

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 92-6**

**Propriety of an Intimate Relationship
Between an Attorney and a Client
of the Attorney's Law Firm**

The Committee has been asked previously whether it is in violation of the Code of Professional Responsibility for an attorney to commence a sexual relationship with a client during the time the attorney is representing that client. In Ethics Opinion 88-1, the Committee responded by setting forth criteria that would render such a relationship unethical. More recently, we have been asked to assess whether Ethics Opinion 88-1 applies to a sexual relationship commenced between an attorney and a client of the attorney's law firm. Specifically, we have been asked to determine whether it was unethical for a lawyer to become intimately involved with a client of the firm during the course of the firm's representation in a termination of parental rights proceeding.

The Committee has concluded that this conduct is unethical if:¹

- (1) The sexual relationship has an adverse affect on the lawyer's ability to protect the client's interests, or is otherwise prejudicial or damaging to the client's case;
- (2) The sexual relationship creates the potential that the attorney will be called as a witness on behalf of the client or to testify on issues prejudicial to the client;
- (3) The client is involved in a legal matter of the type that is generally recognized to be emotionally charged; or
- (4) The sexual conduct is exchanged for legal services, non-consensual, coercive, or illegal.

These factors recognize that there are some circumstances and types of representation under which a sexual relationship is inconsistent with a professional relationship between an

¹ The Committee has taken this opportunity to expand and clarify the standards for determining when an intimate relationship is unethical and warrants withdrawal or disqualification. Most notable changes are those now set forth in criteria (2) and (3).

attorney and client. The Committee's basic concern is 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.

It is the opinion of the Committee that a sexual relationship between an attorney and a client of the attorney's firm is improper to the same extent as a relationship between an attorney and the attorney's own client, with certain limited exceptions. First, an attorney not directly involved in representing the client must know or have reason to know of the attorney/client relationship existing between the client and the attorney's firm. Second, such attorney may rebut with objective evidence the presumption established in criterion (3), which assumes that an attorney who is sexually involved with a client during cases that are by nature emotionally charged is unethically exploiting the attorney-client relationship.

In the case presented, the Committee has not been provided with sufficient facts to determine whether the attorney's sexual relationship with the firm's client was proper. However, the fact that the client was involved in a proceeding to terminate parental rights would trigger the presumption in criterion (3), which is not satisfactorily rebutted by the client's subjective statements that he or she was not harmed by the short-lived affair. The attorney must carefully consider this and the remaining criteria to determine the propriety of his or her conduct. If any of the criteria are met, the attorney's conduct is unethical, and no member of the attorney's firm may continue to represent the client under principles of imputed disqualification embodied in DR 5-105(d). Accordingly, the firm must withdraw.

For further guidance, the above criteria are discussed separately below.

(1) Adverse Impact on Client's Case

In some situations, a sexual relationship with a client during the course of representation may adversely affect the client's case or otherwise prejudice or damage the client's position. The Oregon State Bar has evaluated the propriety of an attorney's sexual relationship with an unemployed woman he was representing in a divorce proceeding. Oregon State Bar Ethics Opinion 429 (May 1979). The opinion stressed that the particular facts are extremely important in each case. It concluded that there were several facts militating in favor of a finding that the lawyer's conduct was improper under DR 5-101, which prohibits a lawyer from accepting employment if the exercise of his professional judgment on behalf of the client will be affected by personal interests. First, the lawyer's conduct could significantly aggravate the other spouse and threaten a reasonable settlement. Second, in the event of a trial, the potential for an embarrassing disclosure of the lawyer's affair might cause him to curb effective and aggressive representation.

Similarly, Maryland Ethics Opinion 84-9 (September 7, 1983), advises 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 and wife, and a possible divorce. In these circumstances, an intimate personal relationship between the lawyer and the client may have an adverse effect on the lawyer's ability to protect his client's interests.

Although not directly discussed by the Oregon or Maryland opinions, a sexual relationship may also prove damaging to the merits of a client's case in

particular circumstances. For example, in matters involving child custody, a parent's conduct is closely scrutinized, and the details of an intimate relationship may conceivably become part of this scrutiny, particularly to the extent it may affect the children in question. Not only could the parent's conduct be negatively viewed by the court, but the lawyer would face a serious risk of becoming a material witness and being required to withdraw. Additionally, the lawyer's professional judgment and ability to render competent representation may be compromised. *Bourdon's Case*, 565 A.2d 1052 (N.H. 1989); *Kentucky Bar Assn. v. Meredith*, 752 S.W.2d 786 (Ky. 1988).

Clearly, sexual relationships should be avoided because they pose a number of potential violations of DR 7-101(A)(3), which prohibits a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship. The fact that a lawyer's associate, not the lawyer, is sexually involved with the lawyer's client has little bearing on this analysis. Like the lawyer, the associate is ethically bound to refrain from conduct that prejudices or damages a client of the firm.

(2) Potential For Becoming a Witness

If an attorney or attorney's associate should be called as a witness on the client's behalf, the continued representation of the client by the attorney or the attorney's firm is jeopardized pursuant to DR 5-102. The risk of becoming a witness is particularly great where the client's ongoing conduct is at issue, such as in a divorce, custody or adoption dispute; a matter involving the client's physical, mental or emotional limitations or injuries, including a personal injury and wrongful death case; and a criminal matter where a client's compliance with court orders may be at issue. In such cases, attorneys or associates who place themselves in a position to know first-hand intimate details of a client's life create a likelihood that they will learn information that either (1) ought to be divulged in the client's behalf at trial, which would require disqualification pursuant to DR 5-102(a), or (2) might prejudice the client, if the attorney or associate is called as a witness other than on the client's behalf. Such a risk is unacceptable because the potential of harm to the client is too great. Again, whether the lawyer or lawyer's associate is sexually involved with the client is irrelevant -- if *either* is in a position to be called as a witness, continued representation by the firm is jeopardized.

(3) Presumed Emotional Vulnerability

The Committee is of the view that sexual relationships with clients must be presumed to be harmful to clients in cases that can be viewed objectively as emotionally traumatic. Examples of such cases include, but are not limited to, divorce, child custody or adoption disputes, or criminal matters involving the client, client's spouse or other family member. These cases involve the loss or potential loss or incarceration of persons of significance to the client, such as spouses or children. Because such cases by nature involve emotional issues, clients' judgments on emotional matters can be expected to be impaired, making them more vulnerable to the advances of a lawyer or more likely to initiate advances of their own. A lawyer has a duty to be cognizant of this vulnerability and to refrain from sexual relationships for the duration of representation. See *Drucker's Case*, 577 A.2d 1198 (N.H. 1990); Levy, *Attorneys, Clients and Sex: Conflicting Interests in the California Rule*, 5 GEO. J. LEGAL ETHICS 649 (1992). This duty extends to the lawyer's associates, who are also in a position to exploit a client's emotional vulnerability through their affiliation with the firm and potential familiarity with the case.

(4) Sex that is Non-consensual, Coercive, Illegal, or Accepted in Exchange for Legal Services

A sexual relationship with a client that is initiated by an attorney under circumstances reflecting that the client may have been deprived of free choice with regard to the relationship is unethical. As an example, in *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. 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.

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. An attorney who had been retained to represent a female client on a drunk driving charge was found to violate DR 1-102(A)(3) when he made sexual advances to the client in the jail library and later in his car. *In Re Littleton*, 719 S.2d 772, 776 (Mo. en banc 1986). The *Littleton* court noted that DR 1-102(A)(3) does not require a conviction of a crime, but only illegal conduct. The court further noted that moral turpitude includes everything contrary to justice, honesty, modesty and good morals. In holding that the attorney had violated his professional obligations, the court stated:

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. *Id.* The court also emphasized that the non-consensual nature of the sexual relationship was an important factor in the finding of impropriety. An attorney who grabbed his female client, kissing her and raising her blouse, was also found to engage in illegal conduct involving moral turpitude. *In the Matter of Adams*, 428 N.E.2d 786 (Indiana 1981).

Finally, an arrangement between an attorney and client under which the client would provide sexual favors in exchange for legal representation would also violate DR 1-102(A)(3). *Iowa State Bar Assn. v. Hill*, 436 N.W. 2d 57 (Iowa 1989); *Carter v. Kritz*, 560 A.2d 360 (R.I. 1989). Similarly, the withholding of services or provision of damaging legal advice because of a client's refusal to engage in sex is improper. *McDaniel v. Gile*, 281 Cal. Rptr. 242, 245-46 (Cal. 1991).

Again, no separate standard is warranted for a lawyer's associate. If the sexual conduct is non-consensual, coercive, illegal, or induced in exchange for legal services, it is improper regardless of whether the attorney involved represents the client directly or is simply an associate of the client's attorney.

(5) Conclusion

The Committee concludes that sexual relationships with clients commenced during the course of representation by either an attorney or the attorney's law firm are unethical under any of the four circumstances described above. 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. In this regard, the Committee emphasizes that its chief concern is to diminish the potential for legal or personal harm to a client, for exploitation of a client's vulnerability, or for illegal coercion or force that are posed by the commencement of sexual relationships during or as a condition of representation by either a client's attorney or the attorney's associate. While the Committee would recommend that a lawyer not represent *any* client with whom he or she is sexually involved when the above circumstances exist, it is the *commencement* of a sexual relationship during the course of representation that is of greatest concern.

Approved by the Alaska Bar Association Ethics Committee on October 1, 1992.

Adopted by the Board of Governors on October 30, 1992.

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