

ALASKA BAR ASSOCIATION

Ethics Opinion 88-1

Re: Potential Impropriety of Sexual Relationship with a client during the time the attorney represents a client.

The Committee has been asked whether it is in violation of the Code of Professional Responsibility for an attorney to engage in a sexual relationship with a client during the time the attorney is representing that client. While the opinion request submitted to the Committee provided specific facts regarding the professional representation of an attorney, during which a sexual relationship occurred, it was felt by the Committee that more effective guidance could be given to the Bar Association by dealing with the question in a general context.

It is the opinion of the Committee that a sexual relationship between a client and an attorney during the time the attorney is representing the client is improper under circumstances that would include, but not be limited to, the following:

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

2. The attorney exchanges legal services for sexual favors from a client;
3. The sexual relationship has an adverse affect on the lawyer's ability to protect his client's interest, or is otherwise prejudicial or damaging to the client's case; or
4. Where the client is in an emotionally fragile condition, and the sexual relationship may have an adverse affect on the client's emotional stability;
5. Where the sexual conduct is illegal.

There are some circumstances and types of representation under which that sexual relationship is inconsistent with the professional relationship.

Sexual relationships are potentially harmful to the client in a situation involving the loss or potential loss or incarceration of other persons of significance to the client. Examples of this principle may include, but are not limited to, situations involving wrongful death, divorce and separation, child custody or adoption disputes, and criminal defense representation of the client's spouse or other family member.

A sexual relationship with a client that is initiated by the attorney under circumstances reflecting that the client may have been deprived of a free choice with regard to the relationship is unethical. As an example, in the case of People v. Gibbons, 685 P.2d 168 (Co. 1984), an attorney undertook representation of seven co-defendants charged with burglary. The lawyer, who was sixty-six years of age, initiated a sexual relationship with a twenty-three year old female defendant as a condition for his representation of her and her husband. Following the conclusion of the criminal case, his clients filed a complaint alleging blackmail because the sexual relationship was made a condition of representation.

The lawyer conceded that the relationship violated DR 5-101(A), which prohibits a lawyer from accepting employment if the exercise of his professional

judgment on behalf of the client will be, or reasonably may be affected by his own personal interests, without the client's consent, and DR 7-101(A)(3), which prohibits a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship. In disbarring the attorney, based upon the sexual relationship and other matters relating to the attorney's responses to the grievance proceeding, the court noted that the client was in a stressful situation and she was placed "in a position in which she was unduly dependent on the respondent and in which she may not have been able to exercise free choice." Id. at 175.

An arrangement between an attorney and client under which the client would provide sexual favors in exchange for legal representation, would violate DR 1-102(A)(3), which prohibits an attorney from engaging in illegal conduct and involving moral turpitude.

In some situations, a sexual relationship with a client, during the period of time the attorney is representing the client, may adversely affect the client's case or otherwise prejudice or damage the client's position. These facts were presented to the Oregon State Bar when asked for an opinion with regard to an attorney who was retained by an unemployed woman to represent her in a divorce proceeding. The opinion stressed that when reviewing the propriety of an attorney's sexual relationship with a client, the particular facts are extremely important in each case. It was noted that the lawyer's conduct could significantly aggravate the other spouse in a domestic action, possibly making reasonable settlement nearly impossible. Moreover, in the event of a trial, it was felt the potential for embarrassing disclosure of the lawyer's affair could cause the attorney to curb effective and aggressive representation. In that type of situation, the attorney's conduct would be improper under DR 5-101. Oregon State Bar Ethics Opinion 429 (May, 1979).

A similar opinion was expressed in Maryland Ethics Opinion 84-9 (September 7, 1983), which advised that a lawyer must withdraw from

employment when he is sexually involved with a client who is seeking advice regarding the sale of property owned by the client and her husband, the transfer of property from the husband to the wife, and a possible divorce. In those circumstances, an intimate personal relationship between the lawyer and the client may have had an adverse affect on the lawyer's ability to protect his client's interest.

Finally, if the sexual relationship with the client, or sexual conduct toward the client, is illegal, the attorney is violating DR 1-102(A)(3), which prohibits a lawyer from engaging in illegal conduct involving moral turpitude. In Re Littleton, 719 S.2d 772, 776 (Mo. banc 1986) dealt with an attorney who had been retained to represent a female client on a driving while under the influence charge. The attorney made sexual advances to the client in the jail library and later in his car. The court noted that DR 1-102(A)(3) does not require a conviction of a crime, but only illegal conduct. The court further noted moral turpitude includes everything contrary to justice, honesty, modesty and good morals. In holding that the attorney had violated his professional obligations, the court said:

Respondent and [client] entered into a professional relationship. [Client] had a right to expect that Respondent would conduct himself in that relationship in a manner consistent with the honorable position of the legal profession - a tradition founded on service, integrity, vigorous commitment to the client's best interest, and that leads us to the rule of law. Instead of remaining true to that tradition, however, Respondent chose to exploit it, seeking to turn the professional relationship into a personal one.

While the court stressed the exploitation, the non consensual nature of the conduct would be an important factor. Similarly, In the Matter of Adams, 428 N.E. 2d 786 (Indiana 1981), an attorney who grabbed his female client, kissing her and raising her blouse, was found to be guilty of illegal conduct involving moral turpitude.

This opinion is not intended to prohibit representation of a client in a case where the attorney and client have been engaged in a mutually consensual and on-going sexual relationship prior to the commencement of the representation.

Adopted by the Alaska Bar Association Ethics Committee on November 3, 1987.

APPROVED BY THE BOARD OF GOVERNORS: January 9, 1988

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