Model Rule 8.4 Misconduct Arising from Domestic Violence, Sexual Misconduct and Disparagement

2019 CLE by the Sea

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February 15, 2019
Prince Waikiki | Honolulu, Hawaii

CLE# 2019-001 *1.0 Ethics CLE Credit

*1.0 General CLE Credit – HI

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Lawyers as advocates for and defenders of clients are deeply involved in a representational way with the issues raised by the Me Too and like movements. At the same time, the legal profession itself continues to be confronted with instances of domestic violence, sexual misconduct and disparagement by its own members. This program will explore whether such actions will continue to be addressed in the future, as for the most part they have in the past, on a case by case basis or if there are larger implications for the how the profession conceives of itself, is seen by others, and deals with perpetrators individually and collectively within its own society, politic and culture.

Larry J. Cohen is a certified specialist in injury and wrongful death litigation who has focused in his more than thirty years of law practice on serious medical injury and emotional damages cases, including especially brain injury claims. He received his J.D. from Northwestern University in 1985, and has been admitted to practice in Arizona since 1985. Mr. Cohen also has a Master's degree and a Ph.D. from Syracuse University and has participated in a post-doctoral program in clinical neuropsychology.

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January 24, 2019

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The materials for this program consist of ethics opinions published at the model rule and state levels dealing with the issues that are the focus of this presentation. I am providing as well information about where you can locate further materials on these issues. There is not a lot out there, notwithstanding of the issues we will be addressing.

8.4 and Domestic Violence

PA Eth. Op. 90-12 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.), 1990.

In this inquiry, the inquirer asks the following questions:

1. Where domestic violence is alleged, may the Assistant District Attorney (A.D.A.) continue to represent a private client in a domestic relations setting? A lawyer has expressed concern to the inquirer that perpetrators of violent acts against a spouse have been known to engage the services of an A.D.A. with the apparent belief that this might thwart criminal prosecution, or that he might receive other special consideration. While the reverse has not been brought to the inquirer's attention, i.e., that the victim of such abuse might expect similar special attention in the way of more vigorous prosecution, the inquirer also asks that such issue also be addressed.

2. The district attorney's office is charged with representing the plaintiff in support cases. The need for such representation is especially apparent when the plaintiff is a foreign jurisdiction resident in an action under the Revised Uniform Reciprocal Enforcement of Support Act, and thus is not physically present during the proceeding. In these support cases, may an A.D.A. ethically represent the defendant? May the ADA do so in a support contempt proceeding?

Protection From Abuse Cases

With respect to the initial inquiry only, the scope of this response is broadened to encompass individuals serving as part-time public defenders. It would appear that the same considerations which apply to assistant district attorneys also govern the actions of assistant public defenders. For convenience, all of these attorneys shall be referred to as public attorneys. By its express terms, the inquiry is limited to part-time public attorneys and, because special contract conditions apply to full-time district attorneys and also may apply to full-time public attorneys, no response is made, nor should this opinion be considered authoritative, with respect to full-time public attorneys. It also is assumed, for the purpose

of this response, that there are no restrictions set forth in the employment contract of the individuals as public attorneys which would limit the types of cases the attorneys may handle in their private practice as a condition of their public employment.

In response to the inquiry, it would appear that where counsel already is providing representation to a client with respect to family law matters, there is no ethical prohibition against a part-time public attorney representing, in private practice, either individuals charged with or claimed to be victims of acts of domestic violence in domestic relations matters as an adjunct to the representation of the client in the family law matters.

Initially, it must be recalled that a Protection from Abuse Proceeding is a civil action and not a criminal matter [see the Act of October 7, 1976, P.L. 1090 (35 P.S. 10181) and Pa.R.C.P. No. 1901, et seq.]. Of course, the events which give rise to the civil cause of action may constitute sufficient action to also give rise to a criminal cause of action. However, unless either of the public attorneys have prior involvement with a criminal proceeding arising out of an incident with either of the parties involved in the civil Protection from Abuse proceedings, there is no impropriety in the attorney's accepting private representation of such clients at the stage of the proceedings where an original Protection from Abuse Order is sought. However, see Informal Opinion 87-217, copy attached, which requires disqualification in those situations where it is known that criminal proceedings have been instituted at the time counsel is requested to represent the private client.

Although there is no ethical prohibition in the first instance described above, it would be a violation of Pa.R.P.C. 1.7 and thus unethical for a public attorney to represent a party in a domestic violence matter in opposition to a victim or a defendant for whom the attorney had served as counsel in a proceeding arising out of the same events. Victims are not normally parties in a criminal prosecution, and therefore, are not clients of the District Attorney. However, in a criminal matter, a victim may divulge confidential information to an assistant district attorney. If confidential information is acquired from a victim in the course of representing the Commonwealth, then this information may come within the scope of Pa.R.P.C. 1.8(b) and require disqualification.

Correspondingly, it would be improper, and thus unethical, for the attorney to participate in a criminal proceeding, either as prosecutor or as public defender or defense counsel in those situations where, in the attorney's private practice, the attorney had previously represented the victim of the alleged abuse. In this situation, the public attorney's superiors should take appropriate measures to ensure that the public attorney is screened from providing confidential information obtained from his client to the prosecuting or defending attorney handling the criminal matter.

Where no criminal proceedings have been instituted, a public attorney may appear on behalf of either of the parties in a protection from abuse proceeding but, by so appearing,

that attorney may thereby become disqualified from representing either party in any subsequent criminal prosecution. Of course, in a criminal proceeding, a public defender may represent a party that was previously represented by the public defender as a defendant in the prior Protection from Abuse Action. Whether an assistant district attorney may prosecute a criminal matter arising out of an abuse incident where the victim had been represented by the assistant district attorney is a matter of policy for the District Attorney. Suffice it to state that there is no ethical prohibition against such representations.

Contempt of Abuse Order Cases

A more difficult situation is presented by the events which give rise to a contempt proceeding stemming from an alleged violation of the protection from abuse order. In this situation, counsel may be placed in the role of taking a position which appears inconsistent with the role of a public attorney. Contempt proceedings of this kind are civil in nature, not criminal, because their dominant purpose is to enforce compliance with an order of court for the benefit of the plaintiff in the Protection from Abuse action and, thus, even though a fine or imprisonment may be involved, the mere possibility of those penalties is insufficient to require disqualification. See Wetzel v. Suchanck, 373 Pa. Super. 458, 541 A.2d 761 (1988).

Prosecution of Support Cases

With respect to the second inquiry, it must again be borne in mind that, at the present time, support proceedings within the Commonwealth of Pennsylvania are civil actions. (See 23 Pa.C.S.A. 4301, et seq., and Pa.R.C.P. 19101, et seq.). The fact that statutorily the district attorney's office is designated to aid in the enforcement of a duty to support has not changed the categorization of the type of case involved.

Under the statute, the duties of the district attorney are defined as follows:
Section 4306. Duties of District Attorney.

(a) General rule.--The district attorney shall at all times aid in the enforcement of the duty of support and shall cooperate with the domestic relations section in the presentation of complaints or in any proceeding designed to obtain compliance with any order of the court.

(b) Representation of complainant.--The district attorney, upon the request of the court or a Commonwealth or local public welfare official, shall represent any complainant in any proceeding under this subchapter.

This statutory authorization distinguishes the situation propounded by the second inquiry from that contained in the first.

This statutory provision clearly requires that when counsel accepts a position as assistant district attorney, that acceptance is with the knowledge that a part-time assistant district attorney would be disqualified from representing a defendant in support proceedings.

With respect to support proceedings brought pursuant to the Uniform Reciprocal Enforcement of Support Act (23 Pa.C.S.A. Section 4501, et seq.), special statutory provisions also prevail. Under Section 4512 of that Act (23 Pa.C.S.A. 4512), all of the prosecutions of out-of-state or out-of-county cases initiated in a particular county must be handled by the district attorney's office. However, since the defendant in those proceedings initiated in the initiating county is generally out of the jurisdiction and thus not normally represented by counsel in the initiating court, it is unlikely that a conflict could arise. However, in that unlikely event, the assistant district attorney would be prohibited from representing the defendant. See Informal Opinion 88-18, copy attached, with respect to representation outside of the initiating jurisdiction.

However, in those situations where actions are referred by an initiating jurisdiction to the responding jurisdiction, Section 4518 (23 Pa.C.S.A. 4518) places exclusive authority to prosecute those cases with the district attorney in the responding state. Thus, it would be unethical for a part-time assistant district attorney to undertake representation of a defendant under those circumstances.

The opinions expressed above also would require disqualification of the assistant district attorney in any proceedings for alleged contempt of a support order.

Representation in Other Matters

The final question posed by the inquirer is, assuming that a part-time public attorney is prohibited from participating in any of the situations included within the foregoing inquiries, does that prohibition extend to the representation of that client for any other purpose, including other domestic relations matters. Initially, disqualification of an attorney has been limited only to those specific proceedings where the disqualification has occurred. Thus, it would be permissible for a public attorney to continue to represent a client in other proceedings concerning that client's affairs, including other domestic relations matters so long as the attorney follows the standards set forth in Pa.R.P.C. 1.6.

With respect to those matters in which the attorney is disqualified, it would be appropriate for the disqualified attorney to refer the client to another unassociated counsel to continue the representation. See e.g., Pa.R.P.C. 1.16(d).

CAVEAT : THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. IT CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.

MOREOVER, THIS IS THE OPINION OF ONLY ONE MEMBER OF THE COMMITTEE AND IS NOT AN OPINION OF THE FULL COMMITTEE.

March 20, 1990

RE: Ethics Inquiry 90-12B

Thank you for your comments concerning my response to the above inquiry. I will address your comments in the order that you have presented them.

1. You are incorrect to assume that my response was not intended to address the concerns you outline in Paragraph 1 of your letter. Similarly, it is incorrect to assume that I had not reviewed the provisions of Pa.R.P.C. **8**.**4**(e) in this matter. In this connection, I point out that the New Rules of Professional Conduct make a substantial change from the old Code of Professional Responsibility in the area which is implicit in your inquiry. It is significant that under the new rules, the concept of "apparent conflict of interest" has been abandoned in favor of the concept of "actual conflict of interest". Bearing that policy change in mind, and reviewing the express language of Pa.R.P.C. **8**.**4**, it becomes apparent that for there to be a violation of that rule, the attorney involved must actually engage in conduct that is prejudicial to the administration of justice. It is significant that the factual scenario submitted in your inquiry does not contain any reference to any facts from which it could be concluded that there had been actual engagement in conduct of the type described in Pa.R.P.C. **8**.**4**(e). Of course, if you change the factual scenario upon which the prior response was based, it could result in a change in my opinion. Indeed, the operative concern of Pa.R.P.C. **8**.**4**(e) is the conduct of the attorney and not the impressions of the client, or third persons.

***5** Of course, if an assistant district attorney is to engage in conduct such as that contemplated in Paragraph 1 of your letter of March 14, 1990, then that attorney would be engaging in conduct in violation of Pa.R.P.C. **8**.**4**(e). The difference between the two situations is that the rules as they presently stand require some actual effort by the attorney to engage in improper conduct. Thus, the former concept of "appearance of impropriety" no longer prevails.

With your question concerning including public defenders along with A.D.A.'s in the scope of my opinion, from my perspective, I can see no discernable distinction between the actions of either of those offices.

2. Although I appreciate your comment with respect to 35 P.S. Section 10190(a), I see no acceptable difference between criminal charges instituted as a result of alleged contempt of a Protection from Abuse Act order and ordinary criminal charges stemming from the actions which gave rise to the Protection from Abuse Act order in the first instance. It is my opinion that the chronology of sequences is crucial and I believe that my response clearly indicates that if the retention of the attorney is prior to the institution of any criminal

charges, there is no ethical prohibition from the public attorneys becoming involved at that stage of the proceedings. As I point out in my response, however, by becoming engaged at the initial stages of the Protection from Abuse Act proceeding prior to there having been any criminal charges instituted, the public attorney may thereby become disqualified from subsequent participation in any of the criminal proceedings arising out of that series of incidents involved in the Protection from Abuse Act proceeding.

3. I reiterate my prior comment with respect to the perceptions of persons, other than the attorney involved, set forth in the response to your Paragraph 1 above.

I have reviewed carefully all of the illustrations you have set forth in 3A through 3E and I find that each of those incidents is comprehensively covered by the response I provided to the initial inquiry. Again, I believe the touchtone is not the possibility of criminal prosecutions but the actual existence of criminal prosecutions at the time the public attorney is asked to become involved in the proceedings.

I reiterate my prior response that participation in Protection from Abuse Act proceedings may disqualify the public attorney from subsequent involvement in criminal proceedings under the circumstances discussed in my response.

I would also like to additionally comment on the events that you described in examples 3A through 3E of your letter of March 14, 1990. In each of those illustrations, regardless of how serious the conduct may be, the opinion I have expressed does not in any way impinge or interfere with the ability of the district attorney to institute criminal charges stemming from those incidents. Those are matters which rest within the sound discretion of the district attorney. Of course, in the event that the district attorney has delegated that responsibility to a member of his staff, such delegation would not be proper to an assistant district attorney who had previously participated in the Protection from Abuse Act proceeding.

I sense from the context of your letter that you disagree with the opinion that I have expressed. Of course, that opinion is nothing more than my own personal view on this matter and certainly is not binding upon anyone. However, I must point out that a substantial amount of my practice is in the domestic relations area, including protection from abuse proceedings, and my opinion is meant to express my general view with respect to the inquiries presented. Circumstances may vary from county to county and certainly a district attorney may properly impose a condition of employment upon his assistant district attorneys in accordance with the particular policies of that district attorney.

Board of Bar Overseers Office of the Bar Counsel, Massachusetts Bar Disciplinary Decisions and Admonitions, IN THE MATTER OF PAUL J. GRELLA., Suffolk [Massachusetts] . September 4, 2002. - October 30, 2002.

MARSHALL, C.J. At issue in this case is the appropriate disciplinary sanction for a

member of the bar convicted of a misdemeanor arising from his violent assault on his estranged wife. The matter commenced on May 16, 2000, when bar counsel notified the county court that the respondent, Paul J. Grella, had been convicted of assault and battery.[1] A single justice remanded the matter to the Board of Bar Overseers (board) for further proceedings, whereupon bar counsel filed a petition for discipline alleging that the respondent had violated Mass. R. Prof. C. 8.4 (b) and (h), 426 Mass. 1429 (1998).[2]

Hearings were conducted in November, 2000, at the conclusion of which the hearing committee of the board recommended that the respondent be suspended from the practice of law for two months. In May, 2001, the board adopted the hearing committee's findings and recommendations, and filed an information to that effect. The single justice did not accept the board's recommendation and ordered that the respondent be suspended from the practice of law for six months and suspended the execution of the discipline for three years provided that the respondent abstain from alcohol and abide by the rules of the profession. Bar counsel appealed.

We give the matter de novo review, Matter of Kennedy, 428 Mass. 156, 156 (1998), and conclude that the appropriate sanction in this case is, as the board recommended, suspension of the respondent from the practice of law for two months.

1. Facts. The relevant facts found by the hearing committee and adopted by the board may be succinctly stated as follows. The respondent received his bachelor's degree from the University of Massachusetts in 1978, and a law degree from City University of New York Law School in 1987. The respondent married the victim while attending law school; after his graduation the couple moved to Massachusetts. After working as a law clerk for a Bankruptcy Court judge in Rhode Island, the respondent was admitted to the Massachusetts bar in 1989. Since that time he has practiced law in Massachusetts, predominantly as a sole practitioner.

In 1997, the respondent and his wife sought marital counselling, during the course of which she made certain allegations concerning the respondent's conduct toward his then ten year old daughter, one of their four children. The counsellor reported the allegation to the Department of Social Services, which later dismissed the claim, finding no reasonable cause to support it. The marital counselling proved unsuccessful, and the respondent and his wife separated in May, 1998. They were divorced in 1999.

The events that gave rise to the respondent's criminal conviction occurred on July 29, 1998. Beginning at 12:50 A.M., the respondent repeatedly telephoned his estranged wife, leaving messages on her answering machine to the effect that he wanted to come over to see her.[3] His wife, who had just returned home from work, did not answer the telephone, but she heard the recorded messages. She eventually turned off the telephone ringers in her home and fell asleep, but was awakened when she heard the respondent calling her name. He was in her bedroom. She asked the respondent to leave. He refused, pushed her on the bed, lay

on top of her, and put his hand over her mouth. The victim, feeling that she was unable to breathe, finally pushed him away, and she fell to the floor. The respondent fell on top of her, screaming at her while slapping her and pulling her hair. The respondent pulled at the victim's clothes, ripping off two buttons. He pushed her back down on the bed. The victim begged him to stop. Fearing for her life, she scratched the respondent's cheek in the hope that someone would notice if something happened to her. She told the defendant 'not to do anything because of the children.' The assault continued for approximately four hours, with the respondent refusing to let the victim leave her bedroom. At 5:45 A.M., the respondent finally left the house. The victim immediately dialed 911 and reported that her husband had attacked her and had just left the house. She told the police that the respondent had pulled her hair and slapped her, that her lip was bloody, and that the respondent had threatened to harm her if she telephoned the police. The police later observed and photographed the wife's injuries.

2. The decision of the board. The hearing committee concluded that the respondent's guilty plea constituted a conviction within the meaning of S.J.C. Rule 4:01, §12 (1), as appearing in 425 Mass. 1313 (1997),[4] and that the conviction was conclusive evidence that the respondent had committed an assault and battery in violation of G. L. c. 265, §13A. See S.J.C. Rule 4:01, §12 (2), as appearing in 425 Mass. 1313 (1997).[5] The hearing committee noted that the respondent's conviction was not defined as a 'serious crime' within the meaning of S.J.C. Rule 4:01, §12 (3), as appearing in 425 Mass. 1313 (1997),[6] but concluded that S.J.C. Rule 4:01, §12 (5), as appearing in 425 Mass. 1313 (1997), specifically allows the court to refer a matter involving a crime 'not constituting a serious crime' to the board for appropriate action.

The hearing committee concluded that the respondent's commission of assault and battery on his estranged wife constituted a violation of Mass. R. Prof. C. 8.4 (b) and (h). See note 2, supra. It determined that, when an attorney commits an act of domestic violence, a discipline of suspension is generally warranted regardless of whether the attorney is later convicted of a felony or a misdemeanor. It recommended that the respondent in this case be suspended from the practice of law for two months. In making its recommendation, the hearing committee considered several facts offered by the respondent in mitigation, as well as those offered by bar counsel in aggravation. The hearing committee rejected each of the respondent's claims.[7] Of the three claims made by bar counsel, the hearing committee agreed that the respondent's failure to show remorse for his conduct constituted a factor in aggravation.[8]

The board adopted the hearing committee's conclusion and recommendations.

3. Appropriate discipline. Bar counsel argues that the sanction imposed by the single justice is 'an inadequate sanction for the respondent's assault on his wife.' We agree. Our standard for reviewing a sanction imposed by the single justice is whether it is markedly disparate from judgments in comparable cases. See Matter of Finn, 433 Mass. 418, 422-423 (2001);

Matter of Alter, 389 Mass. 153, 156 (1983). We are also mindful that the board's recommendation is entitled to substantial deference, Matter of Tobin, 417 Mass. 81, 88 (1994), and that, in determining the appropriate sanction, the 'primary factor' for our consideration is 'the effect upon, and perception of, the public and the bar. ' Matter of Concemi, 422 Mass. 326, 329 (1996), quoting Matter of McInerney, 389 Mass. 528, 535 (1983). Matter of Alter, supra. Applying these principles, we conclude that a two-month suspension from the practice of law is the appropriate sanction.

We have little doubt that the respondent's sustained and violent attack on his estranged wife adversely reflects on his fitness as a lawyer. See Bar Counsel v. Doe, 16 Mass. Att'y Discipline Rep. 441, 445 (2000) (attorney's misdemeanor assault and battery constituted violation of rule 8.4 b] and h]).[9] Comment to Mass. R. Prof. C. **8.4**, 426 Mass. 1430 (1998), provides, in pertinent part: 'Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence . . . are in that category.'[10] See S.J.C. Rule 4:01, §3, as amended, 430 Mass. 1314 (1999) ('Each act . . . by a lawyer . . . which violates any of the Massachusetts Rules of Professional Conduct . . . shall be grounds for appropriate discipline even if the act or omission did not occur in the course of a lawyer-client relationship or in connection with proceedings in a court'). The essence of the conduct of a lawyer is to facilitate the resolution of conflicts without recourse to violence, for law is the alternative to violence. Engaging in violent conduct is antithetical to the privilege of practicing law, and such conduct generally will warrant suspension from the practice of law.

Had the respondent in this case broken into a stranger's home and committed the same acts of violence as he perpetrated on his wife, suspension would almost certainly have been warranted. See, e.g., Matter of Goldberg, 434 Mass. 1022, 1023 (2001) (recognizing that, in absence of unusual circumstances in mitigation, presumptive sanction for commission of felony assault and battery is suspension or disbarment); Matter of Valerio, 10 Mass. Att'y Discipline Rep. 281 (1994) (imposing one-year suspension for attorney convicted of threatening to commit crime and assault by means of dangerous weapon). Where the victim of violence is a family member, the violence 'is not less but more of a threat' to the victim's basic sense of security. Custody of Vaughn, 422 Mass. 590, 596 (1996).

The 'usual and presumptive' sanction for an attorney convicted of a felony is suspension or disbarment from the practice of law. See Matter of Concemi, supra at 329-330. Because suspension is appropriate in this case, we need not consider whether, as the single justice suggested, there should be a presumptive sanction of suspension following a misdemeanor conviction in cases involving domestic violence. Whether a conviction is obtained and whether that conviction is of a felony or a misdemeanor is less important than the nature and extent of the assault itself. There may be many cases of serious domestic assault where no conviction is obtained. See, e.g., Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849, 1860-1861 &

n.40 (1996) (explaining that 'victim noncooperation, reluctance, or outright refusal to proceed' are often cited as 'major reasons' for lack of criminal prosecution in domestic violence cases).[11] Here, the assault was, as the single justice recognized, a 'terrifying] incident of violence.' We also cannot ignore the harmful effects of a domestic abuser's actions on those whom the law commands us to protect. Here, although the hearing committee made no specific finding regarding the whereabouts of the respondent's children at the time of his assault on the victim, the record supports an inference that the children were present in the home and were potential witnesses to the respondent's violent attack.[12] See Weithorn, Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes, 53 Hastings L.J. 1, 5-8 & n.3-6, 11-16 (2001) (citing wealth of data that children are seriously harmed when subjected to domestic violence). See also Custody of Vaughn, supra at 596 ('Particularly for children the sense that the home] is the place of greatest danger is the ultimate denial that this is a world of justice and restraint, where people are entitled to respect').

States that have considered the question of the appropriate discipline for an attorney who commits an act of domestic violence have almost uniformly concluded that suspension is warranted, even where the violent acts do not give rise to a criminal conviction or where the attorney is convicted of a misdemeanor, and not a felony. See, e.g., People v. Musick, 960 P.2d 89 (Colo. 1998) (one year and one day suspension for commission of three assaults, although no criminal charges were filed); Matter of Walker, 597 N.E.2d 1271 (Ind. 1992) (sixty-day suspension, although no conviction at issue); Supreme Court Bd. of Professional Ethics & Conduct v. Ruth, 636 N.W.2d 86 (Iowa 2001) (indefinite suspension with no possibility of reinstatement for six months for conviction of operating while intoxicated, together with domestic abuse assault).[13] See also Attorney Grievance Comm'n v. Painter, 356 Md. 293 (1999) (suspension is 'the sanction imposed by most courts addressing the issue' of domestic violence committed by attorney).[14]

In looking for 'comparable cases' in Massachusetts, bar counsel points to Matter of Lee, S.J.C. No. BD-1999-067 (Feb. 2, 2001), in which an attorney was disciplined for an assault conviction stemming from an act of domestic violence. The attorney in that case had admitted to sufficient facts on one count of simple assault and battery, two counts of assault and battery by means of a dangerous weapon, and four counts of violation of an abuse prevention order. The attorney had a history of abusive behavior and, moreover, had previously received a letter of admonition for unrelated conduct. In mitigation in that case, the board found that the attorney's conduct was caused, in part, by alcoholism and that he had willingly participated in treatment. He was suspended from the practice of law for six months, the last three months suspended for two years.

The respondent in this case has been convicted of a single assault, and has no prior history either of abuse or of any other misconduct. While his case thus differs from the Lee case, supra, in its particulars, at the core both concern serious acts of domestic violence. We have explained that 'abuse by a family member inflicted on those who are weaker and less able

to defend themselves . . . is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security. ‘ Custody of Vaughn, supra at 595. In this case, the hearing committee and the board recognized the seriousness of the respondent’s assault, but reasoned that, ‘because the respondent did not engage in a pattern of domestic abuse and violation of abuse prevention orders, his suspension should be shorter than that in Lee.‘ We are of the view that a recommendation by the board for a longer suspension would have been warranted, but we give the board’s determination ‘substantial deference.‘ Matter of Tobin, 417 Mass. 81, 88 (1994), and cases cited. The board made its recommendation in this case, as it must, ‘on its own merits‘ in an effort that ‘every offending attorney . . . receive the disposition most appropriate in the circumstances.‘ Matter of Nickerson, 422 Mass. 333, 335 (1996), quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984). We therefore conclude that the appropriate sanction is, as the board recommended, suspension of the respondent from the practice of law for two months.

The decision of the single justice is vacated. A judgment is to be entered in the Supreme Judicial Court for Suffolk County ordering that the respondent be suspended from the practice of law for two months.

So ordered.

FOOTNOTES:

Footnotes

[1] On June 18, 1999, the respondent pleaded guilty to a misdemeanor, a single count of assault and battery in violation of G. L. c. 265, §13A. He was sentenced by a judge in the Superior Court to five years’ supervised probation, with the conditions that he abstain from alcohol; undergo psychological, batterer’s, and sex offender evaluation and treatment as deemed necessary by the probation department; remain gainfully employed; obey any restraining orders issued under G. L. c. 209A; and stay away from members of the victim’s family, other than their children in common.

[2] Rule **8.4** of the Massachusetts Rules of Professional Conduct, 426 Mass. 1429 (1998), provides in pertinent part: ‘It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects . . . (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.‘

[3] The respondent told the hearing committee that, among other things, he wanted to speak to his wife about the allegations she had made during counselling about his relationship with his daughter. The hearing committee did not credit his testimony.

[4] Supreme Judicial Court Rule 4:01, §12 (1), as appearing in 425 Mass. 1313 (1997), defines a conviction as 'any guilty verdict or finding of guilt and any admission to or finding of sufficient facts and any plea of guilty or nolo contendere which has been accepted by the court, whether or not sentence has been imposed.'

[5] Supreme Judicial Court Rule 4:01, §12 (2), as appearing in 425 Mass. 1313 (1997), provides that '[a] conviction of a lawyer for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that lawyer based upon the conviction.'

[6] Supreme Judicial Court Rule 4:01, §12 (3), as appearing in 425 Mass. 1313 (1997), defines a serious crime as '(a) any felony, and (b) any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft or an attempt or a conspiracy, or solicitation of another, to commit a 'serious crime.''

[7] The respondent claimed that he had overcome substantial psychological and familial difficulties in his life, warranting a lesser sanction. There was no evidence that any such difficulties were causally related to the assault, and the hearing committee rejected his claim. The hearing committee also rejected the respondent's claim that his conduct was causally related to the allegations made by his wife regarding their daughter. See note 3, supra. The respondent argued that his sanction should be lessened because he was going through an emotional and stressful divorce when he committed the abuse. The hearing committee did not accept that 'the stress of marital problems should in any way excuse or ameliorate domestic violence.' The hearing committee considered that the respondent had provided a substantial amount of pro bono representation over the course of his career, but concluded that the provision of such services was not a mitigating factor. Finally, the respondent argued that his lack of any prior disciplinary record, his good reputation in the community, and his participation in civic affairs warranted him a mitigated sanction. The hearing committee found all of these factors to be 'typical' circumstances, having little impact on the level of discipline to be imposed.

[8] The hearing committee rejected bar counsel's other assertions that the respondent's failure to make court-ordered child support payments and his lack of candor in testifying should weigh against him.

[9] Other States also have concluded that an attorney's violent conduct reflected negatively on his or her fitness as a lawyer. See, e.g., People v. Musick, 960 P.2d 89, 92 (Colo. 1998) (attorney's acts of violence had bearing on his fitness to practice law because they were 'malum per se'); Matter of Magid, 139 N.J. 449, 454-455 (1995) (prosecutor's act of domestic violence 'was a serious violation' of N.J. R. Prof. C. 8.4).

[10] The ABA Standards for Imposing Lawyer Sanctions (1992) are to like accord. Standard 5.12 provides that ‘ suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer’s fitness to practice.‘ The commentary to standard 5.12, quoting the Model Rules of Professional Conduct, explains, in language mirroring that found in comment 1. to Mass. R. Prof. C. **8.4**, 426 Mass. 1430 (1998), that ‘ offenses involving violence‘ are part of the category of ‘offenses that indicate lack of those characteristics relevant to law practice.‘

[11] The disinclination of domestic violence victims to press charges is well documented. See, e.g., Wills, Domestic Violence (‘ A. domestic violence victim’s ‘refusal to press charges’ is the norm in domestic violence prosecutions‘). In this case, the prosecutor recommended, with the victim’s approval, that the respondent be placed on supervised probation for three years, subject to several conditions. The prosecutor explained to the sentencing judge that the Commonwealth was forgoing more serious charges, in deference to the victim’s expressed wishes and interests.

[12] At the respondent’s plea colloquy, the prosecutor recited facts which, with one exception not relevant here, the respondent admitted were true. As the prosecutor described the attack, he said: ‘She the victim. said she was afraid and she started to tell the defendant not to do anything because of the children‘ (emphasis added).

[13] See also People v. Reaves, 943 P.2d 460 (Colo. 1997) (six-month suspension for disorderly conduct conviction and several arrests for domestic violence); People v. Knight, 883 P.2d 1055 (Colo. 1994) (180-day suspension for misdemeanor third degree domestic assault); People v. Wallace, 837 P.2d 1223 (Colo. 1992) (three-month suspension for assault conviction arising from act of domestic violence); Committee on Professional Ethics & Conduct v. Patterson, 369 N.W.2d 798 (Iowa 1985) (indefinite suspension with no possibility of reinstatement for three months for misdemeanor conviction of assault and battery committed against girl friend).

[14] We are aware of only three cases where a sanction less than suspension was imposed on an attorney who committed an assault stemming from an act of domestic violence. See People v. Senn, 824 P.2d 822 (Colo. 1992); Matter of Magid, 139 N.J. 449 (1995); Matter of Principato, 139 N.J. 456 (1995). In People v. Senn, supra, the Supreme Court of Colorado imposed a public censure on an attorney who, while intoxicated, discharged a gun aimed above his wife’s head. In People v. Wallace, 837 P.2d 1223, 1225 (Colo. 1992), however, the Colorado court distinguished People v. Senn, supra, explaining that, in the Senn case, there was no risk of actual injury to the wife. In Matter of Magid, supra, and Matter of Principato, supra, decided on the same day, the Supreme Court of New Jersey imposed a public reprimand on two attorneys who had committed simple assaults in a domestic context. The court explained, however, that its more lenient sanction was due, in part, to the fact that

the issue was a matter of first impression in New Jersey. The court cautioned that 'in the future it would. ordinarily suspend an attorney who is convicted of an act of domestic violence.' Matter of Magid, supra at 455; Matter of Principato, supra at 463.

Office of the Attorney General, State of South Carolina, March 9, 2017

Dear Mr. Limehouse:

You have requested our opinion as to whether the crime of domestic violence 2nd degree constitutes a "crime of moral turpitude" for purposes of the Governor's suspension power pursuant to Art. VI, § 8 of the State Constitution. By way of background, you note that "this question has not been squarely addressed by the Supreme Court of South Carolina." It is our opinion that a court would most likely conclude that domestic violence 2nd degree is a crime of moral turpitude.

Law/Analysis

In Op. S.C. Att'y Gen., 2015 WL 2148106 (April 24. 2015), we discussed the question of what constitutes a "crime of moral turpitude" at some length, stating as follows:
Our Supreme Court has defined a crime of moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties that man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Smith v. Smith, 194 S.C. 247, 9 S.E.2d 584, 589 (1940); see also State v. Drakeford, 290 S.C. 338, 340, 350 S.E.2d 391, 392 (1986); State v. Morris, 289 S.C. 294, 296. 345 S.E.2d 477, 478 (1986): State v. Yates, 280 S.C. 29. 37, 310 S.E.2d 805, 810 (1982), overruled by State v. Torrence, S.C., 280 S.C. 29, 310 S.E.2d 805 (1982); State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263, 263 (1978). Opinions of our Office on the subject of moral turpitude have consistently recognized the same. See, e.g., Op. S.C. Att'y Gen., 2014 WL 2538230 (May 12, 2014); Op. S.C. Att'y Gen., 2007 WL 655616 (Feb. 5. 2007); Op. S.C. Att'y Gen., 1998 WL 61843 (Jan. 27, 1998). Moreover, "moral turpitude implies something immoral in itself, regardless of whether it is publishable by law as a crime." State v. Horton, 271 S.C. 413. 414, 248 S.E.2d 263 (1978) (citing 58 C.J.S. Morals at 1203). Behavior that is primarily self-destructive typically does not involve moral turpitude, which requires a breach of duty to society and one's fellowman. State v. Major, 301 S.C. 181. 184, 391 S.E.2d 235, 237 (1990). Thus, it follows that while all crimes involve some degree of social irresponsibility, not every crime is one that involves moral turpitude. State v. LaBarge, 275 S.C. 168, 172, 268 S.E.2d 278, 280(1980).

"In determining whether a crime is one involving moral turpitude, the Court focuses primarily on the duty to society and fellow man which is breached by the commission of a crime." State v. Ball, 292 S.C. 71, 73, 354 S.E.2d 906, 908 (1987), overruled on other grounds by State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990). Furthermore, it has been concluded that "[m]ost offenses found to involve moral turpitude ... seem to include some

sort of dishonest behavior ....” McAninch and Fairey, The Criminal Law of South Carolina, 45 (3rd ed. 1996); see also State v. Hall, 306 S.C. 293, 295, 411 S.E.2d 441, 442 (Ct. App. 1991) (quoting the above in its analysis of whether first offense driving under the influence and resisting arrest were crimes of moral turpitude).

We have not previously addressed the issue of whether an indictment for domestic violence 2nd degree constitutes a “crime of moral turpitude” for purposes of Art. VI, § 8. This provision of the State Constitution authorizes the Governor to suspend “[a]ny officer of the State or its political subdivisions except members and officers of the Legislative and Judicial branches, who has been indicted by a Grand Jury for a crime of moral turpitude ...” Section 16-25-20(A) makes it unlawful to:
(1) cause physical harm or injury to a person’s own household member; or

(2) offer or attempt to cause physical harm or injury to a person’s own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Subsection (C) further states:
(C) A person commits the offense of domestic violence in the second degree if the person violates subsection (A) and:
(1) moderate bodily injury to the person’s own household member results or the act is accomplished by means likely to result in moderate bodily injury to the person’s own household member;

(2) the person violates a protection order and in the process of violating the order commits domestic violence in the third degree;

(3) the person has one prior conviction for domestic violence in the past ten years from the current offense; or

(4) in the process of committing domestic violence in the third degree one of the following also results:
(a) the offense is committed in the presence of, or while being perceived by, a minor;

(b) the offense is committed against a person known, or who reasonably should have been known, by the offender to be pregnant;

(c) the offense is committed during the commission of a robbery, burglary, kidnapping, or theft;

(d) the offense is committed by impeding the victim’s breathing or air flow; or

(e) the offense is committed using physical force or the threatened use of force against

another to block that person's access to any cell phone, telephone, or electronic communication device with the purpose of preventing, obstructing, or interfering with:
(i) the report of any criminal offense, bodily injury, or property damage to a law enforcement agency; or

(ii) a request for an ambulance or emergency medical assistance to any law enforcement agency or emergency medical provider.

A person who violates this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than two thousand five hundred dollars nor more than five thousand dollars or imprisoned for not more than three years, or both.

Domestic Violence in the second degree is a lesser-included offense of domestic violence in the first degree, as defined in subsection (B), and domestic violence of a high and aggravated nature, as defined in Section 16-25-65.

Assault and battery in the second degree pursuant to Section 16-3-600 (D) is a lesser-included offense of domestic violence in the second degree as defined in this subsection.

Domestic violence 2nd degree is an offense within the jurisdiction of the Court of General Sessions. Based upon the Indictment, it appears that the Defendant is alleged to fall within § 16-25-20(A) [cause physical harm or injury to household member] and § 16-25-20(C)(1) [moderate bodily injury to person's household member]. The term "household member" is defined in § 16-25-10(3) to include a spouse, former spouse, persons who have a child in common or a male or female who are cohabiting or formerly have cohabited.

While our opinions have not yet addressed the question of whether the crime of domestic violence 2nd degree constitutes a crime of moral turpitude, a number of other jurisdictions have dealt with the question generally. In Morelli v. Ashcroft, 100 Fed. Appx. 620, 621-22 (9th Cir. 2014), for example, the Ninth Circuit concluded that" ... we agree with the district court that the BIA (Board of Immigration Appeals) did not err when it treated a crime of domestic violence against a cohabitant as a crime of moral turpitude." Morelli cited in support of this conclusion Grageda v. U.S. INS, 12 F.3d 919, 922 (9th Cir. 1993), which had held that inflicting injury upon one's spouse severely to cause a "traumatic condition" is "an act of baseness or depravity contrary to accepted moral standards."

And, in People v. Rodriguez, 5 Cal. App. 4th 1398, 7 Cal. Reptr. 495 (1992), the Court held that the crime of inflicting corporal injury upon a spouse or cohabitant is a crime of moral turpitude. There, the Court's reasoning was as follows:
[t]o violate section 273.5 the assailant must, at the very least, have set out, successfully to

injure a person of the opposite sex in a special relationship for which society rationally demands, and the victim may reasonably expect stability and safety, and in which the victim for these reasons among others, may be especially vulnerable. To have joined in, and thus necessarily to be aware of, that special relationship, and then to violate it willfully, and with intent to injure, necessarily connotes the general readiness to do evil that has been held to define moral turpitude.

5 Cal. App. 4th at 1402, 7 Cal. Reptr. at 497. Thus, in the California Court of Appeals' view, it is the breach of the "special relationship" of the couple through the infliction of injury by one upon the other which marks the crime as one of "moral turpitude." See also People v. Burton, 243 Cal. App. 4th 129, 135, 136, 196 Cal. Reptr. 392, 398, 399 (2015) [purpose of statute is to "afford greater protection to intimate partners" and that "we agree with the California courts that have previously addressed this issue that a violation of Section 273.5 is a crime of moral turpitude as a matter of law."]

While, as you indicate, the South Carolina Supreme Court has not squarely addressed this question, there are strong indications the Court would conclude that domestic violence 2nd degree constitutes a crime of moral turpitude. In Re Laguiere is a good example. There, in an attorney disciplinary proceeding, in which the attorney was publicly reprimanded, the Supreme Court noted that the attorney in question had admitted that he violated several rules of professional conduct following his plea of guilty for criminal domestic violence. One of the Rules which Respondent admitted to have violated was Rule **8.4**(c) (professional misconduct for a lawyer to engage in conduct involving moral turpitude).

Moreover, In Re Berry, 345 S.C. 463, 549 S.E.2d 254 (2001), also involved a disciplinary action. Respondent was accused of numerous violations of the Rules of Professional Responsibility, including having pled guilty to the offense of criminal domestic violence, as well as several narcotics offenses. The Court noted that these criminal offenses (including domestic violence) had been found by the Panel to constitute "convictions of serious crimes as defined by Rule 2 of Rule 413, as well as crimes of moral turpitude." (emphasis added). The Court disbarred the Respondent as "the appropriate sanction in similar cases involving multiple acts ofmisconduct, including criminal violations." One of the cases cited by the Court was In Re Courtney, 342 S.C. 617, 538 S.E.2d 652 (2000) which had concluded that Respondent Courtney had violated, among other Rules, Rule 8.4(c), relating to conduct involving moral turpitude. Thus, it can reasonably be assumed that the Court in In Re Berry implicitly affirmed the recommendation of the Panel regarding the conviction of criminal domestic violence as one involving moral turpitude.

In the present situation the Indictment states:
That Mohsen A. Baddourah did in Richland County on or about June 29, 2016 cause physical harm or injury to a household member, CARRIE RHETT, or did offer or attempt to cause physical harm or injury to a household member, CARRIE RHETT, with apparent present ability under circumstances reasonably creating fear of imminent peril by striking

CARRIE RHETT with a car door an act likely to result in moderate bodily injury, in violation of Section 16-25-20 (A-D), S.C. Code of Laws, 1976, as amended.

Thus, the Indictment alleges conduct which falls within §§'s 16-25-20(A) and (C)(1)'s ambit. Based upon the foregoing authorities, in our opinion, the Indictment alleges sufficiently a "crime of moral turpitude" for purposes of Article VI, § 8.

Conclusion

It is our opinion that the crime of domestic violence 2nd degree is a "crime of moral turpitude" for purposes of the Governor's suspension power provided in Article VI, § 8 of the South Carolina Constitution. We address herein only domestic violence 2nd degree and no other domestic violence offenses or any other offense.

Sincerely,

Robert D. Cook
Solicitor General

IN THE MATTER OF: DAVID CHRISTIAN JENK, ATTORNEY-RESPONDENT. NO. 6311101
IL Disp. Op. 2016PR00023 (Ill.Atty.Reg.Disp.Com.), 2017, Hearing Board of the Illinois Attorney Registration and Disciplinary Commission.

Respondent, David Christian Jenk, by his attorneys, Mary Robinson and Sari W. Montgomery, Robinson Law Group, LLC, answers the Administrator's Complaint as follows:

1. At all times alleged in this complaint, 720 ILCS 5/12-3.2 (a)(1) and (b) provided that any person commits domestic battery if he or she knowingly, without legal justification, by any means, causes bodily harm to any family or household member, and that the offense of domestic battery was a Class A misdemeanor.

ANSWER: Admitted.

2. On June 9, 2013, Respondent pushed, shoved, and struck Astrid Conte - Russian, who was Respondent's girlfriend at the time. As a result, Conte-Russian lost consciousness, suffered swelling to her jaw, bruising on her arm, a displaced fracture to her left forearm, and had a laceration to her eye that required stitches.

ANSWER: Denied.

3. On August 8, 2013, Respondent was arrested by the Chicago Police Department and charged with domestic violence, in violation of 720 ILCS 5/12-3.2 (a)(1), as a result of the incident described in paragraph two, above. The matter was docketed as *People v.Jenk*, case number 13 DV 74550 in the Circuit Court Cook County, First Municipal District.

ANSWER: Admitted.

4. On March 18, 2013, after a bench trial, Respondent was found guilty of domestic battery in case number 13DV7455001. The court sentenced Respondent to 18 months of court supervision and fined him $500 plus court costs.

ANSWER: Respondent admits that he was found guilty of domestic battery in case number 13 DV 455001 after

a bench trial on March 18, 2013, but further states that his appeal of the conviction is currently pending. Respondent denies the remaining allegations of Paragraph Four above and states that he was sentenced to one year of probation, domestic violence counseling, and $450 in fines, fees, and costs, all of which he successfully completed.

5. As a result of the conduct described above, Respondent has engaged in the following misconduct:
a. committing a criminal act that reflects adversely on the lawyer's fitness by striking, pushing and shoving Astrid Conte-Russian, and thereby committing domestic battery in violation of 720 ILCS 5/12-3.2(A)(l), in violation of Rule **8**.**4**(b) of the Illinois Rules of Professional Conduct; and

b. engaging in conduct that is prejudicial to the administration of justice by striking, pushing and shoving Astrid Conte-Russian, and thereby committing domestic battery in violation of 720 ILCS 5/12-3.2(A)(l), in violation of Rule **8**.**4**(d) of the Illinois Rules of Professional Conduct

ANSWER: Denied.

Other Source

See, People v. Scott, 121 P.3d 366 (Colo. O.P.D.J. 2005) (assault, false imprisonment, and harassment of ex-wife); *In re Scott*, 989 N.E.2d 1249 (Ind. 2013) (battery against wife); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Polson*, 569 N.W.2d 612 (Iowa 1997) (battery of spouse); *In re Grella*, 777 N.E.2d 167 (Mass. 2002) (lawyer suspended for assaulting estranged wife); *In re Toronto*, 696 A.2d 8 (N.J. 1997) (conviction for assault of wife); *State ex rel. Okla. Bar Ass'n v. Zannotti*, 330 P.3d 11 (Okla. 2014) (lawyer assaulted former client he had been dating). *But see In re Michaels*, 67 A.3d 1023 (Del. 2013) (lawyer's misdemeanor conviction for grabbing minor daughter by ponytail and refusing to let her go "in the context of an intensely stressful family situation," bore "no relationship to [his] fitness to practice law"). *See generally* Karen A. Geraghty, *Bruising the Legal Profession: Attorney Discipline for Acts of Domestic Violence*, 28 Rutgers L.J. 451 (Winter 1997).

8.4 and Sexual Misconduct

PA Eth. Op. 97-100 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.), 1997, Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion Number 97-100, September 26, 1997

I. Introduction

This Formal Opinion provides ethical guidance to lawyers on the subject of lawyer-client sexual relations in the absence of an express prohibition of such conduct in the Pennsylvania Rules of Professional Conduct. As more fully set forth below, it is the Committee's unanimous view that the initiation of sexual contact with a client not a spouse of the lawyer presents grave ethical concerns. The Committee joins with the growing number of jurisdictions that have concluded, either through the adoption of new ethics rules, ethics opinions or in judicial decisions, that a lawyer may not demand that a client or a representative of a client engage in sexual contact or sexual relations with the lawyer,

or attempt to coerce a client or a representative of a client into engaging in sexual contact with the lawyer. The Committee further recommends that ongoing consideration be given to the adoption of a new Rule of Professional Conduct prohibiting lawyers from initiating sexual contact with existing clients, except where the client is a spouse or where a consensual sexual relationship predated the lawyer-client relationship.

II. Background

In 1993, the then President of the Pennsylvania Bar Association was advised by chief counsel to the Disciplinary Board that the Board was receiving an increasing number of complaints involving attorneys who had become sexually involved with clients. This Committee was requested to consider whether further ethical guidance in this area was warranted and, if so, what form it should take.

The Committee Chair thereafter formed a Subcommittee on Sexual Misconduct (subcommittee) to examine the advisability of issuing specific ethical guidance to lawyers concerning **sexual** relationships with clients. At present, there is no Pennsylvania Rule of Professional Conduct prohibiting such relationships, although it is well recognized that the danger of violating any one of a series of ethics rules, and of committing a breach of fiduciary duty owed to the client, substantially increases when such a relationship exists. The subcommittee considered the growing body of case law, ethics opinions and ethics rules enacted in other jurisdictions proscribing sexual contact with clients, as well as anecdotal evidence suggesting a need for the issuance of a new Pennsylvania Rule of Professional Conduct, a formal ethics opinion providing guidance in this area, or both.

The subcommittee thoroughly researched and carefully examined the issues presented, and also conducted an informal poll of family law practitioners to ascertain the perceived need for ethical guidance in this area. The subcommittee's preliminary conclusions and recommendations were reviewed and discussed at length at various meetings of the Committee over the past two years. The subcommittee and a majority of the members of the Committee support a broad-based prohibition on sexual contact with a current client of the lawyer unless the client is a spouse of the lawyer or a consensual sexual relationship existed between the lawyer and client before the lawyer-client relationship commenced.[1] Other Committee members would more narrowly label as unethical conduct involving some form of undue influence or coercion, such as proscribing the lawyer from requesting or demanding sexual relations from the client in exchange for legal representation.

At its meeting held on June 6, 1997, the Committee determined to defer further consideration of the subcommittee's proposed new Rule of Professional Conduct 1.18 generally prohibiting lawyers from commencing sexual relationships with clients in favor of the issuance of a more detailed formal opinion setting forth the bases for the Committee's general view that sexual relationships with clients should be avoided, and incorporating the specific guidance that it is unethical for a lawyer to initiate sexual contact

with a client other than a spouse where the sexual relations either are the result of intimidation, coercion or undue influence. The Committee also determined to caution lawyers concerning the conflicts of interest and breach of the duty of loyalty that may arise when a sexual relationship is initiated with clients in, for example, certain domestic relations actions, where the sexual conduct of the client may be at issue in the pending proceeding or where clients are emotionally vulnerable or financially insecure.

This Formal Opinion was adopted by unanimous vote of the Committee at its regular meeting in Harrisburg on September 26, 1997. The opinion will be circulated to various other interested PBA Committees and Sections and the Committee will solicit comments concerning the scope of the guidance provided in this opinion and the desirability of proposing a new Rule of Professional Conduct including a per se prohibition of sexual contact with clients, except where the sexual relationship predated the lawyer-client relationship.

The Committee expresses its sincere appreciation for the hard work of the members of its Subcommittee on **Sexual Misconduct**, and for the thoughtful comments, suggestions and support of the PBA leadership and other members of the bar who have contributed to the discussion and deliberations on this important subject.

III. Discussion

Sexual contact[2] between professionals and their clients has been discussed in various professional disciplines.[3] Such conduct has been prohibited for many of these professionals, including doctors,[4] therapists,[5] and clergy.[6]

Formal barriers to sexual relations between professionals in a position of trust and authority and their patients or clients emerged during the last few decades, erected by a variety of governmental and organizational bodies. The American Psychiatric Association, for example, prohibits psychotherapists from engaging in sexual relations with their patients. Since 1989, the American Medical Association has prohibited all physicians (not just psychiatrists) from becoming sexually involved with their patients.

The American Bar Association (ABA), through its Standing Committee on Ethics and Professional Responsibility (Standing Committee), first addressed attorney-client sexual relations in Formal Opinion 92-364. In this opinion, the Standing Committee concluded that attorney-client sexual relations may be problematic. The Standing Committee revisited the issue when it declined to support a resolution proposed by the ABA's Young Lawyers Division Ethics and Professionalism Committee (YLD Committee).[7] The Standing Committee was of the view that an express rule was unnecessary, though some have questioned the Standing Committee's reasoning in reaching this conclusion.[8]

Many states have examined the issue and proposed an express rule despite the ABA's

position. California was the first state to address attorney-client sexual relations, and it prohibits such relationships by both ethical rule and by statute.[9] Florida,[10] Iowa,[11] New York,[12] Minnesota,[13] Oregon,[14] Wisconsin,[15] Utah[16] and West Virginia[17] have also adopted rules prohibiting attorney-client sexual relations, and such rules have been recommended in Kansas,[18] Kentucky,[19] North Carolina, Maryland and Texas.[20] Arizona,[21] Illinois,[22] Michigan and Washington have considered but not adopted such a restriction. Oklahoma and Ohio have also addressed the issue.[23] Two organizations, the Roscoe Pound-American Trial Lawyers Foundation[24] and the American Academy of Matrimonial Lawyers,[25] also have express rules prohibiting attorney-client sexual relations.

During the same period that this Committee was examining issues relating to the need for guidance concerning attorney **sexual misconduct** with clients, the Pennsylvania Bar Association considered the question whether to bar **sexual** harassment by lawyers. An amendment to Rule **8.4** of the Rules of Professional Conduct to include **sexual** harassment as a form of professional **misconduct** was proposed by the Gender Education Committee, a precursor to the Commission on Women in the Profession. On May 3, 1996, the PBA House of Delegates voted to recommend the amendment to the Supreme Court for approval.[26]

After reviewing the literature and the ethics guidance issued from other jurisdictions, conducting an informal survey of Pennsylvania family law attorneys, holding numerous informal teleconference meetings, and engaging in various discussions and reviews with the full Committee, the subcommittee proposed that an express prohibition of attorney-client sexual contact be adopted in Pennsylvania. A summary of the subcommittee's reasoning and its proposed rule follow.

IV. The Problem With Sexual Contact Between Attorneys and Clients

Several problems arise when an attorney engages in sexual contact with a client. The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. Also, an attorney is in a fiduciary relationship with a client. Many authorities support the proposition that when an attorney has sexual involvement with a client, the fiduciary relationship the attorney owes to a client is breached. This type of contact also violates the transference that frequently exists between a client and an attorney. It is the attorney's responsibility to manage the process of transference, and when the attorney fails to do so a client can suffer severe harm. Sexual contact is also likely to result in a conflict of interest for the attorney and render the attorney unable to objectively assess what is truly in the client's best interest. Lastly, the harm that can often occur as a result of attorney-client sexual relations reflects negatively on the legal profession.

Support for a prohibition on sexual contact between an attorney and a client may be derived from the fiduciary nature of the relationship.[27] A fiduciary relationship exists when:

confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence; where confidence is reposed and accepted, whether the origin is moral, social, domestic, or merely personal; or where a person has knowledge and authority which he is bound to exercise for the benefit of another person.

The parties to a fiduciary relationship typically do not deal on equal terms. The one reposing trust in the fiduciary generally is in an inferior position and often is vulnerable to exploitation.[28]

Sexual contact between parties to a fiduciary relationship can constitute a breach of fiduciary responsibility by the one in whom the trust is reposed.[29] Many authorities even assert that, due to the inherent imbalance in the relationship, the inferior party is deemed incapable of actually consenting to a sexual relationship with the fiduciary.[30] Many attorneys lack sensitivity to the power imbalance that may be inherent in the relationship and then fail to recognize that initiation of a sexual relationship may also preclude the lawyer's continued effective representation, or worse. Instead, if the clients appear interested and willing to engage in sexual contact with them, they often simply view the matter as one involving two "consenting adults."

Transference, a phenomenon frequently discussed in the therapy professions, occurs when the client transfers feelings to the professional which are more appropriately directed toward another person of importance in the client's life. It is an "[u]nconscious phenomenon in which the feelings, attitudes, and wishes originally linked with important figures in one's early life are projected onto others who have come to represent them in current life."[31]

Positive transferences are often expressed in sexual terms. A person (in this case, a client) experiencing transference is often vulnerable to exploitation[32] and is frequently dependent on the professional.[33] When the professional responds and acts on the transference this action frequently constitutes mismanagement of the transference phenomenon by the professional and is customarily experienced as exploitation by the client at some point during or after the sexual contact or relationship occurs.[34] This experience of exploitation occurs even where the client seems to have been a very willing participant in the sexual contact as often the client is unaware of the transference that is a critical component of the contact.

Though the existence of the transference phenomenon is most frequently identified in the psychotherapist-patient relationship, transference may also exist in a range of other professional relationships, including the attorney-client relationship.[35] Since the attorney-client relationship can often involve transference, sexual contact between an attorney and a client can constitute an abuse of the relationship and should not be permitted. Not every

attorney-client relationship will involve transference issues of the client. However, it is very difficult to make that assessment, particularly when the nature of the relationship itself contains an inherent power imbalance. Most attorneys are not trained or knowledgeable about this issue and have little awareness of the serious harm that can truly occur to the client. As with many therapeutic relationships where abuse of this type occurs, the injury to the client is not always realized during the sexual relationship. The client often recognizes the injury at a later time. The literature suggests that the trauma a client experiences when the awareness of exploitation becomes conscious may be long term and highly damaging.

A prohibition on sexual contact between attorneys and clients is separately justified because the mere existence of such a relationship in many cases will cause a conflict of interest for the attorney.[36] Indeed, particularly in the matrimonial law context, the existence of the relationship alone may place the client's rights in jeopardy.[37] Furthermore, the intimate relationship may often render the attorney less likely to be able to independently assess what is truly in the client's best interest.[38]

Cases of actual conflicts of interest due to sexual contact have been reported;[39] it is easy to imagine conflicts which might arise in many other situations. While some may argue that a sexual relationship would make an attorney more protective of the client's best interest, and that may be true in certain instances, the attorney may also become less able to discern what is in the client's best interest and may, in fact, subordinate the client's interests to his/her own interests.[40]

Another concern with attorney-client sexual contact is the negative impact many believe these relationships have on the legal profession. Because the harm that is suffered by clients who are traumatized by these events can be so severe,[41] the client's need to reveal this harm, whether to friends or to the general public, is great, and actually, often therapeutic for the client in seeking to recover from this harm. The PBA leadership is well aware of the public's negative perception of lawyers and has engaged in a number of initiatives to rectify that problem, from establishment of a Committee on Lawyer Advertising to its support of mandatory IOLTA. Unfortunately, popular television series[42] as well as true stories of clients who have suffered harm as a result of sexual relationships with their attorneys tend to aggravate that already negative image. While this negative perception may not, in and of itself, support a prohibition on sexual contact between attorneys and clients, it adds weight to the other legitimate reasons for such a prohibition.

Thus, in the subcommittee's view, sexual contact between attorneys and clients should be prohibited via a bright line rule because of the fiduciary nature of the attorney-client relationship, the transference phenomenon, the potential for a conflict of interest and an impact on an attorney's ability to independently assess the client's best interest, and the negative effect on the public's perception of the profession.[43] The Committee as a whole recognizes these legitimate concerns and will, upon issuance and distribution of this Formal

Opinion, canvass the other interested committees and sections concerning the need for a new Rule of Professional Conduct directed to the issue. At the same time, the Committee is sensitive to the reasonable concerns raised that casting too broad a net in this area may tend to invade legitimate personal privacy interests and potentially prohibit conduct that in some cases in no way interferes with the provision of necessary legal services and sound legal advice.

V. The Arguments For A New Rule

The Committee recognizes that a sexual relationship between an attorney and a client may lead to a violation of one or more existing Rules of Professional Conduct. In fact, there are cases across the country that have relied upon similar implied proscriptions when disciplining attorneys for engaging in sexual relations with clients. However, in situations where there are no express rules addressing the conduct at issue, and determinations are dependent upon implied proscriptions, the results are often fact-dependent and finders-of-fact are left to wrestle with concepts such as breach of fiduciary duty, transference, and conflicts of interest in this context. Also, the proceedings governed by implied proscriptions are likely to make the client's conduct the target of the inquiry, rather than focusing on the conduct and primary responsibility of the attorney to ensure that the representation is conducted in a professional manner. These considerations led the subcommittee to propose that a new, clear and express rule should be adopted and made an integral part of the Rules.[44]

A **sexual** relationship between a Pennsylvania attorney and a client may be prohibited by the general conflict of interest provision, Rule 1.7,[45] and by the **misconduct** provision, Rule **8**.**4**.[46] Though neither rule expressly addresses sexual contact by an attorney with a client, both might impliedly prohibit such conduct depending upon the circumstances. However, there has not been an express opinion of any Pennsylvania ethics committee or the Disciplinary Board articulating this position or otherwise providing useful guidance to lawyers contemplating an intimate relationship with a client. Further, it is reasonable to question whether attorneys who are prone to initiate sexual contact with their clients will make an independent assessment that will cause them to refrain from such contact based on ethics guidance stated solely in an aspirational fashion, rather than as a definite and mandatory prohibition. In the subcommittee's view, this is not a determination that should be left to the discretion of an individual attorney. There is a compelling argument to be made that any guidance in this area should be clear, and that a "bright line" rule would be the most effective way to communicate and implement such guidance.[47]

The subcommittee also was concerned that a number of these incidents occur and are not reported due to, among other reasons, a fear by the complainant that he or she will not be believed and an awareness by the complainant that such contact is not expressly prohibited by the existing Rules. This lack of clarity leaves claimants vulnerable to a process where they are then susceptible to being "put on trial" rather than the person who has engaged in

the offensive conduct.

There is no clear guidance regarding the propriety of sexual relations between attorneys and clients for the public and the bar in Pennsylvania. Although this conduct may ultimately be deemed to violate other existing rules, it would seem that attorneys who initiate in sexual contact with clients are unlikely to assume such an interpretation in the absence of an express rule. To eliminate any such confusion and to make mandatory compliance with the prohibition, the subcommittee advocated the adoption of a new Rule 1.18, discussed below.

VI. The Subcommittee's Proposed New Rule 1.18 and Comment

The subcommittee's draft proposed Rule 1.18 follows:

Rule 1.18: Attorney-Client Sexual Contact

A. During the course of the lawyer-client relationship, a lawyer shall not: (1) engage in sexual contact with a client or a representative of a client not a spouse; (2) demand that a client or a representative of a client engage in sexual contact with the attorney; or (3) attempt to coerce a client or a representative of a client into engaging in sexual contact with the attorney.

B. This rule does not apply to consensual sexual relationships which predate the lawyer-client relationship, or where the client is represented by the lawyer's law firm and the lawyer has no involvement in the legal work performed for the client.

C. For purposes of this rule only, when the client is an organization, the "client" representative refers to any person who oversees the representation or gives instructions to the lawyer on behalf of the organization.

Comment: The draft rule developed by the subcommittee would prohibit the lawyer from engaging in sexual contact with a client or a representative of a client[48] during the course of the lawyer-client relationship unless the client is the spouse of the lawyer or a consensual sexual relationship existed between the lawyer and the client before the lawyer-client relationship commenced, or the client is represented by the lawyer's law firm and the lawyer has no involvement in the legal work performed for the client. The draft rule would also explicitly prohibit the lawyer from demanding that a client or a representative of a client engage in sexual contact with the attorney, or attempting to coerce a client or a representative of a client into engaging in sexual contact with the attorney.

The purpose of adopting a rule of ethics is to clearly identify the types of contact with clients that are expressly prohibited. In the absence of a rule, the subcommittee members

were concerned that the question of attorney-client sexual contact will lack the clarity lawyers need for guidance through the often close and necessarily intimate relationship that can exist during the course of their representation of a client. Clients who seek representation by a lawyer are frequently in need of critical legal guidance and assistance. They often know little about the law, and rely heavily upon the advice given to them by lawyers. Clients often feel unable to act or chart their own course without the lawyer's guidance. They easily become dependent upon the lawyer as the overseer of at least a portion of their lives. The nature of the lawyer-client relationship often involves emotion, strong feelings and a sense of gratification. If those aspects of the relationship are not properly managed by the attorney, harm can result to the client.

The conduct intended to be regulated by a new rule is not merely the prohibition of an actual sexual relationship between the lawyer and client. The general focus of the subcommittee's proposed rule is on "contact," not on the more amorphous concept of "relationship." For purposes of such a rule, "sexual contact" would include, but is not necessarily limited to, sexual intercourse or any touching of the sexual or other intimate parts of a client or causing a client to touch the sexual or other intimate parts of the lawyer for the purpose of sexual arousal, gratification, or abuse.[49] "Sexual contact" is intended to be broader and more inclusive than "sexual relations" or "sexual relationship."

Sexual contact between a lawyer and a client which was initiated during the lawyer's representation of the client may constitute a violation of the lawyer's fiduciary duty to the client. Such contact may intentionally or unintentionally result in harm to the client by violating the trust reposed by the client in the lawyer. The fact that a client is often dependent upon a lawyer creates, de facto, a power imbalance in the relationship. The lawyer's choice to initiate or permit sexual contact with a client is often a misuse of power, and can result in a sense of exploitation by the client. Furthermore, sexual contact can readily give rise to a conflict of interest. As a result of the lawyer's personal involvement, the lawyer may be unable to recognize the conflict or to dispassionately assess and independently act in the client's best interest. Even if the lawyer is able to recognize a conflict, this recognition may cause the lawyer to have to withdraw from the representation or face disqualification.[50] This withdrawal, itself, can be traumatic for the client. The various types of harm that can be experienced by a client are often not understood or appreciated by the client in advance of sexual contact. Often, the lawyer does not understand the real potential for harm. For these reasons, the subcommittee's proposed Rule 1.18 would prohibit a lawyer from engaging in, demanding, or attempting to coerce sexual contact with a client not a spouse or a client's representative during the course of the representation.

Lawyers are expected to fulfill their fiduciary duties to their clients. If the professional relationship begins to transform into a personal relationship so that sexual contact is likely, the lawyer is expected to exercise that fiduciary duty by referring the client to a new lawyer and by withdrawing from the representation. In determining whether to withdraw, and the

manner in which to withdraw, the lawyer should be guided by the considerations set forth in Rule 1.16. However, it is important for the lawyer to grasp the fact that the client may not fully appreciate the ramifications of the loss of the lawyer-client relationship at the time a determination is being made. The lawyer should know and understand the potential loss, and it should be part of the lawyer's consideration in balancing the purported benefit to the client of a sexual relationship with the potential harm that may befall the client due to the withdrawal of representation.

The subcommittee would not prohibit the representation by a lawyer of the lawyer's spouse or of someone with whom the lawyer has been engaged in an ongoing sexual relationship prior to representation so long as this representation does not violate this or other Rules of Professional Conduct. The intent is to exclude those relationships which are reasonably well established and have evolved to a level where the power disparity between the lawyer and client should not reasonably be an issue.

When the client is an organization or corporation, the proposed proscription applies to individuals who supervise the lawyer or have decision-making authority concerning the representation.[51] This proscription would apply both to in-house counsel and to outside lawyers representing a corporation. Section C of the subcommittee's proposed rule also clarifies the meaning of the client's "representative" to acknowledge situations when it may not be the actual client who is interacting with the lawyer, but rather one acting on behalf of the client, and charged with protecting the client's interest.[52]

Due to the dynamics involved in the lawyer-client relationship and the vulnerability experienced by many clients seeking legal advice from lawyers, the subcommittee advocated enactment of an ethics rule providing that the client shall not be considered to have the capacity to consent to the sexual contact.

VII. Potential Objections to a Prohibition on Lawyer-Client Sexual Misconduct

One objection that is frequently raised when a bright-line proscription of sexual contact between a lawyer and client is under consideration is that such a rule is unnecessary. Opponents assert that sexual contact between attorneys and clients occurs infrequently and claim the contact is clearly prohibited by other existing provisions.[53] Unfortunately, attorney-client sexual contact occurs with greater frequency than most of us care to acknowledge. When harm results from these relationships, it can be egregious harm. Full recovery for a client may be a long and arduous road. When a client is forced to rely on implied rules that purportedly cover this conduct, the proceedings will often treat the client as the wrongdoer (even if the client has the courage to proceed).

We do not hesitate to draw bright-line rules in other instances, such as obtaining publication rights to subject matter related to the representation while the representation is continuing or taking an interest in the subject matter of litigation.[54] Even though these rules impinge

upon lawyers who could engage in such actions without causing harm, a per se rule is established prohibiting these actions. In addition, although some cases of lawyer-client sexual contact will run afoul of existing provisions, there is confusion about the application of existing rules to such conduct and to what extent the client's behavior bears on the analysis. Thus, guidance in the form of a bright-line, express proscription may well be needed and best serves the attorneys, clients and the public.

A second objection frequently voiced is that a bright-line rule is warranted, but only in the family law setting. Family law matters commonly involve emotionally vulnerable clients, complicated family relationships, and sometimes difficult economic circumstances for a client.[55] "Dependent on the lawyer to determine how best to protect or further [the client's best] interests, the client is apt to accede to the lawyer's advice and counsel and becomes vulnerable to a lawyer's inappropriate personal conduct." In the Matter of Kraemer, 200 Wis.2d 547, 547 N.W.2d 186, 190 (1996). Of course, sexual contacts between lawyers and clients occur in a variety of practice areas, not just family law. The factors justifying an express rule -- the obligation to manage issues related to fiduciary duties, transference, conflicts of interests, etc. -- similarly exist across many practice areas. Though there may be instances where the sexual contact may not involve the harms discussed, these instances are the exception rather than the rule. At the same time, however, it cannot be ignored that the anecdotal evidence, as well as a substantial majority of the reported cases and ethics opinions addressing claims of inappropriate sexual conduct by lawyer arise from instances where the lawyer initiated a sexual relationship with a client whose divorce, child custody or support arrangements were at issue.

A third objection often heard is that a prohibition on sexual relations violates a right to privacy or "the freedom of intimate association."[56] Other professions have prohibited sexual contact by their members despite an arguable right to privacy. Moreover, the Supreme Court of the United States has stated that "any claim that [the right to privacy] cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[57] Thus, the right to privacy objection does not apply to a rule which limits sexual contact during representation; if the attorney wishes to become sexually involved with a client, the attorney should refer the client to another attorney and withdraw from the representation.

A fourth objection is that education, not prohibition, best serves to encourage truly responsible behavior. Rather than issuing mandatory pronouncements on the topic of attorney-client sex, some commentators opine that the profession should take steps to ensure personal and professional relationships. Practitioners in the domestic relations field are especially cautioned that the initiation of **sexual** contact with clients in an emotionally vulnerable state commonly serves as a basis for findings of **misconduct** and disciplinary action.

Footnotes

[1] The subcommittee concluded that a "bright line" ethics rule was desirable in this area for reasons more fully set forth in Part V below. The subcommittee's proposed formulation of that rule is set forth in Part VI of this opinion.

[2] For purposes of this opinion, "sexual contact" would include, but is not necessarily limited to, sexual intercourse or any touching of the sexual or other intimate parts of a client or causing a client to touch the sexual or other intimate parts of the lawyer for the purpose of sexual arousal, gratification, or abuse. The term is intended to be more inclusive than the terms "sexual relations" or "sexual relationship."

[3] Bisbing, Jorgenson, and Sutherland, Sexual Abuse By Professionals (1995).

[4] See, e.g., Vigilant Ins. Co. v. Employers Ins. of Wausau, 626 F. Supp. 262 (S.D.N.Y. 1986); Cotton v. Kambly, 300 N.W.2d 627 (Mich.Ct.App. 1980); Hoopes v. Hammargren, 725 P.2d 238 (Nev. 1986); Roy v. Hartogs, 366 N.Y.S.2d 297 (N.Y.Civ.Ct. 1975); Omer v. Edgren 685 P.2d 635 (Wash.Ct.App. 1984); L.L. v. Medical Protective Co., 362 N.W.2d 174 (Wis.Ct.App. 1984); American Psychiatric Ass'n, The Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry (1985); American Psychiatric Ass'n, Opinions of the Ethics Committee on the Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry (1985). For the doctor, the proscription begins with the Hippocratic Oath: "In every house where I come, I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women and men." Leonard L. Riskin, *Sexual Relations Between Psychotherapist and Their Patients: Toward Research or Restraint*, 67 Cal.L.Rev. 1000, 1002 (1979). See also Bisbing, Jorgenson and Sutherland, supra note 1.

[5] See, e.g., Robert I. Simon, ***Sexual Misconduct*** *of Therapists*, 21 Trial 46 (May 1985); Horak v. Biris, 474 N.E.2d 13 (Ill.App.Ct. 1985); American Psychological Ass'n, Ethical Principles of Psychologists and Code of Conduct (1992).

[6] See, e.g., Committee On Ethics and Appeals, Rabbinic Code of Ethics of the Central Conference of American Rabbis, Proposed draft submitted to the Central Conference of American Rabbis Convention (June 1991); Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and* ***Sexual Misconduct****,* 12 Miss. C.L. Rev. 97 (1991).

[7] Letter from David B. Isbell, Chair, ABA Standing Committee on Ethics and Professional Responsibility, to Steven L. Slagel, Chair YLD Ethics and Professionalism Committee (Sept. 1, 1993).

[8] Correspondence from Charles W. Wolfram, Charles Frank Reavis, Sr., Professor of Law at

Cornell Law School, to Nancy Goldberg Wilks (Jan. 8, 1996); Nancy Goldberg Wilks, *Sex and the ABA: Impotent Standing Committee or the Proverbial Fox?*, 6 Md. J. Contemp. Legal Issues 205 (1995).

[9] Cal. Rules of Professional Conduct 3-120 (West 1992 & Supp. 1995); Cal. Bus. & Prof. Code §6106.9 (West 1992). The California rule prohibits an attorney from engaging in a sexual relationship pursuant to a quid pro quo arrangement; by means of coercion, intimidation or undue influence; or when the relationship adversely affects attorney competence. The rule does not apply to lawyers and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

[10] Florida Rules of Professional Conduct Rule 4-8.4(i) (July 20, 1995).

[11] DR 5-101(B) provides: "A lawyer shall not engage in sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the attorney-client relationship. Even in these provisionally exempt relationships, attorneys should strictly scrutinize their behavior for any conflicts of interest to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may be impaired, of the client harmed by the continuation of the sexual relationship, the attorney should immediately withdraw from the representation."

[12] 9 Lawyers' Manual on Professional Conduct (ABA/BNA) 252-252 (Sept. 8, 1993). New York's rule, §1200.3 [DR 1-102(a)(7)], restricts only attorneys engaged in domestic relations matters; however, an official commission recently recommended that it be applied to all lawyers in the state.

[13] Minnesota Rules of Professional Conduct Rule 1.8(k) (1994).

[14] Oregon Code of Professional Responsibility DR5-110 (1992). The Oregon rule states:
(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.
(B) A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.
(C) For purposes of DR5-110 "sexual relations" means:
(1) Sexual intercourse; or
(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.
(D) For the purposes of DR 5-110 "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such

assistance.

15 SCR 20:1.8(k)(1) (April 19, 1995), reported in 11 Lawyers' Manual on Professional Conduct (ABA/BNA) 151 (May 31, 1995). See In the Matter of Kraemer, 200 Wis.2d 547, 547 N.W.2d 186, 188 & n.3 (Wis. 1996)(interpreting rule to apply prospectively).

16 Rule 8.4(g), effective April 1, 1997, provides that "[i]t is professional **misconduct** for a lawyer to:
(g) Engage in **sexual** relations with a client that exploit the lawyer-client relationship. For purposes of this subdivision:
(1) "Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and
(2) Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between a lawyer and a client shall be presumed to be exploitative. This presumption is rebuttable."

17 Rule 8.4(g) (effective Sept. 1, 1995), which provides that it is professional **misconduct** for a lawyer to "have **sexual** relations with a client whom the lawyer personally represents during the legal representation unless a consensual **sexual** relationship existed between them at the commencement of the lawyer/client relationship."

18 Proposed Kansas Ethics Rule 1.17 (KBA Ethics Advisory Committee and its Subcommittee on **Sexual Misconduct**). In September, 1997, the KBA Board of Governors unanimously voted to circulate the proposed rule for comment. That vote followed a highly publicized disciplinary proceeding against a Wichita attorney for engaging in sexual relations with a series of emotionally vulnerable clients with pending divorce and custody matters.

19 Joanne P. Pitulla, *Lawyer-Client Sex-Incompatible Roles?*, Professional Lawyer, Feb. 1995, 14, 16.

20 Id. See also Nancy Goldberg Wilks, *Sex In Texas: An Argument For A Bright Line Ethical Rule Prohibiting Attorney-Client Sexual Relations*, Houston Lawyer (May/June 1996).

21 Petition to Adopt ER 1.18 for the State Bar of Arizona, In Re: Rule 42, Ariz.R.S.Ct., denied May 18, 1994.

22 Illinois has not acted on a proposed rule, Ill. Code of Professional Conduct Proposed Rule 1.18 (1992). However, the Chicago Bar Association, the Illinois State Bar Association and the Supreme Court's Rules Committee have each proposed regulation in the area. The Illinois Supreme Court recently approved the suspension from practice of an attorney for professional **misconduct** for engaging in **sexual** relations with clients and then testifying falsely about same before the Disciplinary Commission. In re Rinella, 677 N.E.2d 909 (Ill. 1997).

[23] 11 Lawyers' Manual On Professional Conduct (ABA/BNA) 19-20, 29-30, 35 (Feb. 22, 1995), reporting on Oklahoma Bar Ass'n Ethics Opinion 308 (12/9/94) (lawyer's sexual relationship with client is unethical, even in absence of specific ethics rule on subject). See also Disciplinary Counsel v. DePietro, Ohio Supreme Court No. 92-56 (Dec. 30, 1994)(lawyer who engaged in intimate sexual relationship with personal injury client and later with divorce client publicly reprimanded).

[24] American Lawyers' Code of Conduct Rule 8.8 (1982).

[25] The AAML standard states that "an attorney should never have a sexual relationship with a client or opposing counsel during the time of representation." Bounds of Advocacy Standard 2.16 (Am. Academy of Matrimonial Lawyers 1991), cited in Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 Fordham L. Rev. 5 (1993).

[26] Proposed Rule **8.4**(e) provides that "[i]t is professional **misconduct** for a lawyer to: … (e) engage in **sexual** harassment in the practice of law [.]" The term "**sexual** harassment" is undefined. While primarily directed to lawyer **misconduct** toward subordinates in the law office, Rule **8.4**(e) might well be construed to prohibit some forms of **sexual** contact with clients. As of the date of issuance of this formal opinion, the Supreme Court had not acted on the proposed amendment to Rule **8.4**.

[27] See, e.g., Maritrans GP. Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 253, 602 A.2d. 1277, 1283 (1992); Horak v. Biris, 474 N.E.2d 13 (Ill. App. Ct. 1985); Simon, supra note 5.

[28] ABA Formal Opinion 92-364 states "[t]hat the attorney-client relationship is not merely one that necessarily imposes fiduciary obligations but also is one that is often inherently unequal." The ABA Standing Committee's opinion concludes that such a relationship "may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently."

[29] See, e.g., Simon, supra note 5, at 47; Roy v. Hartogs, 366 N.Y.S.2d 297 (N.Y.Civ.Ct. 1975); Omer v. Edgren, 685 P.2d 635 (Was. Ct. App. 1984); Horak v. Biris, 474 N.E.2d 13 (Ill. App. Ct. 1985); Hoopes v. Hammargren, 725 P.2d 238 (Nev. 1986).

[30] See, e.g., Roy v. Hartogs, 366 N.Y.S.2d at 299, citing Graham v. Wallace, 63 N.Y.S. 372, 377 (N.Y.Sup.Ct. 1990) ("Consent obtained under such circumstances is no consent, and should stand for naught.").

[31] Alfred Freedman, Harold Kaplan, and Benjamin Sadock, Comprehensive Textbook of Psychiatry II 2608 (2d ed. 1975).

[32] Simon, supra note 5.

[33] L.L. v. Medical Protective Co., 362 N.W.2d 174, 177 (Wis. Ct. App. 1984); Thomas L. Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 Notre Dame L. Rev. 197, 211 (1970).

[34] Glen O. Gabbard, Sexual Exploitation in Professional Relationships (1986).

[35] Shaffer, supra, at 214-15; Alan Stone, Law, Psychiatry and Morality 196 (1984); Mischler, supra note 53, at 250-56.

[36] The Comment to Rule 1.7 provides that one of the factors to assess when determining if a conflict or a potential conflict of interest exists is "the duration and intimacy of the lawyer's relationship with the client or clients involved."

[37] E.g., In re DiSandro, 680 A.2d 73 (R.I. 1996). Here, the Rhode Island Supreme Court publicly censured an attorney who engaged in consensual sexual relations with a divorce client whose case was not, in fact, adversely impacted. The court pronounced that any lawyer who practices in the area of domestic relations must be aware that the conduct of the divorcing parties, even in a no-fault divorce, may have a significant impact on that client's ability to secure child custody, and also materially affect the client's rights regarding distribution of marital assets. The court concluded that, when an attorney represents a divorce client in a case in which child custody, support and distribution of marital assets are at issue, the attorney must refrain from engaging in sexual relations with the client or must withdraw from the case. See also ABA Formal Opinion 92-364, at 8 (attorney engaging in sexual relationship with client in divorce case may risk becoming an adverse witness to the client on issues of adultery and child custody, and thereby contravene Rule 3.7 Lawyer as Witness).

[38] Samuel Stretton, Ethics Forum: *When Cupid Invades the Law Office*, Pennsylvania Law Weekly, p. 5 (June 2, 1997) (advocating immediate withdrawal from representation and referral to independent attorney if a romantic interest develops between lawyer and client).

[39] See, e.g., In re Di Pippo, 678 A.2d 454 (R.I. 1996)("The lawyer's own interest in maintaining the sexual relationship creates an inherent conflict with the proper representation of the client."); Musick v. Musick, 453 S.E.2d 361 (W. Va. 1994), reported in ABA/BNA Lawyers' Manual on Professional Conduct (Feb. 22, 1995)("Clearly, the better practice is for lawyers to avoid sexual relationships with clients in all cases."); People v. Zeilinger, 814 P.2d 808, 810 (Colo. 1991)(sexual relationship with client in divorce "may destroy the chances of reconciliation, and blind the attorney to the proper exercise of professional judgment."); In re Disciplinary Proceedings Against Ridgeway, 462 N.W.2d 671 (Wis. 1990); Matter of Bowen, 542 N.Y.S.2d 45, 47 (1989); Matter of Wood, 358 N.E.2d 128 (Ind. 1976); Annot., ***Sexual Misconduct*** *as a Ground for Disciplining Attorney*

or Judge, 43 A.L.R.4th 1062.

[40] For example, the matrimonial lawyer may find it difficult to recommend that his/her client/lover attempt a reconciliation. A related problem arises under Rule 3.7 (Lawyer as Witness) in matrimonial cases where the lawyer may be placed in the position of witness adverse to the client's interests in divorce and child custody cases. Longo v. Longo, C.C.P. Lanc. Cty., No. 1167-1995 (May 19, 1995); Kristi N. Saylors, *Conflicts of Interest in Family Law*, 28 Fam. Law Q., 451, 462-63 (1994). See also Bourdon's Case, 565 A.2d 1052 (N.H. 1989) (attorney disbarred for violating Rule 1.7(b) by entering physical and emotional relationship with vulnerable client, failing to consult with her about possible conflict, then using information relating to the representation to his own advantage); In re Disciplinary Proceedings Against Ridgeway, 464 N.W.2d 671 (Wis. 1990) (suspension of public defender who initiated sexual contact with client facing a parole revocation; attorney also gave client a beer, contrary to terms of her probation).

[41] Some cases have supported the viability of a cause of action for intentional infliction of emotional distress where, for example, the lawyer demanded sexual favors from a client and neglected her case when she refused. E.g., McDaniel v. Gile, 230 Cal.App.3d 363, 281 Cal.Rptr. 242 (1991).

[42] Cornelia Tuite, *In Re Arnie Becker*, ABA Journal (Vol. 77, p. 88) March, 1991.

[43] In the Matter of Manson, 676 N.E.2d 347 (Ind. 1997)("Such actions erode the public's perception of the integrity of the legal profession."). Bisbing, Jorgenson, and Sutherland, supra note 2, at 3, explain the need for a rule:

Why regulate relationships between consenting adults? The answer lies in the unique characteristics of some professional-client relationships.

The professional's special knowledge gives him or her power over the more vulnerable patient or client who comes to the professional for advice. Clients and patients are encouraged to trust professionals and rely upon their advice based on both their authority and expertise. What distinguishes certain professions from others is the degree to which trust is required by the client or patient, and the relative vulnerability and power imbalance that ensues.

The high degree of trust patients and clients must have in their psychotherapists, physicians, and attorneys makes it possible for these professionals to gain an advantage at their patients' or clients' expense. The advantage that trusted professionals may gain is akin to a fraud. Trust and reliance may lead to the exercise of undue influence by the professional…. Because of the danger of surreptitious takings by the trusted professional, higher legal standards of care have been required of those in highly trusted or "fiduciary" positions.

[44] Myers, Sonenshein and Hofstein, *To Regulate or Not to Regulate Attorney-Client Sex?: The Ethical Question in Pennsylvania*, 69 Temple L. Rev. 741 (1996); Nancy E. Goldberg, *Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule*, 26 Akron L.

Rev. 45 (1992).

[45] Rule 1.7 Conflict of Interest: General Rule
* * *
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by…the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[46] Rule 8.4 Misconduct provides:
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
* * *
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice; ….

[47] "[S]ome may disagree that there need be any rule which expressly governs sexual relations between an attorney and client. Yet, few could disagree that a *per se* rule prohibiting sexual relations between an attorney and client … would provide the clearest guidance to practitioners in this regard." In re Rinella, supra, 677 N.E.2d at 917 (Freeman, J., concurring in part and dissenting in part).

[48] When the client or a representative of the client is an organization, "client" refers to those individuals who supervise or have decision-making authority concerning the representation. The term "representative of the client" is intended to include, but is not limited to, persons such as a parent or guardian of the client as that person has the responsibility to protect the client's interest in legal matters.

[49] Proposed Kansas Model Rule of Professional Conduct 1.17(c) provides:
Sexual conduct means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or intimate parts of the lawyer for the purpose of sexual arousal, gratification or abuse, or the request or demand for sexual conduct.

[50] E.g., Longo v. Longo, C.C.P. Lanc. Cty., No. 1167-1995 (May 19, 1995) (granting petition to disqualify counsel on conflict of interest grounds because lawyer represented her sexual partner in his divorce action and also was a necessary witness on the issue of marital conduct and alimony issues); Musick v. Musick, 453 S.E.2d 361 (W. Va. 1994).

[51] Wisconsin formulates this aspect of its rule as follows: "If the client is an organization,

'client' means any individual who oversees the representation or gives instructions to the lawyer on behalf of the organization."

[52] The subcommittee felt that the existence of a rule also would provide to junior associates a basis in the Rules of Professional Conduct to decline unwanted sexual advances from client representatives.

[53] See Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 Georgetown J. Legal Ethics 209, 220-26 (Winter 1996).

[54] Rule 1.8 Conflict of Interest: Prohibited Transactions
* * *
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
* * *
(j) A lawyer shall not acquire a proprietary interest in a cause of action that the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

[55] Many of the reported discipline cases do involve situations where the client was found to be especially vulnerable and subject to sexual overtures by reason of her pending divorce. E.g., In the Matter of Manson, 676 N.E.2d 347 (Ind. 1997)(attorney suspended for having sex in courtroom with divorce and custody client); In the Matter of Dipippo, 678 A.2d 454, 456 (R.I. 1996)("An attorney who desires to engage in sexual relations with a divorce client … must choose between furthering an intimate relationship or acting as a lawyer for the client. It is impermissible to do both."); Matter of DiSandro, 680 A.2d 73, 75 (R.I. 1996) (same); In the Matter of Kraemer, 547 N.W.2d 186, 190 (Wis. 1996); Drucker's Case, 577 A.2d 1198 (N.H. 1990)(attorney suspended for having sex with client represented in divorce proceeding); In re Disciplinary Proceedings Against Woodmansee, 434 N.W.2d 94 (Wis. 1988) (suspension for "sexually assaulting depressed and vulnerable client"); Committee on Prof. Ethics v. Hill, 436 N.W.2d 57 (Iowa 1989)(indefinite suspension for paying client for sex during divorce action).

[56] Mischler, supra note 53, at 231-35. The author also posits that bans on attorney-client sex do not just "control male sexuality -- by disciplining attorneys who engage in sexual relationships, the vast majority of whom are male" -- they also indirectly impair female sexuality by denying female clients the ability to enter into a consensual dual relationship with a lawyer. Thus, under such rules, "a woman may choose her lover as her lawyer, but not her lawyer as her lover." Id. at 237.

[57] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

VA Legal Eth. Op. 1853 (Virginia Legal Ethics Opinions), 2009, LEGAL ETHICS OPINION 1853, SEXUAL RELATIONSHIP WITH A CLIENT

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

APPLICABLE RULES

The Committee recognizes that no provision in the Virginia Rules of Professional Conduct specifically prohibits sexual relationships between lawyer and client;[1] however, the lawyer must consider that such conduct could: (1) jeopardize the lawyer's ability to competently represent the client (Rule 1.1), (2) wrongfully exploit the lawyer's fiduciary relationship with the client, (3) interfere with the lawyer's independent professional judgment (Rule 2.1), (4) create a conflict of interest between the lawyer and the client (Rule 1.7, Rule 1.7 Comment [10], Rule 1.8(b) and Rule 1.10(a)), (5) jeopardize the duty of confidentiality owed to the client (Rule 1.6(a)), or (6) potentially prejudice the client's matter (Rule 1.3(c)). Additionally, a lawyer who intentionally uses the fiduciary relationship of lawyer and client to coerce sexual favors from a client may be found to have violated Rule **8.4**(b)'s prohibition against a "deliberately wrongful act that reflects adversely on the lawyer's ... fitness to practice law."[2] Also, when a lawyer solicits sexual favors in lieu of charging the client legal fees, the lawyer will have violated Rule **8.4**(b).[3]

ANALYSIS

Competence and Diligence

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

Lawyer's Independent Judgment

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

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

A lawyer involved in a sexual relationship with a client, especially one that arose during the attorney-client relationship, could become conflicted in providing the "straightforward advice" that "involves unpleasant facts and alternatives that a client may be disinclined to confront." Rule 2.1 Comment [1].[5] Additionally, the lawyer's ability to maintain independent objectivity free from emotion or bias could be impaired because of the personal relationship. The lawyer risks losing the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment.

Fiduciary Obligations

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

The lawyer's position of trust places the burden on the lawyer to ensure that all dealings between the lawyer and client are fair and reasonable. Rule 1.8 Comment [1]. By nature,

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

The principle of Rule 1.3(c)[8] rests on public policy and is a protection to the client that the lawyer will not take advantage of any confidence imparted by the client. Further, Rule 1.8(b)[9] supports the fundamental principle that a lawyer may not use client confidences to the disadvantage of the client, and Rule 1.7(a)(2)[10] prohibits a lawyer from representing a client when the representation may be limited by the lawyer's own interests.

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

Conflict of Interests

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

representation is impaired. *See* Rule 1.7 Comment [10].[13]

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

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

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

Preservation of Client Confidences

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

In addition, a lawyer who uses confidential client information to pursue sexual relations with a client violates Rules 1.6(a) and 1.8(b), particularly in circumstances where the

lawyer acts upon client vulnerabilities to manipulate the client to participate in sexual relations. Clients in domestic, child custody, criminal, and pro bono cases are especially prone to such manipulation.[20]

CONCLUSION

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

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

Committee Opinion

December 29, 2009

Footnotes

[1] In response to growing concerns over breaches of fiduciary duty and exploitation of trust issues, prior to the development of ABA Model Rule 1.8(j), many states had developed their own specific rules regarding lawyer-client sexual relationships. By 2003, thirteen states had amended their model rules of professional ethics or disciplinary codes to include provisions regarding the propriety of consensual lawyer-client sexual relationships, ranging from absolute prohibition to limited restrictions to commentary advising about the possible negative consequences of such relationships. On April 2, 1992, California became the first state to enact a formal rule regarding attorney-client relationships when the state adopted Rule of Professional Conduct 3-120. Phillip R. Bower & Tanya E. Stern, "Conflict of Interest?: The Absolute Ban on Lawyer-Client Sexual Relationships Is Not Absolutely Necessary, 16 GEO. J. LEGAL ETHICS 535, 540 (2003) (explaining how a blanket rule prohibiting consensual lawyer-client sexual relations is both over inclusive and under inclusive). Currently, according to the American Bar Association, 27 states have addressed lawyer-client sexual relations in some form in their rules of professional conduct. Daniel Gilbert, "Virginia State Bar rules against adopting **sexual misconduct** regulation," *Bristol Herald Courier*, August 9, 2009 ("Gilbert article"). Critics of an unqualified ban acknowledge that a lawyer often holds a position of substantial power vis-à-vis a client, but both attorney and client have rights of privacy and freedom of association which should not lightly be restricted by the state. As one commentator notes, "any regulation by the bar of

attorney-client sexual relations must account for the complex variety of relationships that can and do exist between attorneys and their clients." William K. Shirley, "Dealing with the Profession's Dirty Little Secret: A Proposal for Regulating Attorney-Client Sexual Relationships," 13 GEO.J. LEGAL ETHICS 131, 133 (1999).1

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

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

4 Rule 1.3 Diligence
(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

5 A lawyer may be disinclined to provide bad news to a client about their legal matter while the lawyer is having a sexual relationship for fear of losing the personal sexual relationship. In that situation, the lawyer's personal interests in continuing the sexual relationship could materially limit the legal representation and create a conflict of interest under Rule 1.7 (a)(2). See the discussion of conflicts of interest beginning at p.5 of this opinion.

6 A fiduciary relationship arises from principles of common law. As stated by the Supreme Court in 1850, "There are few business relations of life involving a higher trust and confidence than those of attorney and client, or generally speaking one more honorably and faithfully discharged, few more anxiously guarded by the law or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment of prejudice of the rights of the party bestowing it." *Stockton v. Ford*, 52 U.S. (11. How) 232, 247 (1850); *see also Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992) (citing *Stockton* with approval); *In re Education Law Center, Inc.*, 86 N.J. 124, 429 A.2d 1051 (1981) (same); 98 A.L.R. 2d 1235 (1964) (collecting cases).

7 *See* ABA Formal Op. 92-364, *supra*, noting that an individual client, in particular: is likely

to have retained a lawyer at a time of crisis; the divorce client's marriage is disintegrating; the criminal client may have just been arrested and could be facing the possibility of jail; the probate client is dealing with the loss of a loved one; the immigration client may fear deportation; a client may be trying to save a business or salvage a reputation; the corporate employee's job may be on the line, depending on the outcome of the transaction or litigation.

[8] *See* note 4, *supra*.

[9] Rule 1.8 Conflict of Interest: Prohibited Transaction

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(b) A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

[10] Rule 1.7 Conflict of Interest: General Rule
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[11] *See* note 12, *infra*.

[12] A client may not feel free to rebuff a lawyer's unwanted advances for fear the rejection will reduce the lawyer's attention to the case or cause the client to find a new lawyer. *See*, e.g., Virginia State Bar v. Wade Trent Compton, CL08-172 (Cir, Ct. Dickenson Co. (2009) and related "Gilbert article," *supra* at n.1. Mr. Compton stipulated in an agreed disposition that he engaged in sexual conduct with clients while employed at a licensed legal aid society. On December 15, 2008, a three-judge panel of the Dickenson County Circuit Court suspended Wade Trent Compton's license to practice law for five years with terms for violating professional rules that govern conflict of interest and misconduct that involves a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Clients in emotionally traumatic domestic relations and criminal cases may be psychologically distressed, weakened and vulnerable, and the lawyer can become a powerful figure who can victimize the client by exploiting the weakness. *See* Matter of Berg, 955 P.2d 1240 (Kan. 1998) (attorney disbarred). *See also* In re Landry, M.R. 14025, 95 CH 446 (Ill. Nov. 25, 1997) (lawyer took advantage of emotionally troubled divorce client the day before a hearing by having sexual relations with the client); Otis' Case, 609 A.2d 1199, 1203 (N.H. 1992) (attorney disbarred); Alaska Bar Ass'n Ethics Op. 92-6 (October 30, 1992).

[13] Rule 1.7 Comment [10]: A lawyer may not allow business or personal interests to affect representation of a client .... A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.

[14] *See* Rule 3.7, which requires that a lawyer terminate representation if the lawyer is likely to be called as a witness against his client.

[15] Rule 1.7 Conflict of Interest: General Rule

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

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

[17] Rule 1.10 Imputed Disqualification: General Rule
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

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

[19] Rule 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

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

Other Sources:

Crimes of a sexual nature violate Rule 8.4(b). *See, e.g., People v. Bauder*, 941 P.2d 282 (Colo. 1997) (lawyer solicited prostitution during telephone call to client's wife by offering to pay wife and client's girlfriend for sexual rendezvous); *In re Hall*, 761 S.E.2d 51 (Ga. 2014) (sexual battery against client); *In re Holloway*, 469 S.E.2d 167 (Ga. 1996) (felonious invasion of privacy arising from surreptitious videotaping of secretary in bathroom); *In re Conn*, 715 N.E.2d 379 (Ind. 1999) (child pornography conviction); *In re Haecker*, 664 N.E.2d 1176 (Ind. 1996) (six counts of voyeurism for videotaping neighbors through holes drilled in their bathroom and bedroom walls); *Roberts v. Ky. Bar Ass'n*, 245 S.W.3d 207 (Ky. 2008) (indecent exposure); *Ky. Bar Ass'n v. Martin*, 205 S.W.3d 210 (Ky. 2006) (sexual assaults against employee and client); *In re Boudreau*, 815 So. 2d 76 (La. 2002) (smuggling and possessing child pornography); *State ex rel. Counsel for Discipline v. Cording*, 825 N.W.2d 792 (Neb. 2013) (public indecency); *State ex rel. Okla. Bar Ass'n v. Wilburn*, 142 P.3d 420 (Okla. 2006) (misdemeanors involving inappropriate sexual contact with female courthouse security guards); *In re Hassenstab*, 934 P.2d 1110 (Or. 1997) (nonconsensual sexual contact with clients); *In re Parrott*, 480 S.E.2d 722 (S.C. 1997) (assault and battery for pulling down woman's bathing suit at beach); *see also State ex rel. Okla. Bar Ass'n v. Olmstead*, 285 P.3d 1110 (Okla. 2012) (judge downloaded obscene materials on state-issued computer). Also see the following section on violent crimes.

8.4 and Disparagement

PUBLISHING CRITICISM OF OTHER ATTORNEYS, NY Eth. Op. 912 (N.Y.St.Bar.Assn.Comm.Prof.Eth.) March 15, 2012

QUESTION

1. May a lawyer host or participate in an internet blog established as a forum for lawyers to recount their experiences in dealing with an adversary whose past professional conduct is considered by them to have been unethical, harassing or abusive?

OPINION

2. Although Rule 8.2 of the New York Rules of Professional Conduct (the "Rules") expressly addresses lawyer criticism of judges ("A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office"), there is no comparable provision that specifically addresses public criticism of a lawyer by a lawyer. Therefore, any ethical restraint on such expression would, under the Rules, necessarily derive from the more general provisions of Rule 8.4(c), prohibiting a lawyer

from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentations", or Rule **8.4** (d), prohibiting a lawyer from engaging in conduct that is "prejudicial to the administration of justice."

3. Assuming that the blog criticism is sufficiently accurate and in context not to run afoul of Rule **8.4**(c), the question is whether there are any limitations arising from Rule **8.4**(d) on a lawyer's factually sustainable public criticism of another lawyer. We believe there are none. Still, we add two observations:

4. First, the "Standards of Civility" adopted for the Uniform Court System provide: "Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony towards other counsel, parties or witnesses." 22 NYCRR part 1200, App. A, I(B). Although these standards are aspirational, and not intended as rules to be enforced by sanction or disciplinary action, they nonetheless elaborate a norm of acceptable behavior that excludes gratuitous vulgarity, disparagement and vituperation. We also urge the inquirer "to avoid petty criticisms, and to make critical statements only when motivated by a desire to improve the quality of ... the legal system in general, and then to present his [or her] views only in a temperate, dignified manner." *Cf.* N.Y. City 1996-1 (holding a lawyer may write an article containing well-founded criticisms of a sitting judge for abusive and intemperate trial conduct, notwithstanding that New York State Commission on Judicial Conduct found no cause for pursuing an investigation into the same allegations of misconduct).

5. Second, Rule 8.3(a) imposes a reporting requirement upon a lawyer who "knows that another lawyer has committed a violation of the Rules ... that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." To the extent that the negative information to be published about an attorney's professional conduct is both significant and truthful, Rule 8.3(a) may require reporting such misconduct to a "tribunal or other authority empowered to investigate or act upon such violation."

CONCLUSION

6. The Rules of Professional Conduct do not prohibit a lawyer from hosting or participating in a blog dedicated to publishing factually accurate criticism of another lawyer's professional conduct.

IN RE: JOHN S. KEATING, Board of Bar Overseers Office of the Bar Counsel, Massachusetts Bar Disciplinary Decisions and Admonitions, NO. BD-2016-035, May 4, 2016

John S. Keating, the respondent, was admitted to the bar of the Commonwealth on June 20, 1996. On April 4, 2016, he was suspended for two months, on a condition specified below, for the following misconduct.

On December 15, 1999, the respondent admitted to sufficient facts in the Plymouth District Court to one count of assault and battery in violation of G. L. c. 265, § 13A. The facts were that the respondent slapped his wife in the face during an argument. The matter was continued without a finding until June 15, 2000, on which date the matter was dismissed. The respondent failed to report the conviction to bar counsel within ten days, as required by S.J.C. Rule 4:01, § 12(8).

On August 29, 2013, the respondent admitted to sufficient facts in the Plymouth District Court to two counts of violation of an abuse prevention order in violation of G. L. c. 209A, § 7. The facts were that the respondent sent his ex-wife text messages that violated an abuse prevention order in that they went beyond arranging for visitation, disparaged the ex-wife and included a veiled threat of violence. The matter was continued without a finding until August 28, 2015, on condition that the respondent "abide by 209A."

On September 10, 2013, the respondent was arrested for violation of the abuse prevention order. On October 11, 2013, he pleaded guilty in the Plymouth District Court to one count of violation of the abuse prevention order in violation of G. L. c. 209A, § 7. The basis of the plea was that the respondent sent the ex-wife a number of additional text messages disparaging the ex-wife and went to the ex-wife's home to drop off their child's pet. The respondent also admitted to a violation of probation in the prior matter. On both matters, he was placed on supervised probation until August 28, 2015, and ordered to undergo anger management counseling.

The respondent's criminal conduct violated Mass. R. Prof. C. **8**.**4**(b) and (h). His failure to report the 1999 conviction to bar counsel violated S.J.C. Rule 4:01, § 12(8), and Mass. R. Prof. C. **8**.**4**(d). His violation of probation violated Mass. R. Prof. C. 3.4(c) and **8**.**4**(d) and (h).

In mitigation, the respondent suffers from Attention Deficit Disorder and Obsessive Compulsive Disorder, which were exacerbated in the summer of 2013 by an ongoing dispute with his ex-wife over financial issues, thereby impairing his judgment. The dispute was subsequently resolved and the ex-wife allowed the abuse prevention order to lapse. The respondent complied with all probationary terms, including anger management counseling.

After formal disciplinary proceedings were instituted, the parties filed with the Board of Bar Overseers a stipulation on February 9, 2016. The respondent admitted his misconduct as described above. The parties agreed that the respondent be suspended for two months, on condition that prior to reinstatement he provide bar counsel with a current report from a therapist to assure that his ADD and OCD are under control.

***2** On March 7, 2016, the board voted unanimously to accept the stipulation of the parties

and to recommend that the respondent be suspended for two months on the condition stated in the stipulation. On April 4, 2016, the Supreme Judicial Court for Suffolk County (Hines, J.) so ordered.

Other Sources

In re Fletcher, 424 F.3d 783 (8th Cir. 2005) (pattern of unprofessional conduct "in an attempt to harass, humiliate and intimidate deponents and their counsel" by, for example, """""selectively quoting deposition testimony in a way that grossly mischaracterized deponents' statements"); *People v. Maynard*, 275 P.3d 780 (Colo. 2010) (lawyer threatened to sue subpoenaed witnesses in attempt to keep them from testifying); *In re Abbott*, 925 A.2d 482 (Del. 2007) (briefs containing personal attacks against opposing counsel and implying court was biased against client); *Fla. Bar v. Norkin*, 132 So. 3d 77 (Fla. 2014)(letters, e-mails, and public insults intended to disparage and humiliate opposing counsel); *In re Moore*, 665 N.E.2d 40 (Ind. 1996) (lawyer grabbed opposing counsel's tie and hit him hard enough to send him across table); *In re Greenburg*, 9 So. 3d 802 (La. 2009) (two lawyers exchanged vulgarities in open court, then fell to floor when one lawyer grabbed other); *In re Moran*, 42 A.D.3d 272 (N.Y. App. Div. 2007) (lawyer posted on website information about confidential investigation into conduct of rival law firm); *In re Golden*, 496 S.E.2d 619 (S.C. 1998) (insulting and degrading comments to adverse party during deposition); *see also In re Jaques*, 972 F. Supp. 1070 (E.D. Tex. 1997) (lawyer assaulted opposing counsel in courtroom during trial recess and engaged in abusive and disruptive behavior during his own deposition); *In re Vincenti*, 704 A.2d 927 (N.J. 1998) (prolonged course of personal attacks on opponents; court rejected lawyer's claim he merely engaged in aggressive lawyering on behalf of his clients).

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