about their propriety. In Kentucky Bar Ass'n v. Meredith, the lawyer in a probate case had an apparently consensual sexual relationship with his client. The Kentucky Supreme Court issued only a public reprimand, with three justices dissenting on the grounds that no charges should have been brought against the attorney. Similarly, in In re McDow, an attorney received only a public reprimand even though his adulterous affair with his female client caused the family court to grant her husband's request for a divorce based on adultery. Neither the obvious conflict of interest nor the clear damage to the client's interests struck the court as warranting a more severe penalty.

By contrast, the court in a recent Georgia case, In re Lewis, suspended for three years an attorney who initiated an affair with a client seeking a divorce even though she failed to establish either a quid pro quo arrangement or coercion. The court emphasized the potential conflict of interest problems and chastised the lawyer for risking possible injury to his client's interests in the dissolution action. As in the Meredith case cited above, three justices dissented, but this time on the basis that the penalty was too lenient and that the lawyer should have been

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140. See id. at 775-76. One may speculate that the Disciplinary Review Board's casual attitude toward the misconduct can be attributed to the fact that the client was a known prostitute.
141. See id. at 776.
143. See In re Wood, 358 N.E.2d 128, 133 (Ind. 1976); see also People v. Crossman, 850 P.2d 708, 712 (Colo. 1993) (en banc) (suspending attorney for one year and one day for soliciting sexual favors in exchange for reduction of legal fees on three separate occasions with three different prospective clients).
144. See In re Wood, 489 N.E.2d 1189, 1191 (Ind. 1986).
145. 752 S.W.2d 786 (Ky. 1988).
146. See id. at 787.
147. See id.
149. See id. at 383-84.
151. See id. at 174-75.
152. See id. at 175.
disbarred.\textsuperscript{153}

The court imposed disbarment as the penalty in \textit{Bourdon's Case},\textsuperscript{154} in which the attorney had engaged in a consensual sexual affair with a client seeking a divorce.\textsuperscript{155} In an unrelated incident the attorney also inadequately represented another client by failing to inform him of his criminal conviction, of his appeal rights, and of his obligation to obey the court's orders.\textsuperscript{156} The court held that the two incidents together justified disbarment and particularly criticized the attorney's "calculated abuse of [the divorce client's] trust."\textsuperscript{157}

Unquestionably, members of the legal profession disagree about whether lawyers who initiate sexual affairs with their clients commit serious breaches of professional ethics.\textsuperscript{158} Although a number of state bar associations have disciplined attorneys for sexual misconduct involving their clients, some have felt that a minor penalty sufficiently displayed the bar's displeasure with such conduct.\textsuperscript{159} The divergence in opinion about what constitutes sufficient punishment for what one judge called the profession's "dirty little secret"\textsuperscript{160} supports the need for a specific
rule regulating attorney-client sexual relationships. Some clearer indication of when such relationships are not in the best interests of clients might lead to a more even-handed administration of discipline in this area.

B. Civil Suits

A number of former clients have brought civil actions against their attorneys to recover for professional malpractice or for personal injuries based on the attorneys’ actual or attempted sexual involvement with them. Plaintiffs in these cases have sought damages based on a variety of theories, including battery and misrepresentation, breach of fiduciary duty, intentional infliction of emotional distress, and violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”).

1. Battery and Misrepresentation

In *Barbara A. v. John G.*,161 a client sued her former attorney for battery and misrepresentation.162 The plaintiff had hired the attorney to represent her in a post-dissolution proceeding involving modification of spousal and child support.163 The lawyer initiated a sexual affair with her and, in response to her concerns about birth control, assured her that he could not impregnate her.164 Assuming that he was sterile, the client agreed to the affair.165 The attorney’s statement regarding his infertility was knowingly false, however, and the client became pregnant as a result of the affair.166

The trial court dismissed the plaintiff’s cross-complaint for failure to state a cause of action.167 The California appellate court reversed, holding that the plaintiff had plead sufficient facts, which, if proven, would support claims for battery168 and deceit.169 Even without the attorney-
client relationship, the plaintiff's assertion of the facts justified these claims. The court was reluctant to take the next step, however, and to state that the fiduciary relationship bore directly on the battery and deceit claims.

The court noted that the parties' fiduciary relationship conceivably was relevant to elements of both claims based on the presumption that the party in whom trust and confidence is placed exerts undue influence over the other party. Undue influence bears both on the consent element of the battery claim and on the justifiable reliance element of the deceit claim. Thus, although conceding that the fiduciary relationship bore on the plaintiff's claims, the court refused to declare as a matter of law that an attorney-client relationship imposed on the attorney a fiduciary duty with respect to the client in their personal, as well as their professional, relations. The court left open the possibility, however, that the client could prove that a confidential, as distinguished from a fiduciary, relationship existed between the two parties in their personal dealings. Once the plaintiff demonstrates the existence of such a relationship, the burden shifts to the defendant to prove certain elements of the battery and deceit claims.

The court also declined to address whether it is a breach of ethics for attorneys to induce clients to have sexual relationships during the course of representation, leaving the regulation of such conduct to the State Bar of California. With respect to both the fiduciary relationship issue and the ethics issue, the court evidently was reluctant to create a "chilling and far-reaching effect on any personal relations between an attorney and his or her clients." 

169. See id. To sustain a claim for deceit the plaintiff needed to show "(1) a false representation (ordinarily of a fact) made by the defendant; (2) knowledge or belief on the part of the defendant that the representation is false, or that the representation was made by defendant without reasonable grounds for believing its truth; (3) an intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation; (4) justifiable reliance upon the representation by the plaintiff; (5) damage to the plaintiff, resulting from such reliance." Id. at 427 (citations omitted).

170. See id. at 432.

171. See id.

172. See id.

173. See id. Like the fiduciary relationship, the confidential relationship involves one party's imposing trust and confidence in the other party, who then is in a position to exert undue influence over the first party. See id. As legally recognized confidential relationships, fiduciary relationships are in a sense a subset of confidential relationships. See id. at 431. Confidential relationships, however, do not necessarily arise from a legal relationship but can grow out of a moral obligation, social custom, or a personal understanding between two parties. See id.

174. See id. at 432. The defendant would then have to prove in the battery claim that the plaintiff gave free and informed consent to physical contact or in the deceit claim that the plaintiff was not justified in relying on the defendant's statements about his infertility. See id.

175. See id. at 433.

176. Id. at 432-33.
2. Breach of Fiduciary Duty

The plaintiff in *Suppressed v. Suppressed*, a recent Illinois case, more directly pursued the claim for breach of fiduciary duty alluded to in *Barbara A. v. John G.* In *Suppressed*, a divorce client sued her former attorney for seducing or coercing her into a sexual relationship during his representation of her. Because the two-year statute of limitations for personal injury actions had expired, the plaintiff made a claim for breach of fiduciary duty, which has a five-year statute of limitations. The Illinois appellate court affirmed the lower court's dismissal of the plaintiff's complaint.

The court stated that the client did not sufficiently plead the elements of breach of fiduciary duty or legal malpractice: (1) a duty owed by the attorney to the client arising from their professional relationship; (2) breach of that duty; and (3) actual damages suffered by plaintiff as a proximate result of the breach. The court noted that the plaintiff failed to plead adequately facts relating to the first and third elements. The court refused to extend the attorney's duty of good faith and fair

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177. 565 N.E.2d 101 (Ill. App. Ct. 1990), appeal denied, 571 N.E.2d 156 (Ill. 1991). It is not clear from the opinion why the parties' names were suppressed in this case. The defendant obtained an order from the chancery court requiring suppression of the names and impoundment of the court record. See id. at 102. Probably, the attorney sought the order to protect his reputation. Interestingly, the plaintiff did not desire anonymity, as do many victims in sexual assault cases, and later revealed her identity in a number of press interviews. See Mary Wisniewski, *Sex With Clients an Unfair Affair*, Chi. Daily L. Bull., Apr. 20, 1991, at 1.

The law firm defendant in *Suppressed* and in a later federal case, Doe v. Roe, 958 F.2d 763 (7th Cir. 1992), involving the same defendants and similar allegations, subsequently gave up its anonymity when it sued the attorney and the legal clinic representing the plaintiffs in these cases. The law firm alleged that the attorney and the legal clinic had harassed the law firm and had violated legal ethics by improperly soliciting clients. See William Grady et al., *NU Clinic Collides with Rinella Firm*, Chi. Trib., July 28, 1992, at C3. This suit was dismissed in September 1992. See William Grady et al., *Sybaris Says Bank Left It at the Altar*, Chi. Trib., Sept. 22, 1992, at C3.

178. *See Suppressed*, 565 N.E.2d at 102. The plaintiff's complaint alleged that, after she had retained the defendant as her attorney in a divorce action, he demanded and received oral sex from her and later, on more than one occasion, took her to an apartment where he asked that she inhale an intoxicating substance and submit to sexual intercourse with him. See id. She alleged that she complied with defendant's demands for sex because of her fear that otherwise defendant would not vigorously represent her and her children. See id. at 102-03.

179. See *id.* at 103. The plaintiff also attempted to argue that the longer statute of limitations should apply to her personal injury action because the defendant fraudulently concealed the existence of the conflict of interest that ultimately gave rise to the injury. See *id.* at 104. The appellate court refused to decide this issue because the plaintiff failed to raise it before the trial court. See *id.* at 106. The court commented, however, that "it is highly improbable that we would find that a defendant could have fraudulently concealed a personal injury cause of action from a plaintiff, due [to] the very nature of a personal injury action." *Id.* at 107.

180. See *id.*

181. See *id.* at 104.

182. See *id.* The court's analysis suggests that plaintiff's complaint was insufficient on all three elements.
dealing toward his client to their personal relationship. As long as the attorney's behavior in the personal relationship did not affect his professional activity, no actionable claim for breach of fiduciary duty arose.

Additionally, the plaintiff did not allege actual damages as a result of the defendant's actions apart from intangibles such as shame, humiliation, and emotional distress. She did not plead that the sexual relationship interfered with the attorney's competence or the adequacy of his representation of her, causing her pecuniary harm in her divorce action. Permitting her intangible injury in the form of emotional distress to replace proof of actual damages would circumvent the statutory limitations on such claims as criminal conversation and alienation of affections.

The Illinois appellate court in Suppressed was clearly reluctant to tread in uncharted waters by holding that clients seduced by their attorneys could state a claim for breach of fiduciary duty without any concrete showing of injury to their legal or financial interests. The court feared a chilling effect on the attorney-client relationship, a flood of unjustified claims resulting from dissatisfaction with attorneys, and the possibility of

183. See id. at 105. The court stated:

if we were to accept plaintiff's contention that defendant in this case breached a fiduciary duty arising from the attorney-client relationship, we would be creating a new species of legal malpractice action and we would necessarily be holding that inherent in every attorney-client contract there is a duty to refrain from intimate personal relationships. Plaintiff can cite no support for this proposition, nor do we believe that any exists.

Id. at 104-05.

184. See id. at 105.

185. See id. at 105-06.

186. See id. at 106. Another recent case illustrates the difficulties of recovering in a malpractice action for sexual harassment. See Alexander Peters, Malpractice Verdict Thrown Out, The Recorder, Aug. 13, 1992, at 4. A client sued his attorney for malpractice, alleging that the attorney tried to pressure him into having sex with him in exchange for providing representation and even attempted to assault him physically while he was asleep. See id. The trial judge threw out the jury verdict for the plaintiff and directed a verdict for the defendant. See id. The court apparently concluded that the plaintiff had failed to prove that the attorney's representation of him was either inadequate or failed to meet the appropriate standard of care. See id.

By contrast, a Rhode Island jury recently found that an attorney who exploited his position to coerce sex from his client was liable for malpractice as well as for intentional infliction of emotional distress, battery, and fraud. See ArLynn Leiber Presser, Lawyer Liable for Coerced Sex, 79 A.B.A. J., Feb. 1993, at 24. The jury verdict, which the lawyer is appealing, came in the face of evidence that the attorney was entirely successful in obtaining the relief desired by the client in her divorce action. See id. If the court upholds the verdict on appeal, this will become the first case in which a plaintiff has prevailed on a malpractice claim involving a lawyer-client sexual relationship where there was no proof of injury to the client's legal interests or of attorney incompetence.


188. See Suppressed, 565 N.E.2d at 106.
clients' attempts to blackmail attorneys.\textsuperscript{189} The court suggested that the legislature was the appropriate body to create a new civil cause of action for sexual exploitation of clients by their attorneys, akin to the statutory cause of action that Illinois and other states have created for psychotherapists' sexual abuse of their patients.\textsuperscript{190}

3. Intentional Infliction of Emotional Distress

In a recent California case, \textit{McDaniel v. Gile},\textsuperscript{191} the court further explored the fiduciary duty theory raised in \textit{Suppressed v. Suppressed}. The attorney in \textit{McDaniel} sued his client for unpaid fees, and the client counterclaimed for malpractice and intentional infliction of emotional distress.\textsuperscript{192} The trial court summarily adjudicated certain issues on the cross-complaint in favor of the attorney\textsuperscript{193} and later granted judgment in favor of the attorney on the claim for fees.\textsuperscript{194}

On appeal the California Court of Appeals reversed the trial court's summary adjudication of the issues on the cross-complaint and held that the client, in her cross-complaint, had alleged facts sufficient to support her claim.\textsuperscript{195} The client alleged that she had consulted the lawyer regarding her divorce action and that, during the course of his representation of her, he made sexual advances and sexually provocative remarks to her.\textsuperscript{196} When she spurned his advances, he stopped answering her telephone calls, told her that she should "play[ ] the game the right way,"\textsuperscript{197} and erroneously advised her that she had no community property interest in her husband's retirement plan.\textsuperscript{198}

The appellate court held that the lawyer's fiduciary duty toward his client was relevant to both the malpractice\textsuperscript{199} and the intentional infliction of emotional distress claims.\textsuperscript{200} The attorney's neglect of a client's interests caused by a sexual rebuff can constitute a breach of the attorney's fiduciary duty, which includes the duty to exercise the skill and

\textsuperscript{189} See id. at 106 n.3.

\textsuperscript{190} See id. at 106.


\textsuperscript{192} See id. at 244.

\textsuperscript{193} See id. The lower court found that the defendant client could not state a cause of action for intentional infliction of emotional distress or legal malpractice based on the plaintiff lawyer's alleged sexual advances. See id. Additionally, the court held that § 43.5 of the California Civil Code disallowing a seduction action by a consenting adult barred the claim for intentional infliction of emotional distress. See id.

\textsuperscript{194} See id. at 245.

\textsuperscript{195} See id. at 248-49. The court remanded the case for retrial of the entire action. See id. at 250.

\textsuperscript{196} See id. at 245.

\textsuperscript{197} Id. at 245-46.

\textsuperscript{198} See id.

\textsuperscript{199} A legal malpractice claim is predicated upon the traditional tort notions of duty, breach of duty, causation, and damages. See id. at 249 (citing Budd v. Nixen, 491 P.2d 433 (Cal. 1971)).

\textsuperscript{200} See id.
diligence of a lawyer of average competence.\textsuperscript{201} Further the attorney’s unwelcome sexual advances toward the client, together with his abandonment of her if proven, would constitute “outrageous” conduct, one of the required elements of a claim for intentional infliction of emotional distress.\textsuperscript{202} The court judged the outrageousness of the defendant’s conduct in light of the parties’ relationship.\textsuperscript{203} Attorneys are in positions of authority with respect to their clients and, in many cases, are aware of their clients’ vulnerability and dependency.\textsuperscript{204} As fiduciaries, attorneys must act “with the most conscientious fidelity”\textsuperscript{205} toward their clients. Therefore “[t]he withholding by a retained attorney of legal services when sexual favors are not granted by a client and engaging in sexual harassment of the client are outrageous conduct under these circumstances.”\textsuperscript{206}

In contrast to Suppressed, the court in McDaniel at least allowed the client to establish her breach of fiduciary duty claim at trial.\textsuperscript{207} This divergence in result, however, may be attributed largely to the factual differences between the cases. In Suppressed, the client did not assert that the attorney’s sexual conduct in any way affected his representation of her legal interests\textsuperscript{208} whereas, in McDaniel, the client pleaded that her attorney had abandoned her after she refused his sexual advances.\textsuperscript{209} The court in McDaniel stated flatly that “[w]e specifically do not address whether sexual relations between an attorney and client constitute a per se violation of the fiduciary relationship.”\textsuperscript{210} Thus it is likely that, given the facts of Suppressed, the California appellate court would have reached the same result on the claim for breach of fiduciary duty.

\textsuperscript{201} See id.
\textsuperscript{202} The other elements of the claim include (1) an intent to cause emotional distress or reckless disregard of the probability of causing it; (2) severe emotional distress; and (3) actual and proximate causation of plaintiff’s emotional distress by defendant’s conduct. See id. at 247 (citing Agarwal v. Johnson, 603 P.2d 58 (Cal. 1979)).
\textsuperscript{203} See id.
\textsuperscript{204} See id.
\textsuperscript{205} Id.
\textsuperscript{206} Id. A Rhode Island jury recently awarded a plaintiff compensatory and punitive damages against her former attorney for, among other claims, intentional infliction of emotional distress. See Woman Victorious in Client-Sex Case, N.Y. Times, Nov. 29, 1992, at A38. Unlike the situation in McDaniel, the plaintiff in this case testified that the attorney did an excellent job of representing her in her divorce action, notwithstanding their sexual relationship. The basis for the intentional infliction claim, however, was the attorney’s coercion of her into the sexual affair. The plaintiff asserted that she submitted to the defendant’s sexual advances “out of fear that he would intentionally lose her case if she spurned him . . . [and that] she would lose custody of her 5-year-old daughter and be deported to Spain.” Id.
\textsuperscript{209} See McDaniel, 281 Cal. Rptr. at 245.
\textsuperscript{210} Id. at 249.
4. Violation of RICO

The difficulty of establishing civil liability in cases involving attorney-client sexual relations has led one client to sue her former attorney with whom she was sexually involved for civil damages under the Racketeer Influenced and Corrupt Organizations Act. In *Doe v. Roe*, the client alleged that the attorney lured her into a sexual affair with him by preying both upon her emotional vulnerability during her divorce and upon her financial inability to obtain other counsel once she had paid the defendant a substantial retainer. The client sued under RICO, alleging that the attorney had defrauded her of money, property, and honest services in violation of the federal mail and wire fraud statutes.

The Seventh Circuit affirmed the lower court's dismissal of the plaintiff's complaint. The court held that the plaintiff did not allege an injury to "business or property" as a result of a RICO violation. The court found that no other court had ever sustained a RICO claim based solely upon personal or emotional injuries and rejected the plaintiff's attempts to characterize her injuries as relating to her property interests.

The main flaw in the plaintiff's case was the absence of any pecuniary harm apart from some expenses incidental to her personal injuries. The plaintiff initially paid the defendant a $7500 retainer, and the defendant represented to her that any fees above that amount would be paid by the plaintiff's husband as part of the divorce settlement. Nevertheless, the defendant presented her with a bill for legal fees in excess of the retainer amount and, when she could not pay it, accepted sexual services in lieu of payment. In addition, the plaintiff's husband refused to pay any of his wife's attorney's fees after he discovered his wife and the defendant *in flagrante delicto*. The attorney failed to pursue a court order requiring the husband to pay the wife's legal fees for fear that his indiscretion would be exposed to the court.

The plaintiff first argued that the defendant fraudulently induced her to engage in sexual activity with him, resulting in her husband's refusal to pay her attorney's fees and forcing her to provide additional sexual

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212. 958 F.2d 763 (7th Cir. 1992). As in some other civil suits involving charges of attorney sexual misconduct, the names of both parties were not revealed for the public record. The court in *Doe* made it clear, however, that the defendant in that case was the same lawyer sued in *Suppressed v. Suppressed*. See id. at 769 n.4.
213. See id. at 765.
215. See Doe, 958 F.2d at 770.
216. See id.
217. See id. at 767-68.
218. See id. at 765.
219. See id. at 766.
220. See id. at 765.
221. See id.
Thus deprived of her sexual labors, which have a monetary worth, the plaintiff claimed to satisfy the "property" element of RICO. The court rejected this argument because under Illinois law, by which "property" is to be defined for purposes of RICO, sexual labor has no legal value.

The Seventh Circuit also rejected the plaintiff's argument that certain miscellaneous expenses incurred during her association with the attorney constituted loss of property. These expenses included loss of pay, cost of a security system, the value of companionship services provided to the attorney, and the cost of a new lawyer. These expenses, while clearly pecuniary, flowed from her emotional distress and were thus related to the personal injuries that she suffered. No doubt the court was troubled by the plaintiff's attempt to stretch an already-overused statute to fit what was essentially a claim for breach of fiduciary duty or legal malpractice. The court was sympathetic to the plaintiff's desire to deter Roe's "reprehensible conduct," but held that RICO was not the appropriate avenue of relief.

5. Restitution

Clients without redress for their attorneys' sexual misconduct in tort may be able to recover under a theory of unjust enrichment or restitution. Unjust enrichment is predicated upon the notion that defendants who receive unjust gain at plaintiffs' expense should be forced to disgorge or to give up that gain to the plaintiffs. Restitutionary remedies exist both at law and in equity and are normally measured by the amount of the unjust benefit received by defendants rather than by the amount of plaintiffs' loss. If clients pay their attorneys for services that they later found were never rendered, they could recoup those amounts by suing in unjust enrichment or breach of contract and force the return of the unearned sums.

222. See id. at 768.
223. See id.
224. See id. (citing Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979)).
225. See id. at 770.
226. See id. at 769-70.
227. The court noted that "[m]ost personal injuries—loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering . . . will entail some pecuniary consequences. Perhaps the economic aspects of such injuries could, as a theoretical matter, be viewed as injuries to 'business or property,' but engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary." Id. at 770.
228. Id.
230. See, e.g., Felder v. Reeth, 34 F.2d 744, 747 (9th Cir. 1929) (explaining quasi-contractual legal remedies for conversion of goods sold and delivered).
A recent Illinois case illustrates the potential for the use of this theory in the context of attorney-client sexual relations. In *In re Marriage of Kantar*, the Illinois appellate court allowed a divorce client to petition the court to recalculate the attorney's fees in her case where the client alleged, among other things, that the attorney had billed her for time during which they had sexual relations. Earlier the client had agreed to the attorney's statement of fees at a "prove up" hearing in conjunction with the dissolution proceeding. Later the client filed a petition for relief from the judgment for attorney's fees based, in part, on her inability at the time of the "prove up" to evaluate objectively the fee statement presented by the attorney.

The court held that the trial court erred in granting the respondent attorney's motion for summary judgment. The client had alleged sufficient facts in her petition to warrant a reexamination of the statement of attorney's fees and had filed the petition with due diligence. The court declined to address whether the alleged sexual relationship between the parties breached the attorney's fiduciary duty because the allegation of fee impropriety was sufficient by itself to support the petition.

In his concurring opinion Justice Greiman stated that the attorney's alleged sexual misconduct was relevant to the appropriateness of awarding attorney's fees. The concurrence described sexual misconduct by attorneys as the "legal profession's 'dirty little secret,'" and suggested that, at a minimum, lawyers who initiate sexual relationships with their clients, particularly in matrimonial cases, have created a conflict of interest. Although the concurring justice did not believe that an ethical rule specifically banning attorney-client sexual relations was absolutely necessary, he did advocate a *per se* rule of law requiring attorneys to forfeit their fees in matrimonial cases for services rendered after commencing a sexual relationship with their client.
In some cases attorneys’ fees are not subject to court supervision as in *Kantar*. In the unusual case where attorneys actually bill clients for time spent in sexual activities, the client should be able to recover the amounts paid through theories of unjust enrichment, breach of contract, breach of fiduciary duty, or fraud. Even where attorneys lack the audacity to bill for sex, clients might be able to pursue unjust enrichment claims if their involvement caused them to overpay for legal services. In other words, unscrupulous lawyers might overcharge their lover-clients for legal services by padding the hours expended or by inflating the hourly rate and, because of their emotional attachment, the clients might not realize that the charges were excessive.  

C. Judicial Sanctions

In cases where the courts have supervisory power over the award of attorneys’ fees, clients may be able to challenge the amounts charged by attorneys without having to sue separately to recover for fees overpaid. Additionally, at least one case, *Edwards v. Edwards*, suggests that attorneys may be sanctioned for continuing to represent clients in divorce actions after the clients’ spouses have raised the attorneys’ sexual involvement. In *Edwards*, the lower court imposed monetary sanctions and costs on an attorney who refused to withdraw voluntarily from representing a client in a divorce matter after the client’s husband accused the attorney in open court of being sexually involved with the client. The lower court accepted the husband’s assertion that the attorney had engaged in “frivolous” conduct by continuing to represent his client under those circumstances.

The New York appellate court’s reversal of the imposition of sanctions illustrates the need for more definite rules on the propriety of attorney-client sexual relations. The appellate court stated that sanctions for the attorney’s refusal to withdraw were not justified unless withdrawal was “clearly and unequivocally mandated by existing law.” Given that there was no explicit prohibition on attorney-client sexual relations in the

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245. Perhaps more commonly, attorneys eliminate or cut their fees either because of quid pro quo arrangements or because of the their own emotional attachment to their clients. Some practitioners may not consider romantic entanglements with their clients because it might reduce their chances of being able to collect legal fees.

246. *See supra* notes 233-44 and accompanying text.


248. *See id.* at 646.

249. *See id.*

250. *See id.* New York court rules define conduct as frivolous if “it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law . . . .” N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1(c)(1) (1993).

251. *Id.*
New York ethics rules at the time, the attorney was not required to withdraw absent a violation of some existing ethical rule. After the husband formally accused his wife of adultery, however, the attorney became a potential witness as to the adultery and was required to terminate his representation under DR 5-102(B), which he did within three days. New York has recently changed its rules to prohibit matrimonial lawyers from engaging in sexual relations with their clients, effective in November 1993.

Although the court reversed the imposition of sanctions in this case, it clearly indicated that attorneys who continued to represent their clients under circumstances in which an ethical transgression was present or imminent could be sanctioned. The court, however, discouraged the use of sanctions in the absence of a clear-cut violation of the rules of professional conduct. Once again, the absence of an explicit rule on the propriety of attorney-client sexual relationships decreases the deterrent effect of this remedy.

III. CURRENT EFFORTS AT REFORM

With the increase in public outrage over sexual improprieties by lawyers and other professionals have come proposals for new regulations. Advocates of additional regulation observe that neither existing bar rules nor theories of civil liability have provided adequate deterrence of attorney sexual misconduct nor satisfactory redress for those clients injured by sexual involvement with their lawyers. In enforcing current bar rules, disciplinary bodies arguably have been hamstrung by the need to find a nexus between the sexual activity and the attorneys' representation of their clients or their general fitness to practice law—a connection often difficult to establish. In the same vein, plaintiffs suing their former lawyers for malpractice have often failed to satisfy the requirement that the sexual misconduct affected the quality of the legal representation.

In response to the demands for reform, two states, California and Oregon, have enacted new bar rules restricting sexual relations between attorneys and their clients. In New York the Chief Judge of the Court of Appeals recently issued a comprehensive set of rules controlling abusive practices by the matrimonial bar, including a rule barring sexual relations between matrimonial lawyers and their clients. New York is currently studying whether to extend these new rules to all practitioners.

252. See id. at 649.
253. See id.
within the state. 257 Other states are also considering proposals for amendments to their ethics rules. 258

Most states, however, are taking no action at the present time and presumably are content to rely on enforcement of existing bar rules to curb attorney sexual misconduct. 259 This Part discusses several approaches to regulating attorney-client sexual relations, including those adopted in California and Oregon. Part IV advocates a ban on sexual relationships between attorneys and their individual clients, except where the parties had a preexisting relationship.

A. Opposition to a New Rule

Some commentators have argued that no specific new rule on attorney-client sexual relations is needed and, in fact, would be detrimental. 260 They point out that the present bar rules governing conflicts of interest, illegal conduct involving moral turpitude, and competence adequately regulate attorney sexual misconduct. 261 For example, as discussed earlier, 262 current ethical rules restrict an attorney’s ability to accept or continue employment if a personal interest would impair the exercise of professional judgment. 263 This rule would seem to restrain attorneys in some circumstances from representing present as well as would-be lovers in legal matters. Arguably, attorneys who have sexual relationships with their clients may not be able to use their best objective judgment in representation. Attorneys who represent their clients under those circumstances face possible discipline under current bar rules unless they can

258. See Lewis, supra note 255, at B1.
259. See id.

An informal telephone poll of state bar associations during late February and early March 1993 revealed that most states presently are not considering any specific new ethical rule regarding attorney-client sexual relations. California and Oregon are the only two states with rules specifically on this issue. See infra part III.B-C. Arizona, Florida, and Illinois are considering proposed rules on attorney sexual misconduct. See Telephone Interviews with Sharon Frye, Ariz. State Bar Ass’n (Feb. 26, 1993); Rosalyn Scott, Fla. State Bar Ass’n (Mar. 2, 1993); Wendy Muchman, Ill. Attorney Registration & Disciplinary Comm’n (Mar. 4, 1993). Hawaii and Washington State are in the process of enacting rules prohibiting sexual discrimination or harassment by lawyers in a broader context. See Telephone Interviews with Dew Kaneshiro, Haw. Comm. of Bar Ass’n & Judiciary (Mar. 1, 1993); Bob Welden, Wash. State Bar Ass’n (Feb 26, 1993).

262. See supra part II.A.2.
263. See Model Code, supra note 16, DR 5-101(A); Model Rules, supra note 73, Rule 1.7.
show their clients' awareness of the possible loss of objectivity and knowing waiver of any conflict of interest.\(^\text{264}\)

Opponents of a specific new rule contend that more vigorous enforcement of existing rules would increase the bar's awareness of the problem and would be sufficient to provide sanctions in cases of true abuse.\(^\text{265}\) A ban on sexual relations, these commentators argue, would be overbroad and would intrude unnecessarily on the privacy of the parties.\(^\text{266}\) Clients, who, although willingly consenting to the sexual affair, later become disenchanted with the relationship may misuse such a rule and may retaliate by bringing a disciplinary complaint.\(^\text{267}\) Finally, proponents of the status quo assert that the problem of attorney-client sexual relations, although the subject of some media attention from time to time, is relatively minor. The state bar associations with pertinent statistics report very few complaints from clients about attorney sexual misconduct.\(^\text{268}\) Thus it is

\(^{264}\) See id.

\(^{265}\) See Corboy, supra note 261, at 34-35.


\(^{267}\) The court in Suppressed v. Suppressed, 565 N.E.2d 101 (Ill. App. Ct. 1990), appeal denied, 571 N.E.2d 156 (Ill. 1991), noted the dangers of blackmail by unscrupulous persons if the court were to recognize a cause of action for lawyer malpractice based on sexual affairs with their clients that injured only the clients' emotional well-being and did not interfere with the legal services. See id. at 106 n.3. The court stated that "we would be opening the door to any number of malpractice actions brought by clients who may have been less than satisfied with their legal representation but can point to no specific harm other than their own emotional distress. The potential for abuse would be too great." Id. at 106 (footnote omitted). Similarly, if a bar rule prohibited attorney-client sexual relationships, clients dissatisfied with their attorneys because of the breakup of their personal relationship might threaten to file a complaint with the bar association as a means of coercing resumption of the relationship or cash payments. It is not clear, however, whether the likelihood of blackmail is any greater with this particular ethical rule as opposed to other bar rules.

\(^{268}\) Two lawyers informally polled the fifty state bar associations and found that among the thirty-two states that responded with statistics no more than one percent of the complaints received over a recent two-year period involved attorney-client sexual contact. See Linda Mabus Jorgenson & Pamela K. Sutherland, Lawyer-Client Sexual Contact: State Bars Polled, Nat'l L.J., June 15, 1992, at 26. The Illinois Attorney Registration and Disciplinary Commission reported that about one percent of the 5,000 complaints that it received in 1989 concerned attorney-client sexual encounters. See Illinois Gender Bias Task Force, Ill. Task Force on Gender Bias in the Courts 54 (1990).

On the other hand, in a survey of randomly selected attorneys by Memphis State University professors, 31% of the respondents said that they knew of one or more instances
not necessary for the bar to add a specific new regulation on sexual relations to the already extensive ethical codes. An overly detailed ethical code with a myriad of rules addressing infrequent situations, it is argued, detracts from the code's purpose of setting relatively broad standards of conduct.269

B. The California Rule

In 1989 the California state legislature ordered the California Bar Association ("CBA") to adopt a specific rule regulating attorney-client sexual relations.270 In the fall of 1991, the CBA recommended to the California Supreme Court adoption of a rule restricting attorney-client sexual relations.271 The court initially declined to adopt the proposed rule pending further opportunity for public comment.272 After almost a year, the California Supreme Court adopted the proposed rule in August 1992 with one significant modification.273 Shortly thereafter, reacting to the perceived weakness of the rule, the California State Assembly exercised its concurrent jurisdiction over the legal profession and enacted a supposedly tougher restriction on attorney-client sexual relations.274 The
California Supreme Court rule and the California statute are almost identical in a number of respects. Both carve out three circumstances under which sex between attorneys and clients is prohibited: (1) quid pro quo arrangements; (2) use of coercion or intimidation; and (3) effects on attorney competence.275

Under the supreme court rule, attorneys may not demand sex from their clients "incident to or as a condition of any professional representation."276 The California statute expands this provision slightly by prohibiting attorneys from "[e]xpressly or impliedly condition[ing] the performance of legal services for a current or prospective client upon the client's willingness to engage in sexual relations with the attorney."277 The statute applies to situations where the request for a quid pro quo

Conduct of the State Bar of California, or if the sexual relations would, or would be likely to, damage or prejudice the client's case.

(b) Subdivision (a) shall not apply to sexual relations between attorneys and their spouses or persons in an equivalent domestic relationship or to ongoing consensual sexual relationships that predate the initiation of the attorney-client relationship.

(c) Where an attorney in a firm has sexual relations with a client but does not participate in the representation of that client, the attorneys in the firm shall not be subject to discipline under this section solely because of the occurrence of those sexual relations.

(d) For the purposes of this section, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

(e) Any complaint made to the State Bar alleging a violation of subsection (a) shall be verified under oath by the person making the complaint.

Id.

275. The full text of the adopted version of California Rule 3-120 is as follows:

(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 member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

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

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which 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.

Cal. Rules of Professional Conduct Rule 3-120 (1992) [hereinafter Cal. Rules of Professional Conduct]. Rule 3-110 provides that “[a] member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently.” Id. at Rule 3-110(A).


arrangement is implicit rather than express. In other words, the lawyer does not openly ask the client to pay for legal services with sexual favors, but instead suggests, through innuendo, that the vigor and efficiency of the representation may depend on whether the client agrees to an affair. The statute, unlike the rule, also reaches attorneys' behavior toward prospective as well as current clients and thus prevents lawyers from arguing that the party from whom sexual favors were demanded was merely seeking representation and was not yet a client.

Both the bar rule and the statute also prohibit attorneys from using "coercion, intimidation, or undue influence in entering into sexual relations with a client." This prohibition overlaps somewhat with the previous section in that attorneys who offer clients the option of granting sexual favors in lieu of paying cash may be coercing impecunious clients. Clients without the resources to pay their attorneys' bill in full, but who are able to discharge it in installments, may feel pressured to accede to the lawyers' demands. Even without an explicit quid pro quo arrangement, clients may be desperate, vulnerable, or anxious about an impending legal matter, and fearful that their attorneys will not provide vigorous representation unless they agree to sexual relations. If clients have just spent their last few dollars on a retainer, they may be reluctant to discharge their lawyer and seek counsel elsewhere.

The California bar rule's third provision has the broadest reach, prohibiting continued representation of clients with whom attorneys have engaged in a sexual relationship if the relationship "cause[s] the [attorneys] to perform legal services incompetently ...." Unlike the final rule adopted, the original CBA proposal created the presumption of incompetence on the part of attorneys who have engaged in sexual relations with their clients. Under the proposed rule accused attorneys would have had to rebut that presumption by proving competent repre-

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278. See id.
279. See id.
281. In one suit against an attorney, the client pleaded:

[although [she] felt repulsed by [the attorney's] sexual advances, she submitted because of her fear that otherwise he would not represent her and that since she could not afford a retainer fee to hire a third counsel in her divorce case, she might go unrepresented and lose both custody of her child and the opportunity for financial security for herself and her child.]

283. Proposed California Rule of Professional Conduct 3-120 contained a subsection (E):

A member who engages in sexual relations with his or her client will be presumed to violate rule 3-120, paragraph (B)(3). This presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Cal. Rules of Professional Conduct, supra note 275, Proposed Rule 3-120.
sentation despite the sexual relationship. Without comment the California Supreme Court dropped the presumption of incompetence. Thus the prosecutor in a disciplinary proceeding presumably bears the burden of proving inadequate representation caused by the sexual affair.

The third section of the California statute, while identical in its incompetence standard, expands the bar rule by prohibiting attorneys from representing clients with whom they have had sexual relations if "the sexual relations would, or would be likely to, damage or prejudice the client's case." For example, lawyers who commence affairs with clients they represent in divorce actions may continue to represent their clients competently but, nevertheless, may injure the case by exposing their clients to allegations of adultery from the clients' spouse. Curiously, although the state legislature passed the statute supposedly to strengthen the prohibitions in the bar rule, it is only slightly more restrictive and does not contain the presumption of incompetence of the original proposed bar rule.

The first two provisions of the California rule and of the statute attempt to curtail the most egregious abuses by attorneys who prey upon clients by taking advantage of their own superior position and of their clients' extreme vulnerability. The third sections of both the rule and the statute embrace the notion that, in some cases, a fully consensual sexual relationship causes no detriment to clients. The California Supreme Court eliminated the presumption of incompetence in the original proposal, perhaps believing that an attorney-client affair does not inevitably interfere with attorneys' representation of their clients. The rule implicitly acknowledges that such a relationship may affect the lawyers' competence through the loss of objectivity or the creation of a conflict of interest, but places the burden on the prosecutor to show that the affair adversely affected the clients' interests. Attorneys must then demonstrate competent and responsible representation within the ordinary standards of the profession, notwithstanding the personal involvement.

284. See Hager, supra note 272, at A3.
286. See id.
288. One observer has suggested, tongue-in-cheek, that in some instances sexual affairs with their clients may improve some attorneys' competence because an active and satisfying social life will increase the lawyers' sense of well-being and, consequently, effectiveness at work. See Leslie M. Hartman, Sex With Client Could Improve Competence, The Recorder, Apr. 29, 1991, at 4. Similarly, one could speculate that attorneys who are sexually involved with their clients might provide more vigorous representation because of their personal attachment.
C. **The Oregon Rule**

Proponents of a *per se* rule banning sexual relations between attorneys and their clients argue that an across-the-board prohibition is the only truly effective way to eliminate the perceived abuses of such relationships. Intimate relationships with clients, no matter how carefully conducted, carry a high probability of injury to the clients and their interests, thereby justifying a ban. In addition, a *per se* rule eliminates the exercise of the attorneys' judgment as to when sexual relationships with their clients would be injurious.

In December 1992 the Oregon Supreme Court promulgated an amendment to the state code of professional responsibility creating an across-the-board prohibition on attorney-client sexual relations.

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291. The American Academy of Matrimonial Lawyers recently promulgated a set of aspirational standards for its members, which includes a *per se* rule banning attorney-client sexual relations. This standard states that "[an] attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation." Gerald L. Nissenbaum, *Chicago Sex Rule Doesn't Go Far Enough*, Nat'l L.J., Apr. 13, 1992, at 14 (quoting American Academy of Matrimonial Lawyers, Bounds of Advocacy Standard 2.16 (1991) (emphasis added)). The Academy, one can assume, opted for an across-the-board ban because of its awareness that the matrimonial bar is a prime source of client complaints about sexual misconduct. *See id.*

The American Lawyer's Code of Conduct, drafted as an alternative to the ABA's Model Rules, also prohibits the commencement of sexual relations with a client during the period of the lawyer-client relationship. *See Roscoe Pound-American Trial Lawyers Foundation, Comm'n on Professional Responsibility, The American Lawyer's Code of Conduct Rule 8.8 (Revised Draft 1982).* According to the Comments, the rule "recognizes the dependency of a client upon a lawyer, the high degree of trust that a client is entitled to place in a lawyer, and the potential for unfair advantage in such a relationship." *Id.* at Rule 8.8 cmt.

In addition to Oregon, whose new rule is discussed *infra*, Florida and Washington are also considering new ethical rules that would prohibit all lawyer-client sexual relations during the time of representation unless the parties had a preexisting sexual relationship. *See Florida Proposed Rule on Attorney-Client Sexual Relationships, in Fla. State Bar's Special Comm. for Gender Equality in the Profession (Feb. 16, 1993) (available from Tony Boggs, Florida State Bar Ass'n); Lewis, *supra* note 255, at Bl.*

In addition, the Board of Governors of the Washington State Bar Association recently approved an amendment to its code of its professional responsibility that would forbid lawyers from "[c]ommit[ting] a discriminatory act prohibited by law or harass[ing] a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination or harassment is committed in connection with the lawyer's professional activities." Wash. Proposed Rule of Professional Conduct 8.4(g) (1993). Conceivably, such an anti-harassment provision could be used to discipline lawyers who made unwelcome sexual advances or sexual comments to prospective or current clients. Florida, Minnesota, New Jersey, New York, Rhode Island, Vermont, and the District of Columbia have also adopted or proposed similar anti-bias rules within the last five years. *See Don J. DeBenedictis, More States Ban Bias by Lawyers, 79 A.B.A. J., Jan. 1993, at 24-25; Rosalind Resnick, Florida Joins Other States Barring Lawyers' Acts of Bias, Nat'l L.J., Sept. 14, 1992, at 3.*

292. Oregon Code of Professional Responsibility DR 5-110, promulgated on December 31, 1992, reads as follows:

(A) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer/client relationship commenced.
accepted, without change, the proposed rule passed by the Oregon State Bar in the fall of 1992. This rule bars attorneys from having sexual relationships with current clients unless the parties had a consensual sexual relationship before the period of representation. The exception allows lawyers to represent their spouses and other pre-existing lovers.

The new rule also bans sexual relations between lawyers and representatives of current clients "if the sexual relations would, or would likely, damage or prejudice the client in the representation." The Oregon rule takes the position that sexual relations between attorneys and representatives of corporations, associations, or other entities are not necessarily harmful but should be barred if they would injure the clients' legal representation. In most cases, however, existing disciplinary rules ad-
equately reach lawyers' sexual involvement with their clients' representatives when it injures their clients' legal interests. Perhaps the Oregon Supreme Court, by adding the provision on sexual relations with client representatives, wanted to emphasize the need for caution and increased awareness of possible conflicts of interest in those situations.

A ban on attorney-client sexual relations, similar to that adopted in Oregon, would regulate most effectively attorney misconduct in this area. Such a rule would demonstrate to the public and to practicing attorneys the bar's serious attitude toward the issue and would provide clear and unequivocal standards for lawyers to follow. Unlike the other proposals discussed, a per se rule leaves little room for lawyers' subjective judgment as to when sexual relationships are harmful, but allows the parties the freedom to choose their sexual partners by terminating their professional association.

D. The Illinois Proposal

In 1991 the Illinois Senate, following California's lead, passed a resolution urging the Illinois Supreme Court to adopt an ethical rule governing attorney-client sexual relations. In January 1992 the Chicago Bar Association's Board of Managers unanimously approved a proposed rule developed by a Chicago Bar Association subcommittee and recommended its adoption by the Illinois Supreme Court.

The proposed Illinois rule focuses mostly on undue influence. The rule prohibits sexual relations between attorneys and clients where (1) the attorney exercises duress, intimidation, or undue influence to induce the sexual relationship or (2) the attorney "knows or reasonably should know that the client's ability to decide whether to engage in sexual relations is impaired by the client's emotional or financial dependency, or some other reason." The first part of the proposed rule is directed at

(Regarding conflicts of interest), DR 7-101(A)(3) (regarding prejudice to client); see also supra part II.A.2-3.

298. See infra part IV.
299. See S. Res. 361, 87th Ill. Gen. Assembly, 5 Ill. Sen. J. 5473 (1991). The resolution "urge[d] the Illinois Supreme Court to adopt a rule of professional conduct prohibiting attorney-client sexual relationships during the period of the attorney-client relationship, unless the client is the spouse of the attorney, the sexual relationship predates the commencement of the attorney-client relationship, or some other situation exists in which the court deems the prohibition would not detract from the attorney's representation of the client ...." Id. The resolution's wording is much stronger than the ultimate proposed rule submitted by the Chicago Bar Association to the Illinois Supreme Court. See infra note 301.
300. See Chicago Bar Ass'n Comm. on Professional Responsibility, Report of the Subcommittee on Attorney-Client Sexual Misconduct (1991). Although the Illinois Supreme Court has taken no action on this proposed rule in the last two years, recent sexual misconduct charges against two prominent Chicago lawyers have prompted renewed demand for action on the rule. See John Flynn Rooney, Proponents Renew Call for Court Rule Against Lawyer-Client Sex, Chi. Daily L. Bull., Sept. 17, 1993, at 1.
301. Illinois Proposed Rule of Professional Conduct 1.17 reads in full:
intentional overreaching by lawyers; the second part at the nonmalicious, but nonetheless knowing, persuasion of vulnerable clients to engage in a sexual relationships.

Like the California regulations, the first part of this rule clearly acknowledges that it is unethical for lawyers to use their superior position to coerce clients into sexual affairs. Lawyers should not threaten to withhold legal representation or to turn the client's bill over to collection agencies as a means of inducing the client to provide sexual favors. Such conduct violates the trust that clients place in their attorneys and inevitably brings the profession as a whole into disrepute.302

The second part of the rule addresses the situation in which attorneys may be attracted to their clients and may wish to have a consensual sexual relationship, but the clients, nevertheless, may not perceive matters in the same light. However “honorable” attorneys' intentions may be, clients may feel unable to refuse advances, despite their wish to do so, for fear of retaliation in the form of inadequate representation. Clients also may have experienced a form of “transference,” a phenomenon well known to the psychiatric profession, which may inhibit them from rejecting the attorneys' advances.303 The transference phenomenon, though most commonly associated with psychiatry, may occur wherever individuals develop close, trusting relationships with persons in positions

(a) A lawyer shall not, during the representation of a client, engage in sexual relations with the client if:
(1) The sexual relations are the result of duress, intimidation, or undue influence by the lawyer; or
(2) The lawyer knows or reasonably should know that the client's ability to decide whether to engage in sexual relations is impaired by the client's emotional or financial dependency, or some other reason.

(b) Where a lawyer in a firm has sexual relations with a client, the other lawyers in the firm shall not be subject to discipline solely because of the occurrence of such sexual relations.


302. In its recently issued ethics opinion on lawyer-client sexual relationships, the ABA emphasized the fiduciary relationship that lawyers have with their client and noted that “[a] sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position . . . .” ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992). The opinion warned that if “the lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the lawyer may violate one of the most basic ethical obligations, i.e., not to use the trust of the client to the client's disadvantage.” Id. at n.12. The opinion, while pointing out the possible perils of lawyer-client sexual relationships, did not suggest that the Model Code or the Model Rules prohibit such relationships in all circumstances. See id. at n.13.

303. See Sigmund Freud, An Outline of Psycho-Analysis 65-70 (1949); C.G. Jung, Analytical Psychology: Its Theory and Practice 151-89 (1968). Transference involves the transferring of emotions that an individual had toward other significant people in his or her life such as a parent, onto a trusted figure, usually a psychiatrist or other therapist. In other words, if a female client identifies her therapist with her father with whom she had an extremely submissive attitude, then she may be unable to refuse any request by the therapist. See Freud, supra, at 65-70; Jung, supra, at 151-89.
of authority, such as lawyers.\textsuperscript{304}

Although the Illinois rule attempts to address the situations in which attorney-client sexual relations are most detrimental to the clients' interests, the rule may be both underinclusive and overinclusive. Abusive lawyers may escape punishment and, at the same time, basically ethical lawyers may face discipline. In a disciplinary proceeding the prosecutor normally bears the burden of proving an ethical violation by "clear and convincing evidence."\textsuperscript{305} It may be difficult, if not impossible, in many cases to show that accused attorneys knew or should have known of their clients' emotional or financial dependency, particularly if the clients are not financially dependent and have sufficient means to choose another attorney. Unless their clients are without friends or family, absent some other objective indications of a strong emotional tie, attorneys could easily argue total unawareness of the clients' vulnerability and psychological inability to refuse sexual advances.

The "should have known" standard, of course, can be interpreted quite broadly. For example, individuals going through a contested divorce and fighting for child custody may be said to be so emotionally vulnerable that they would be unable to rebuff their attorneys' advances. Because, however, human beings vary greatly in their response to a given situation, it is difficult to classify all people similarly situated as equally emotionally susceptible. Indeed, clients in that situation may initiate or welcome affairs with their attorneys to reaffirm their desirability or to expand their social horizons.\textsuperscript{306}

\textsuperscript{304} Professor Jung, the eminent psychoanalyst, has described the involuntary nature of transference:

Transference . . . is a projection which happens between two individuals and which, as a rule, is of an emotional and compulsory nature. Emotions in themselves are always in some degree overwhelming for the subject, because they are involuntary conditions which override the intentions of the ego. Moreover, they cling to the subject, and he cannot detach them from himself. Yet this involuntary condition of the subject is at the same time projected into the object, and through that a bond is established which cannot be broken, and exercises a compulsory influence upon the subject.

Jung, \textit{supra} note 303, at 154. Transferences can occur in any relationship between two human beings, but the potential for abuse of the transference is especially great where the object of the transference is a person with authority or is in a position of special trust. \textit{See} Rutter, \textit{supra} note 5, at 50.

\textsuperscript{305} Charles W. Wolfram, \textit{Modern Legal Ethics} 109 (1986). Although some jurisdictions employ the "preponderance of the evidence" standard or the "beyond a reasonable doubt" standard, most commonly the burden of proof in lawyer disciplinary proceedings is "clear and convincing evidence." \textit{See id.; see also} Drucker's Case, 577 A.2d 1198, 1200 (N.H. 1990) (applying standard of clear and convincing evidence); \textit{In re} Liebowitz, 516 A.2d 246, 249 (N.J. 1985) (same).

\textsuperscript{306} It should be pointed out that a ban on sexual relations may offer protection to attorneys as well as clients. In any given situation a lawyer may find sexual advances from a client unwelcome and may feel reluctant to rebuff those advances if the client's business is especially valuable to the lawyer. An ethical rule prohibiting sexual relationships could provide the lawyer with a persuasive reason why the parties should not have an affair. \textit{See} Mark Hansen, \textit{9th Circuit Studies Gender Bias}, 78 A.B.A. J., Nov. 1992, at
ATTORNEY-CLIENT SEXUAL RELATIONS

The proposed Illinois rule concedes that some attorney-client sexual relationships are ethically acceptable. Obviously, such relationships are to be expected between spouses, though one might question the wisdom of lawyers who represent their spouses in seriously contested matters. The rule also seems to allow new relationships to form during the period of representation; it recognizes the possibility that an attorney and a client could meet for the first time in a professional context, or perhaps renew their old platonic friendship, and could begin a consensual sexual relationship that did not harm the client's interest and was perceived as beneficial by both parties.

The open-endedness of the proposed Illinois rule could result in the disciplining of attorneys who sincerely believe that their clients wished to have a mutual, fully consensual sexual affair. The attorneys may believe that their clients are not emotionally dependent, making a romantic liaison ethically acceptable. If the relationship between the two parties later sours or the clients become dissatisfied with the legal representation, they might complain to the disciplinary commission and raise facts to suggest that their attorneys should have known of any emotional dependence. In such a case, clients may honestly believe themselves wronged just as attorneys may steadfastly believe their conduct conformed to the bar rule.

IV. PROPOSAL FOR A MODIFIED BAN

Growing public concern about sexual misconduct by all professionals, the startling lack of clarity in current bar rules, and the uneven enforcement of those rules suggest that a specific new ethical rule regarding attorney-client sexual relations should be created. Toward that end, this Article proposes a rule to be adopted by bar associations prohibiting attorney-client sexual relations during the period of representation where the client is a natural person. By its terms, this proposal excludes situations in which the client is a partnership, corporation, or other entity, such as a labor union, club, or charitable association. Thus officers,

30 (noting that Ninth Circuit report on gender bias found 39% of female attorneys and 8% of male attorneys surveyed claimed to have been sexually harassed by client).
308. See id.
309. "Sexual relations" should be defined to include, at a minimum, sexual intercourse and any touching of the intimate or sexual parts of the client for the purpose of sexual gratification of either party. It could also include the attorney's causing the client to touch his or her intimate or sexual parts and the attorney's touching his or her own intimate or sexual parts in front of the client for the purpose of sexual gratification of either party. Compare Cal. Rules of Professional Conduct, supra note 275, Rule 3-120(A) and Or. Code of Professional Responsibility, supra note 292, DR 5-110(C) (defining sexual relations).
310. A per se rule banning sexual relations would require a prosecutor to prove only that a sexual encounter occurred during the time of representation. Obviously, problems of proof can adhere to that issue as well because often one party's word is pitted against the other's, but at least this rule reduces the number of issues that may be contested in that manner.
directors, and other employees of such organizations would be exempt from the ban. This proposal also includes an exception for pre-existing lovers such as spouses or others with an established, on-going intimate relationship before the time of representation.

Evidence indicates that the most serious abuses in this area have typically occurred in matrimonial practice. Some of the cases, however, involve criminal or probate proceedings. Some commentators have suggested, therefore, that instead of a total prohibition of sexual relations between attorneys and their clients, the ban should be restricted to the most suspect areas of practice such as divorce, criminal, and probate matters on the assumption that these clients are likely to be most vulnerable to the predations of unscrupulous lawyers. Unfortunately, these cases are not the only ones in which clients can be emotionally overwrought. Clients filing for bankruptcy, having an immigration problem, being audited by the Internal Revenue Service, fighting an employment discharge, or seeking redress for personal injuries could experience considerable emotional trauma, isolation, and vulnerability. For example, clients in fear of being deported may not be any less upset and worried than those involved in a marriage dissolution proceeding. Restrictions on attorney-client sexual relations should apply therefore to all areas of practice where the client is an individual.

The various proposed rules involving an examination of the attorneys' or the clients' states of mind are also unworkable. Some proposals have sought to ban relationships based on coercion, duress, or undue influence. These rules necessitate some proof of the parties' mental state. Coercion, for example, implies both the deliberate exercise of force or persuasion by attorneys and the unwillingness of their clients. Presumably, a prosecutor in a disciplinary proceeding would have to demonstrate that the parties had the requisite state of mind at the time of the sexual

311. See, e.g., In re Lewis, 415 S.E.2d 173 (Ga. 1992) (suspending attorney for three years for sexual relations with client being represented in divorce and custody proceeding); Carter v. Kritz, 560 A.2d 360 (R.I. 1989) (suspending attorney for at least one year for sexual misconduct toward client being represented in domestic relations case).


312. See, e.g., People v. Gibbons, 685 P.2d 168 (Colo. 1984) (en banc) (disbarring attorney for having sexual relations with client's co-defendants in a criminal proceeding); In re Howard, 681 P.2d 775 (Or. 1984) (publicly reprimanding attorney for accepting sex in lieu of attorney's fees from client arrested for prostitution); In re Disciplinary Proceedings Against Ridgeway, 462 N.W.2d 671 (Wis. 1990) (suspending attorney for having sex with client while representing her in possible probation revocation).

313. See, e.g., Kentucky Bar Ass'n v. Meredith, 752 S.W.2d 786, 787-88 (Ky. 1988) (publicly reprimanding attorney for professional misconduct resulting from sexual involvement with client being represented in probate matter).

314. See Dubin, supra note 8, at 588; Riga, supra note 6, at 13.

encounters. Unless attorneys use actual physical force, it may be difficult to prove that their clients were unwilling or that the attorneys realized the extent of their coercion. Clients may be so intimidated by their attorneys' superior position and so paralyzed by their own desperate circumstances that they may not resist the lawyers' advances or make any verbal protest.

The California rule and statute, which link the sexual relationship to the adequacy of representation, are also deficient. Attorneys who initiate sexual affairs with their clients may not continue representation if the affair causes them to represent their clients incompetently. The California regulations appear premised on the notion that, unless coercion or quid pro quo arrangements are involved, attorney-client sexual relationships are not inherently undesirable unless they diminish the attorney's effectiveness as an advocate. In most instances, however, it will be difficult for the prosecutor to demonstrate that the representation was inadequate according to generally accepted standards of the profession. In any case an attorney must make a multitude of decisions along the way, particularly if litigation is involved. Unless the lawyer's conduct is clearly negligent, a state ethics board will not likely find incompetence.

When attorneys become sexually involved with their clients, inevitably their professional judgment is tainted because their own personal interest becomes intertwined with their legal representation. Although attorneys may continue to make acceptable decisions on their clients' behalf, they may not use their best judgment to further the clients' interest, that judgment having been clouded by the sexual involvement. A client who sincerely desires a sexual relationship with her attorney may not realize the hazards to their professional relationship. The attorney must be responsible for desisting from behavior that might harm the client's interests.

Like the California regulations, the Illinois proposal avoids a ban by prohibiting only those sexual relationships that are involuntarily imposed

316. For the full text of Cal. Code § 6106.9 and Cal. Rule of Professional Conduct 3-120, see supra notes 274 and 275.
317. The prosecutor in a disciplinary proceeding must show that the legal representation did not comport with the general standards of the profession. See Cal. Rules of Professional Conduct, supra note 275, Rule 3-110.
318. The United States Supreme Court has described the difficulty of pinpointing the deficiencies in representation where attorneys have conflicts of interest:

"In a case . . . of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations . . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but . . . it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation."

Thus the proposed rule bars sexual relations resulting from duress, intimidation, or undue influence, or those in which attorneys knew or should have known that emotional, financial, or other circumstances may have impaired their clients' ability to consent. If interpreted broadly, the latter provision may produce, in essence, a total ban on sexual relations between attorneys and their clients. Clients are likely to have a degree of emotional, if not financial, dependence on their attorneys, especially if their liberty, property, or personal well-being is at risk in pending proceedings.

Lawyers should know that most, if not all, unsophisticated clients are at least somewhat emotionally dependent on them. The Illinois rule, however, requires attorneys to know or have reason to know that the emotional or financial dependence impairs their clients' ability to consent to a sexual relationship. Once again, a broad interpretation of that language suggests that any kind of emotional dependence on a person in a superior position impairs an individual's capacity to make free choices. Although the law and moral codes permit many relationships in nonprofessional contexts that are not truly consensual and lack mutuality, equality, respect, and trust, a fiduciary who is specially trained and worthy of special trust should be more sensitive to that ideal. Because individual clients are rarely impervious to some degree of emotional dependence on their attorneys, a sexual relationship initiated during the course of representation is not, in most cases, truly consensual and authentic. Thus attorneys know or should know that the emotional dependence of most clients impairs their ability to voluntarily consent to sexual relations.

The proposed Illinois rule is tantamount to a ban on sexual relations between attorneys and their clients under this broad interpretation. As a prophylactic measure, this Article proposes a total ban on such relations subject to the exceptions indicated. The danger with the Illinois rule as proposed is that, if interpreted narrowly, it prohibits attorney-client sexual relations only in very few cases. By requiring that attorneys know or have reason know that their clients' emotional or financial dependence impairs their ability to consent to a sexual affair, the Illinois proposal opens the door to a hearing examiner's or disciplinary board's finding that attorneys could not have realized the extent of their clients' dependence. The rule may be read to require proof that clients give overt signs of extraordinary vulnerability and dependence upon their attorneys. In many cases, however, the signs of dependency are more subtle yet nonetheless real.

Unlike other suggested per se rules, such as Oregon's, this Article's

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320. See id.
321. See id.
322. For example, clients may not express to their attorneys, "I'd be lost without you," but may still believe their attorneys to be their last, best hope. Lawyers may be unaware
proposal exempts employees and other agents of clients who are not natural persons from the ban on attorney-client sexual relations. Attorneys presumably will deal with corporate officers or directors in the course of representing corporate clients. Although these individuals may have their own vulnerabilities, they are likely to be more sophisticated in legal matters than the general population and, hence, less dependent on their attorneys. Because of the greatly lowered probability of overreaching by attorneys, the policy of protecting free choice in intimate relationships outweighs those policies supporting a total ban in this context. Although it may not be particularly wise for attorneys to initiate sexual relationships with employees of corporate clients, the need for a per se rule here is considerably reduced. If attorneys’ intimate relationships with their clients’ employees creates a conflict of interest or other problem, the existing bar rules are probably sufficient to address the situation.323

V. ANALYSIS OF A MODIFIED BAN

Any additional regulation of attorney-client sexual relations should advance sound public policy. Arguably, the uneven enforcement and unclear language of current disciplinary rules, as well as the difficulty of establishing civil liability, adversely affect all parties’ interests. Clients who are victims of their lawyers’ sexual misconduct suffer harm to their emotional, financial, and legal interests. Lawyers remain in doubt about the standard of conduct required of them and are injured by the public’s perception of them as manipulative and predatory. Disciplinary bodies must try to prevent the most egregious abuses without the assistance of a clear standard. Finally, public confidence in the profession is lessened by the bar’s continuing acquiescent attitude.

A rule prohibiting attorney-client sexual relations under all circumstances, however, may unduly infringe upon both attorneys’ and clients’ rights of privacy and upon clients’ right to choose their own counsel. A ban could also lead, some argue, to a spate of unjustified claims brought by vengeful clients who are dissatisfied with their attorneys for irrational reasons. Governmental regulation of any sexual behavior is often considered an intrusion on privacy and an invitation to blackmail.324

323. The new Oregon ethics rule prohibits lawyers from having sexual relations with their entity clients’ representatives “if the sexual relations would, or would likely, damage or prejudice the client in the representation.” Or. Code of Professional Responsibility, supra note 292, DR 5-110(B). As argued above, the existing ethical rules regarding conflicts of interest and injury to clients’ interests already ban any attorney conduct that conflicts with or prejudices clients’ legal interests, and it is not clear that this part of the Oregon rule does anything more than reinforce attorneys’ duty to desist from behavior that would harm their clients or create a conflict of interest. See supra notes 295-96 and accompanying text.

A. The Therapist-Patient Analogy

The medical community has long viewed sexual relations between psychiatrists and patients during the course of treatment, and even thereafter, as totally unacceptable. Such relations potentially cause immeasurable injury to patients, often worsening depression and even leading to suicide. As will be seen, the therapeutic relationship is in some sense analogous to that of attorney-client.

Because therapy requires patients to share their innermost thoughts and feeling with trusted therapists, who then assist in resolving conflicts and other problems, some emotional dependency is deliberately and consciously created. Therapists who engage patients in sexual relationships pervert the patients' trust and abuse any emotional dependence. Many patients are unable to refuse the advances of authority figures in whom they have placed ultimate trust and confidence. Patients may

325. Even the Hippocratic Oath of the Physician states "[w]hatever 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 and male persons . . . ." The Hippocratic Oath, in Psychiatric Ethics app. at 344 (Sidney Bloch & Paul Chodoff eds., 1981).

Doctors Masters and Johnson, the noted sex therapists, have condemned sexual relations between therapists and their patients during the time of treatment:

The ultimate in countertransference is, of course, a therapist seducing a patient into overt sexual activity. We feel that this approach to the extremely vulnerable patient with a dysfunction is professionally and personally inexcusable. . . . We feel that when sexual seduction of patients can be firmly established by due legal process, regardless of whether the seduction was initiated by the patient or the therapist, the therapist should initially be sued for rape rather than for malpractice, i.e., the legal process should be criminal rather than civil.

William H. Masters & Virginia E. Johnson, Principles of the New Sex Therapy, 133 Am. J. Psychiatry 548, 553 (1976); see also supra note 1 and accompanying text.

A few psychiatrists have advocated sexual relations between psychiatrists and their patients as a means of allowing the patients to work through problems of intimacy. In his autobiography Dr. Martin Shephard recounted numerous incidents in which he had sexual relations with patients individually or in groups—relations that he clearly believed benefitted his patients as well as himself. See Martin Shepard, A Psychiatrist's Head (1972) (Dr. Shephard spelled his name "Shepard" in his books). Ultimately, the state of New York revoked his medical license based on his sexual activities with his patients. See Shephard v. Ambach, 414 N.Y.S.2d 817, 819 (N.Y. App. Div. 1979).

326. See Zelen, supra note 2, at 180-82 (citing literature strongly indicating sexual relations between therapist and patient are overall highly detrimental, if not devastating, to patient). The case law involving lawsuits by former patients for sexual misconduct of their therapists also suggests that these patients suffered considerable emotional distress as a result of the sexual relationship. See, e.g., Simmons v. United States, 805 F.2d 1363, 1364 (9th Cir. 1986) (noting client suffered depression and attempted suicide); Zipkin v. Freeman, 436 S.W.2d 753, 759 (Mo. 1968) (en banc) (noting client's social isolation and feelings of guilt).


328. Many of the individuals interviewed by Dr. Peter Rutter as part of his book, Sex in the Forbidden Zone, reported feeling totally unable to refuse the sexual advances of their trusted therapist, mentor, pastor, or other authority figure even though some of them experienced guilt and anguish. See Rutter, supra note 5, at 58-59; see also Marie M. Fortune, Is Nothing Sacred? 12-45 (1989) (recounting stories of women parishioners sc-
fear rejection by their therapist if they refuse or may hope that the sexual union will provide relief from the emotional pain that caused them to seek therapy.\textsuperscript{329}

Sexual relationships between therapists and patients can never advance patients' well-being and almost always will cause the patients harm. When therapists pursue the relationship for personal gratification, this opportunism ultimately will become apparent to their patients, and this betrayal diverts attention from the problems that caused the patients to seek therapy in the first place. A therapist in the throes of a sexual relationship with his patient will likely not pay full and objective attention to his patient's emotional conflicts.\textsuperscript{330} In addition, once the therapist loses interest in the patient and cuts off the relationship, the patient may feel abandoned and used, further increasing any feelings of low self-esteem.\textsuperscript{331}

Even in those infrequent cases in which therapists and patients find that they have fallen in love with each other and seek to have a permanent relationship, the commencement of a sexual relationship during the course of treatment, nevertheless, can have damaging effects on the patients. Because of transference, patients may believe erroneously that


\textsuperscript{330} Doctors Twemlow and Gabbard have suggested that therapists who have sexual relationships with patients fall into three broad categories: the psychotic, the antisocial, and the lovesick. See Stuart W. Twemlow & Glen O. Gabbard, \textit{The Lovesick Therapist}, in Sexual Exploitation in Professional Relationships 71, 72-73 (Glen O. Gabbard ed., 1989). The first group contains those therapists who are suffering from a psychotic delusion that causes them to seduce their patients---e.g., the belief that God had ordered them to impregnate their patients. See id. The second group includes counselors who are bereft of empathy for their patients and actively seek to exploit them sexually. See id. Finally, the largest group is comprised of therapists, often well functioning professionals, who believe that they are in love with their patients. See id. In this state of "lovesickness," therapists are often having a narcissistic infatuation with themselves as reflected in their patients. They idealize the patient and frequently fall into a dreamlike state in their patients' presence. See id. It is doubtful whether therapists in this condition could be objective about their patients' problems.

\textsuperscript{331} Commentators have identified a number of negative consequences to women patients who have had sexual contact with their therapists. These include:

- ambivalence and mistrust of subsequent therapists, doubt of their own sense of reality, repetition of childhood trauma that became fixated rather than interpreted, bondage to the offending therapist, exacerbated sexual dysfunctions and problems in intimacy with men; guilt and shame associated with the sexual contact; additional difficulties with discussing sexual fantasies in therapy; and feelings of abandonment and disorganization related to the abrupt termination of the therapy.

they are in love with their psychiatrist.\textsuperscript{332} Therapists themselves are not immune to the effects of what is called the "countertransference," in which therapists transfer onto their patients emotions that they have felt toward other significant figures in their own lives.\textsuperscript{333} Under the influence of the countertransference, therapists may be convinced that they, too, are in love.

For all of these reasons, the counseling professions have long banned any kind of sexual activity between therapists and their patients during the time of treatment.\textsuperscript{334} The same concerns leading to the ban on therapist-patient sexual relations are equally applicable to the attorney-client relationship. Arguably, the attorney-client relationship poses the same risk of overreaching, abuse, betrayal of trust, injury to the clients' interests, and diversion from the professional goals that originated the relationship. In this regard, it may be useful to assess the unique attributes of the therapeutic relationship as compared with those of the attorney-client relationship.

The psychiatrist-patient relationship is characterized by confidentiality, isolation, a relatively long duration, and interaction between a

\textsuperscript{332} Freud observed that it is common, if not inevitable, for patients experiencing transference to feel that they have fallen in love with their analysts. He wrote:

\begin{quote}
[\textit{t}he danger of these states of transference evidently consists in the possibility of the patient misunderstanding their nature and taking them for fresh real experiences instead of reflections of the past. If he (or she) perceives the strong erotic desire that lies concealed behind the positive transference, he believes that he has fallen passionately in love . . . . It is the analyst's task to tear the patient away each time from the menacing illusion, to show him again and again that what he takes to be new real life is a reflection of the past.
\end{quote}

Freud, \textit{supra} note 303, at 69.

Another analyst has noted the importance of handling the patient's transference properly, writing that "[i]f an eroticized and idealized transference to the therapist develops and is not vigorously analyzed, the effects on the patient's life can be pernicious." Robert S. Liebert, \textit{Transference and Countertransference Issues in the Treatment of Women by a Male Analyst}, in Between Analyst and Patient: New Dimensions in Countertransference and Transference 229, 231 (Helen C. Meyers ed., 1986).

\textsuperscript{333} Both Freud and Jung warned against the therapists mishandling of the countertransference, which Jung described as follows:

\begin{quote}
The emotions of patients are always slightly contagious, and they are very contagious when the contents which the patient projects into the analyst are identical with the analyst's own unconscious contents. Then they both fall into the same dark hole of unconsciousness, and get into the condition of participation. This is the phenomenon which Freud has described as countertransference. It consists of mutual projecting into each other and being fastened together by mutual unconsciousness.
\end{quote}

Jung, \textit{supra} note 303, at 157; see also Sigmund Freud, \textit{Observations on Transference-Love (Further Recommendations on the Technique of Psycho-Analysis III)}, in \textit{Essential Papers on Transference} 37, 42 (Aaron H. Esman ed., 1990) (warning against losing neutrality and recommending that counter-transference be kept in check). In his recent work on the countertransference, Dr. Wayne A. Myers recounts his experiences as a supervising psychiatrist in which some of his supervisees failed to recognize the nature of their countertransference to their patients, sometimes with devastating results. \textit{See Myers, supra} note 328, at 32.

\textsuperscript{334} \textit{See supra} note 1 and accompanying text.
trained, caring professional on the one hand and a vulnerable lay person on the other. The attorney-client relationship possesses many of the same characteristics. Clients typically come to attorneys with important problems requiring the attorneys’ expert advice and may reveal confidential information about finances, health, personal relationships, and state of mind. The relationship is often conducted in isolation because, unless attorneys consult co-counsel, only they and their clients should be privy to their discussions. Finally, the relationship may be of relatively long duration if the legal problem requires litigation or other lengthy negotiations or proceedings.

Thus, in several respects, the professional relationships in the legal and psychiatric worlds are similar in nature. These common characteristics cause clients in both settings to develop close, trusting, perhaps idealized relationships with the professional. The danger of transference, counter-transference, overreaching, seduction, and even rape can be present as strongly in a legal relationship as in a psychiatric one. The risk of abuse of the client’s trust suggests that a ban on attorney-client sexual relations, similar to the one in the counseling professions, is warranted.

Notwithstanding these similarities, however, the attorney-client relationship differs in several important respects from the therapist-patient relationship. One may assume that it is normally of shorter duration and of lesser intensity than the relationship between psychiatrists and their patients. Patients often receive psychiatric treatment for months, if not years, at a time, meeting regularly with their therapists at least once a week, sometimes as much as four or five times weekly.

In 1990 the House of Delegates of the American Medical Association (“AMA”) adopted a report of the AMA’s Council on Ethical and Judicial Affairs, which concluded that “sexual contact or a romantic relationship with a patient concurrent with the physician-patient relationship is unethical.” AMA Council on Ethical and Judicial Affairs, Sexual Misconduct in the Practice of Medicine, 266 JAMA 2741, 2745 (1991).

335. The propriety of sexual relations between professionals and their clients has been raised in other contexts such as doctor-patient, minister-parishioner, and professor-student. See Rutter, supra note 5, at 31-36. Although all professions disapprove of forcing sexual relations on clients, they are less adamant about banning seemingly “consensual” sexual relationships. See Gromis v. Medical Bd. of Cal., 10 Cal. Rptr. 2d 452, 458-60 (Cal. Ct. App. 1992) (holding state medical board could not discipline physician for having consensual sexual relationship with patient absent finding that relationship resulted in negligent treatment of patient); Collins v. Covenant Mutual Ins. Co., 604 N.E.2d 1190, 1196 (Ind. Ct. App. 1992) (holding that physician's sexual involvement with patient is not per se malpractice); Eduardo Cruz, When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions, 19 Fla. St. U.L. Rev. 499, 504 (1991) (noting clergy frequently assume counseling functions and therefore are in position to abuse parishioners' trust through sexual manipulation); Monroe H. Freedman, The Professional Responsibility of the Law Professor: Three Neglected Questions, 39 Vand. L. Rev. 275, 277 (1986) (discussing vulnerability of law students to sexual exploitation by professors while observing that healthy sexual relationships do result from some professor-student liaisons).

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cases attorneys meet with their clients on a less consistent basis. Furthermore, the total focus of the therapeutic relationship is on the thoughts, feelings, dreams, memories, and impressions of the patients, whereas the attorney-client relationship has its genesis in the clients' legal problems. Although clients, particularly in divorce or criminal matters, may reveal personal information to their attorneys, the thrust of the relationship is not on the clients' inner lives. Attorneys must be concerned primarily with objective facts about their clients related to the legal matter at hand. Because of its shorter duration and decreased intensity, the attorney-client relationship may be less vulnerable to creation of a transference and to the possibility of overreaching. In some sense, individuals employing lawyers may have much more financial and emotional freedom to discharge their attorneys than do those employing counselors or psychiatrists. Psychiatric patients, on the other hand, may have developed strong emotional dependence on their therapists and may be reluctant to terminate the relationship even where the therapists propose a sexual affair. These differences suggest that perhaps attorneys could have a consensual sexual liaison with clients without overreaching or abusing them. Mature, relatively stable clients presumably have the ability to initiate or consent to sexual relations with their attorneys. Existing bar rules should adequately address any potential conflict of interest problem.

The less emotionally-charged nature of the attorney-client relationship may warrant less stringent restrictions on sexual relations than in the psychiatric sphere. Either more vigorous enforcement of existing rules on conflicts of interest or enactment of a rule modeled on the Illinois proposal, which focuses on the clients' vulnerability, may address adequately those situations in which abuses are likely to occur. But, as was shown above, neither the existing ethics rules nor proposals such as Illinois' create a workable standard of behavior that is both readily understandable by the bar and capable of consistent enforcement. Moreover, although many attorney-client relationships are less emotionally intense than those between therapists and their patients, attorneys are still undeniably in a position of trust and power with respect to their clients. Clients trust lawyers to use their power wisely on the clients' behalf. Even if clients desire to have love affairs with their lawyers, attorneys should refuse because the romantic involvement likely will prevent them from devoting total unbiased and objective attention to their clients' legal needs—a fact of which clients may not be fully aware even after complete discussion of the matter.

B. Constitutional Implications

Critics argue that a complete ban on attorney-client sexual relations

337. See id. at 46-56.
338. See supra part IV.
would constitute an undue infringement upon the rights of privacy and association of both parties and would be, therefore, unconstitutional. This position is highly suspect, as will be demonstrated. Neither a due process nor an equal protection analysis compels the conclusion that this Article's proposal of a modified total ban on attorney-client sexual relations could not survive constitutional attack.

1. Minimal Scrutiny

In recent cases the United States Supreme Court has somewhat blended due process and equal protection analyses. Under the Fourteenth Amendment substantive due process analysis, the Court normally examines whether a state regulation is rationally related to some legitimate state objective. Similarly, under the Fourteenth Amendment equal protection analysis, the Court examines whether a particular legislative classification is rationally related to some appropriate state purpose. Most likely, the Court would regard a bar rule banning attorney-client sexual relations during the time of representation as a legislative classification affecting only attorneys and their current clients. Because the rule applies only to these certain classes of individuals and not to others, its constitutionality is more properly tested through application of the Equal Protection Clause. The requirement of state action under the due process and equal protection clauses is likely

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339. See supra note 266 and accompanying text.
340. Two constitutional law scholars have noted that "[w]hen the Supreme Court reviews a law that restricts the liberty of all persons it will review the law under due process principles. When the Court reviews a law that classifies persons it will use equal protection principles." John E. Nowak & Ronald D. Rotunda, Constitutional Law § 11.4, at 374 (4th ed. 1991); see also Laurence H. Tribe, American Constitutional Law §§ 16-1 to -2 (2d ed. 1988) (discussing equal protection and minimum rationality analysis).
343. Past and future clients are not affected by the ban because attorneys would be free to have sexual affairs with their clients after their professional relationship ended. Lawyers who already are involved in sexual relationships with others, moreover, are allowed to represent those parties under the exception for pre-existing lovers and spouses.
344. Because most laws involve some creation of classifications among individuals, the Supreme Court, since its devaluation of substantive due process analysis after 1937, has tended to review the majority of legislation under the Equal Protection Clause, particularly in the area of fundamental rights. See Nowak & Rotunda, supra note 340, § 14.1, at 568-69. Unquestionably, a bar rule that restricts lawyer-client sexual relations creates a category of persons, namely attorneys and their clients, that are prohibited from engaging in sexual relations. The rule can be enforced only against the attorneys, of course, but it also operates to restrict the sexual choices of clients as well, who presumably will find it more difficult to initiate sexual relationships with their attorneys.
345. The Fourteenth Amendment declares that the states shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. See
satisfied.  

In the absence of legislation involving suspect classifications or fundamental rights, the United States Supreme Court employs minimal scrutiny to evaluate a statute’s constitutionality under the Equal Protection Clause. The Court examines whether the legislation has a rational relationship to some legitimate state purpose. This standard is intended to be, of course, highly deferential to the legislative choice and is predicated upon the theory that the Court should not interfere generally with the policymaking of an elected branch of government.

A bar rule prohibiting attorney-client sexual relations arguably affects the right of both the lawyer and the client to choose their sexual partners, the client’s right to be represented by counsel of choice, and the lawyer’s right to pursue a livelihood. A per se rule banning attorney-client sexual relations would prevent both attorneys and clients from engaging in such activity during the period of the professional relationship. If both parties’ desire for a sexual affair was inexorable, then they could terminate their professional relationship. Under those circumstances, however, the client would have to select another attorney and would be deprived of the original attorney’s skill in representation. And finally, attorneys who violate the ban would be subject to discipline by the bar and conceivably could lose their right to practice law, either temporarily or permanently.

These rights, while significant, would probably not be deemed “fundamental” under current United States Supreme Court holdings. There ex-

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346. Bar rules are most commonly issued by the supreme courts of their respective states or by mandatory bar associations, acting as an arm of the state supreme courts. See Wolfram, supra note 305, at 21, 33-38. The state supreme courts in turn are authorized by the state constitution, by legislation, or by some form of the inherent powers doctrine to regulate the bar by performing this essentially legislative function. See id. at 22-31. Thus the courts’ legislation of bar rules should constitute state action within the meaning of the Fourteenth Amendment.

To the extent that bar associations promulgate lawyer discipline rules with minimal state supreme court involvement, the state action element is arguably somewhat weaker. The issue of state action by bar associations has been debated relative to the application of federal antitrust laws. See id. at 38-44; Hoover v. Ronwin, 466 U.S. 558, 569-74 (1984); Bates v. State Bar of Arizona, 433 U.S. 350, 359-63 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92 (1975).


348. See supra notes 341-42 and accompanying text.

349. In the 1930s, as the Court moved away from its aggressive use of substantive due process to invalidate economic and social welfare legislation, it indicated that legislative choices were to be sustained in most cases. The Court held that “the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis . . . .” United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).
ists a constitutional right to be represented by counsel in court proceedings. Courts also recognize a right to choose one's own counsel, but that right is not absolute and may be counterbalanced by considerations of the fair administration of justice where representation by a particular attorney would create a potentially serious conflict of interest. Although the ability to practice law is an important privilege and cannot be denied arbitrarily to qualified individuals, "[t]here is no fundamental right to practice law . . . [and a]ttorneys do not constitute a suspect class." Licensed attorneys are all subject to the ethical norms of the legal profession and can be sanctioned for violating those norms, presumably to advance the public interest.

The right to engage in intimate relations with another is perhaps the most arguably "fundamental" right as it relates to an inherently private sphere of activities in which the justification for state intrusion is weak. But the United States Supreme Court, as will be discussed more fully below, has never held that there is a fundamental right under the Constitution for single persons to engage in sexual intercourse or for married

350. The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; see also Powell v. Alabama, 287 U.S. 45, 68-71 (1932) (finding the right to counsel fundamental in a criminal proceeding). Courts have viewed the right to counsel in civil matters as incorporated within the constitutional guarantee of due process of law. See, e.g., Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir.), cert. denied, 449 U.S. 820 (1980) ("A civil litigant's right to retain counsel is rooted in fifth amendment notions of due process; the right does not require the government to provide lawyers for litigants in civil matters.").

351. In Wheat v. United States, 486 U.S. 153 (1988), the Supreme Court upheld a federal district court's refusal to allow a defendant in a criminal proceeding to be represented by the attorney for two of his co-defendants. The Court held that the lower court was entitled to refuse the defendant's motion for substitution of counsel based on "a showing of a serious potential for conflict" of interest if the attorney were to engage in multiple representations of criminal defendants. Id. at 164. The Court so held notwithstanding the defendant's willingness to waive any potential conflict. See id. at 163. The Court stated that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Id. at 159.

Similarly, in civil cases, the courts of appeal have held that the right to be represented by counsel of one's choice, though vital, is not absolute and may be outweighed by "compelling reasons," including an unavoidable conflict of interest. See Bottaro v. Hatton Ass'n, 680 F.2d 895, 897 (2d Cir. 1982); see also McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1263 (5th Cir. 1983) (disqualifying judge's brother-in-law as local defense counsel); Federal Trade Comm'n v. Exxon Corp., 636 F.2d 1336, 1345 (D.C. Cir. 1980) (upholding order prohibiting in-house and retained counsel for corporation from having attorney-client relationship with wholly-owned subsidiary during hearing to possibly divest subsidiary from corporation).

352. Giannini v. Real, 911 F.2d 354, 358 (9th Cir. 1990), cert. denied, 498 U.S. 1012 (1990); see also Frazier v. Heebe, 788 F.2d 1049, 1053 (5th Cir. 1986) (finding that the right to practice law is not fundamental), rev'd on other grounds, 482 U.S. 641 (1987); In re Roberts, 682 F.2d 105, 108 (3d Cir. 1982) (finding that admission to the bar is not a fundamental right).

353. See infra notes 357-73 and accompanying text.
persons to do so with someone other than their spouse. A *per se* rule banning attorney-client sexual relations, with the exception for spouses and other pre-existing lovers, regulates only single attorneys and clients or married attorneys and clients seeking to have an affair with someone other than their spouse or present lover.

If the rights affected are not fundamental, the proposal should be able to survive minimal constitutional scrutiny. Certainly, the state has a legitimate interest in preventing lawyers from taking advantage of vulnerable clients by initiating sexual relationships that may compromise the clients' well-being and the lawyers' competence and objectivity. The state bar, as the licensing body for attorneys, and the state supreme court, as the promulgator of ethical rules and the ultimate body before which lawyers practice, both have a strong interest in preserving the integrity and efficiency of the practicing bar and in promoting public confidence in the administration of justice.

A modified ban must be rationally related to those legitimate interests. Under the rational relationship standard, the state must show that the regulation arguably, if not demonstrably, promotes the state's legitimate interests. A ban on sexual relations between attorneys and their clients who are individual persons reduces potential conflict of interest problems, diminishes the risk of loss of objectivity by attorneys, and protects clients against predatory seductions. While no rule can completely eliminate unethical conduct, its mere existence coupled with its vigorous enforcement would send a clear message to the bar that courts will not tolerate amatory exploitation of clients.

2. Strict Scrutiny

Where legislation creates a suspect classification or impinges upon a fundamental right, the Supreme Court will examine the law closely under the Equal Protection Clause to ensure that it is narrowly tailored to foster a compelling state interest. The right to engage in sexual relations with a partner of one's choice may be viewed as a fundamental right within that group of privacy decisions defining personhood and affirming basic notions of liberty in a free society.

Among the few fundamental rights recognized by the Supreme Court are those concerning procreation, marriage, and family relationships. The Court has held that decisions to beget a child, to terminate a pregnancy, to marry, or to educate children in a particular way are

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fundamental and "implicit in the concept of ordered liberty"361 or "deeply rooted in this Nation's history and tradition."362 In Bowers v. Hardwick,363 however, the Court held that homosexuals have no fundamental right to engage in consensual acts of sodomy, even in the privacy of their homes.364 In Bowers the Court reviewed its line of privacy cases, including Loving v. Virginia,365 Griswold v. Connecticut,366 and Eisenstadt v. Baird,367 and concluded that "any claim that these cases . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."368

Most of the Court's privacy decisions have focused on family relationships including marriage, procreation, and child rearing. The Court has recognized the sanctity of the marriage relationship and the inherent undesirability of governmental intrusion into the intimate decisions between husbands and wives. These cases provide, at best, tangential support for the rights of unmarried persons to be free from governmental interference in sexual matters. The Court has acknowledged, however, that even unmarried persons have some fundamental rights concerning the use of contraception and the decision to have an abortion.

In Eisenstadt v. Baird,369 the Court struck down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons.370 The Court found that the statute failed to pass even minimal scrutiny under the Equal Protection Clause because the distinction between married and unmarried persons was not rationally related to the

364. See id. at 191-96. But see Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding state statute criminalizing homosexual sodomy unconstitutional under equal treatment and liberty provisions of Kentucky state constitution).
366. 381 U.S. 479 (1965).
368. Bowers, 478 U.S. at 191. The Colorado Supreme Court, in upholding the constitutionality of a criminal statute penalizing both consensual and nonconsensual sexual relations by psychotherapists with their clients, noted that:
while certain private activities and intimate relationships may qualify for the elevated status of fundamental constitutional rights, it has never been the law that consenting adults, solely by virtue of their adulthood and consent, have a constitutionally protected privacy or associational right to engage in any type of sexual behavior of their choice under any circumstances.

369. 405 U.S. at 438.
370. See id. at 443.
stating its asserted goals. Relying primarily on the statute's arbitrary distinction between married and unmarried persons, the Court avoided the need to decide whether unmarried individuals have a fundamental right to buy and use contraceptives. Justice Brennan, writing for the majority, however, did suggest that unmarried individuals, to the same extent as married individuals, enjoy a fundamental constitutional right of privacy in matters relating to procreation. He wrote, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Justice Brennan's comment may have applied only to procreative matters and not to sexual matters in general. In other words, unmarried persons may have a fundamental right to make procreative decisions without undue governmental interference but may not have a fundamental right to engage in sexual intercourse. On the other hand, procreation and sexual relations may be regarded as inextricably bound together. Recognizing that control over procreation is a fundamental right leads inevitably to the idea that control over one's sexuality and sexual expression is fundamental as well.

Assuming that the right of unmarried persons to choose their sexual partners is a fundamental right, a ban on attorney-client sexual relations would violate the Equal Protection Clause unless the regulation is necessary to promote a compelling governmental interest. The proper administration of justice and the protection of clients from rapacious lawyers arguably constitute compelling state interests. If the vast majority of sexual relationships initiated between lawyers and their clients during the time of representation result from overreaching by lawyers and cause injury to their clients, then the state should be justified in restricting such associations.

Arguably, an across-the-board ban on such relationships where the client is an individual is not narrowly tailored to achieve its stated purpose. In other words, regulations such as the Illinois and California proposals that focus on clients' vulnerability or attorneys' competence have attempted to identify the specific problems occasioned by a lawyer-client

371. The Court rejected as implausible that the state's asserted goals of preventing premarital sex and of protecting the health of unmarried persons. See id. at 448. It found that prohibiting the distribution of contraceptives was not likely to prevent premarital sex and that the statutory requirement that physicians prescribe contraceptives for married persons could equally protect the health of unmarried persons. See id. at 448-52.

372. Id. at 453.

373. The Court's decision in Bowers can be restricted to state prohibition of homosexual activities. The Court chose not to address the state's power to prohibit acts of sodomy by consenting heterosexual adults. See Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986). Even in Roe v. Wade, 410 U.S. 113 (1973), where the Court acknowledged that the fundamental right of privacy encompassed a woman's decision whether or not to terminate her pregnancy, it conceded that the right of privacy was not so broad that "one has an unlimited right to do with one's body as one pleases . . . ." Id. at 154.
affair and are supposedly written in such a way as to eliminate these problems. But, as discussed elsewhere in this Article, these proposals present almost insurmountable problems of proof or leave clients unprotected in situations of potential abuse. If interpreted expansively the proposals could amount to a virtual across-the-board ban on attorney-client sexual relations and, in that sense, would be no more narrowly tailored than a prohibition.

Thus a modified ban is arguably the most narrowly tailored regulation that could effectively protect the public interest in preventing overreaching of vulnerable clients. In addition, such a ban represents only a slight intrusion on the parties' rights of privacy. Attorneys and their clients may still have a sexual liaison simply by terminating their professional relationship. It will be an extremely rare case where an individual client's legal problems are so esoteric that adequate substitute counsel cannot be obtained. Or, if both parties want the original attorney to continue the representation, they can defer beginning their intimate relationship until the end of the representation. This deferral does not represent nearly the kind of intrusion on privacy that the state statutes prohibiting distribution of contraceptives and banning abortions did in Eisenstadt v. Baird and Roe v. Wade.

CONCLUSION

All fiduciary relationships are founded on the premise that fiduciaries should not engage in self-dealing to the detriment of their clients or patients. Attorneys who engage in sexual relations with clients with whom they were previously unacquainted do so largely, if not exclusively, for their own benefit. Most likely, lawyers do not consider whether a sexual affair will benefit their clients; perhaps they assume superficially that it will. But, in many cases, clients will be injured emotionally or financially by the relationship or will suffer some loss of quality in their legal representation.

Parties who meet for the first time in the context of an attorney-client relationship may become attracted to each other and desire a sexual affair. Certainly, this desire may be perfectly legitimate and even beneficial if both parties are single, consenting adults. The considerable dangers of overreaching by attorneys and consequent injury to their clients in many cases, however, dictate that bar rules prohibit lawyers from initiating sexual relationships with clients during the period of representation. If both parties wish to pursue a sexual relationship immediately, lawyers can arrange for competent substitute counsel and can end the professional relationship. Otherwise, both parties should wait until the attorney-client relationship comes to a natural close before pursuing a more personal relationship.

374. See supra part IV.