

NO SEX, PLEASE, WITH CLIENTS

By

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Effective July 1, 1994, the Minnesota Supreme Court implemented a new rule of professional conduct that proscribes sex with a current client. The text of the new rule, Rule 1.8(k), Minnesota Rules of Professional Conduct, appears herein. Minnesota joins Oregon as states that utilize a per se approach to regulate sexual relationships between a lawyer and a current client.[Ftn 1](#)

The issue of how best to regulate consensual lawyer-client sexual relations has engendered considerable debate in Minnesota and around the country in the last several years.[Ftn 2](#) There is little disagreement, however, that such relationships need to be regulated. In Minnesota, as elsewhere, the existing rules of professional conduct have been used in the past to regulate consensual lawyer-client sex. A conflict of interest analysis, using Rule 1.7(b), prohibiting representation which may be "materially limited by the lawyer's own interests," has been the basis of nine admonitions (private discipline) issued to eight lawyers in the last five years addressing consensual sexual relationships with clients.[Ftn 3](#)

Utilizing the general conflict of interest rules, however, did not provide clarity to the bar or to the public that sexual relations with a client were even covered by the rule, let alone where the line was to be drawn. One lawyer, privately disciplined for attorney-client sex, told the Director's Office during its investigation of the client's complaint that he had "carefully checked the rules and case law" and did not believe his sexual relationship would violate the rules.

The incidence of lawyer-client sexual relationships is difficult to document, and discipline statistics are a poor basis on which to judge. There are many reasons why a client would be reticent about complaining, including fear of publicity and embarrassment, coupled with the lack of knowledge as to whether such conduct is even prohibited under the rules. In 1993 the *Memphis State University Law Review* published the results of a random nationwide study of lawyer sexual involvement with clients.[Ftn 4](#) Seven percent of the attorneys responding to the random anonymous survey acknowledged that they had had a sexual relationship with a client. Thirty-two percent knew of another lawyer who had engaged in sexual relations with a client. The survey results thus indicate that lawyer-client sexual liaisons occur much more frequently than indicated by the discipline statistics.

The per se approach to regulation of lawyer-client sex adopted by the Minnesota Supreme Court has a number of advantages. The rule invites compliance because it is clear about what conduct is prohibited. By contrast, the conflict of interest analysis required lawyers to exercise independent or objective professional judgment at a time when most individuals would find it difficult to be objective.

A per se approach is consistent with other conflict of interest rules found in the Rules of Professional Conduct. The Court has enacted per se prohibitions in other instances where there exists potential for

abuse of the lawyer-client relationship for the benefit of the lawyer. Rule 1.8(c) bars a lawyer from writing himself or herself or a close family member into his or her client's will. Rule 1.8(d) prohibits a lawyer from negotiating literary or media rights while representing the client. As Prof. Geoffrey Hazard has opined, "If a literary relationship is enough to contaminate a professional relationship, surely a sexual one can be said to do so as well."[Ftn 5](#) Finally, in Rule 7.3, the Court adopted a per se ban as to in-person and telephone solicitation, recognizing the inherent possibility for undue influence or abuse of power.

A per se approach is also consistent with the regulations imposed on other professions. Doctors, psychiatrists, social workers, and other mental health professionals specifically prohibit sexual relations with clients or patients.[Ftn 6](#) While there are of course differences that can be articulated between these professionals and lawyers, it is the similarities that are more striking for purposes of this issue. All of these professional relationships, including the lawyer-client relationship, involve persons who come to the professional for help with a problem; most involve the transfer of confidential information to the professional; all involve to a greater or lesser degree the notion of transference[Ftn 7](#); and all involve some degree of stress for the client or patient.[Ftn 8](#) It is this vulnerability of the client and corresponding power imbalance that necessitates a per se approach to the issue of lawyer-client sex, just as is true for health care professionals.

While the Court has adopted a per se approach, it is not a blanket prohibition infringing on protected privacy rights, or overburdening lawyers. The per se rule does not govern a lawyer's private sexual relationships. It governs whom the lawyer can represent. Lawyers who wish to pursue a sexual relationship with a client can refer the client to another lawyer or postpone the personal relationship until the representation is completed.

Sexual relationships that predate the lawyer-client relationship are not prohibited. While there are circumstances where it might be unwise for a lawyer to represent an intimate partner, just as it might be unwise to represent a family member, such relationships do not raise the same issues of power imbalance and dependency as occur when the lawyer-client relationship precedes the intimate relationship. Protection of the client in those circumstances is adequate under Rule 1.7(b). The rule also recognizes the difficulty in clearly identifying the client for governmental entities and in-house corporate counsel. So as not to be overbroad, the rule exempts lawyers in such circumstances, and makes specific the application of Rule 1.7(b).

The MSBA and the Lawyers Board were united in their petitions to the Court to adopt an explicit rule to provide clear notice to lawyers and the public as to what is prohibited conduct with respect to sexual relationships with clients. The road to the per se rule adopted by the Court has been marked by twists and turns as the issues have been debated and deliberated by both the Board and the Bar. The Board commends the diligent work of the MSBA to develop a consensus for an explicit rule.

NOTES

¹ Oregon's rule is found at DR 5-110, Code of Professional Responsibility. New York state's First Judicial Department has recently adopted a per se approach to regulating sex with clients for matrimonial lawyers.

² California is the only other state to date to have adopted a rule regulating sex with clients. California's rule 3-120 prohibits sexual relations with a client if the relationship is "incident to or as a condition of the professional relationship," or is a result of "coercion or undue influence," or if the relationship would cause the representation to be performed "incompetently." Other states which are still considering how best to regulate lawyer-client sexual relations include: Florida, Illinois, Washington and Wisconsin. Arizona and New Hampshire have considered the issue and determined to adopt no specific rule at this time. In Formal Opinion 92-364, the American Bar Association addressed the issue of sexual relationships with clients, and suggested that because of the "danger of impairment to the lawyer's representation associated with a sexual

relationship . . . the lawyer would be welladvised to refrain from such a relationship." American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 92-364, July 6, 1992, at 9.

³ While many practitioners believe that the problem is centered around family law clients, due to the increased vulnerability of those clients, it is interesting to note that of the nine admonitions issued, five were in other areas of law: probate, real estate, personal injury and criminal law.

⁴ Dan Murrell, J. L. Bernard, Lisa Coleman, Deborah O'Laughlin and Robert Gaia, "Loose Canons -- A National Survey of Attorney-Client Sexual Involvement: Are There Ethical Concerns?" *Memphis State Law Review*, 23:483. The responses to the 1,500 attorney survey generated a profile generally consistent with that of the bar. (p.488. n.31).

⁵ Geoffrey Hazard, "Lawyer-Client Sex Relations Are Taboo," *National Law Journal*, April 15, 1991, p. 14.

⁶ See Minn. Stat. §147.091 (physicians and surgeons, osteopaths); Minn. Stat. Section 148.01 et. seq. (psychotherapists); Minn. Stat. §148B.68 et. seq. (social work, marriage and family therapy, and mental health professionals).

⁷ Because the client invests the lawyer with a great deal of power and authority, the lawyer has a unique ability to influence the client and a corresponding responsibility to refrain from any action that would harm either the client or the client's legal matter. The power imbalance and confidence given to the lawyer as a professional may extend to confidence in the lawyer as a person as well. This phenomenon is called transference.

⁸ See e.g. Thomas Gutheil, M.D., Linda Jorgenson, Pamela Sutherland, "Prohibiting Lawyer-Client Sex," *Bulletin of the American Academy of Psychiatry and Law*, Vol. 20, #4 (1992), p. 365.