

SEXUAL HARASSMENT AND DISCIPLINE

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On August 26, 1988, The Minnesota Supreme Court reprimanded Dean Geoffrey Peters “to assure the public and warn the practicing lawyer that it cannot condone such [sexually harassing] conduct by an attorney. . . .” In July, when the Court suspended Judge Alberto Miera, it also reprimanded him as a lawyer, because his “conduct adversely reflects on his fitness to practice law. . . .” Despite the clear message of these cases, the regulation of lawyer sexual harassment is currently uncertain, in part because the rule under which Miera and Peters were reprimanded is no longer in effect.

Effective September 1, 1985, the Minnesota Supreme Court replaced the Code of Professional Responsibility with the Rules of Professional Conduct. Peters and Miera were reprimanded for pre-1985 violations of a provision of the Code, DR 1-102(A)(6), which forbade a lawyer to “. . . engage in any other conduct that adversely reflects on his fitness to practice law.” The successor to 1-102(A)(6) is Rule 8.4(b), which forbids a lawyer to “commit a *criminal* act that reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” The rules did not carry forward DR 1-102(A)(3), forbidding a lawyer to “engage in illegal conduct involving moral turpitude.” Those interested in Minnesota lawyer professional responsibility must now consider proposing to the Court a rule proscribing noncriminal sexual harassment.

The *Peters* decision makes clear that regulations against sexual harassment should be broadly drawn. Neither a criminal violation nor a “formal adjudication that conduct is illegal” is needed for discipline. Both “quid pro quo” and “hostile environment” employment harassment may be found unprofessional. Neither an employment relationship nor an attorney-client relationship is required for discipline.

To “clarify the limits” of the broad principles of *Peters*, Justice Popovich wrote a concurring opinion. The concurrence notes the difficulty in drawing the right lines between acceptable and unacceptable social interactions in the workplace. Also noted is the need to establish a connection between non-criminal, non-client-related sexual misconduct and fitness to practice law. The challenges to precise rulemaking in this area seem formidable.

What form should a new Rule of Professional Conduct against sexual harassment take? Should the proscription also include racial, religious, and other grounds? Should the rule also forbid lawyers to discriminate? Discrimination is a broader concept than harassment.

There are few models in other states for Minnesota to consider. Vermont has a rule against lawyer discrimination, but it is limited to employment situations. New York and Florida are considering rules against discrimination by lawyers.[Ftn 1](#) Should disciplinary investigations and proceedings regarding complaints of sexual harassment and the like be deferred pending proceedings before the Human Rights

Department and the civil courts? The questions are difficult and hard to limit. Several states have issued ethics opinions that attorney-client sex violates professional rules in some situations.[Ftn 2](#)

Should there be a rule against attorney-client sexual relationships in certain situations? Most attorney discipline cases for sexual misconduct have involved criminal offenses. However, doctors and psychologists have rules flatly forbidding such relations. Improper sexual relationships are a dominant theme of recent Minnesota judicial discipline. One author recently reviewed the considerable literature on the subject, and advocated as a new rule, “A lawyer shall not engage in any sexual relations with a divorce client during the lawyer-client relationship.”[Ftn 3](#)

Would it be better to return to a “catchall” rule like the old 1-102(A)(6)? DR 1-102(A)(6) was not included in the ABA Model Rules because of concern for lack of fair notice to attorneys. Doctors, judges, and other professionals have broad “conduct unbecoming” rules. Twenty years ago Justice White opined that,

[M]embers of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment . . . [including] conduct which all responsible attorneys would recognize as improper for a member of the profession.[Ftn 4](#)

The catchall approach, however, regulates far more than harassment; indeed it means to regulate conduct not specifically contemplated by rule-drafters. Is this too much regulation?

Broad questions of social philosophy are involved in crafting the right rules. On one hand there is a trend toward increased legal protections for the vulnerable, including victims of sexual harassment and other invidious discrimination. However, there is also a powerful trend toward forcing government retreat from regulation of people’s private affairs, and particularly consensual sexual activity.[Ftn 5](#)

It is difficult to balance concerns for lawyer fitness and protecting the vulnerable against concerns with privacy, fair notice, and over-regulation. In several private discipline matters involving sexual relations between Minnesota attorneys and clients, the balance has been struck by focusing on the vulnerability of the complainant. Thus an attorney, who had a sexual relationship with a divorce client with a history of mental illness, was disciplined for a conflict between his personal interest and her legal and personal interests.

The Court emphasized both the special vulnerability of the persons harassed and the power and special responsibility of Dean Peters and Judge Miera. These themes have also been sounded in other states’ disciplines of lawyers for sexual misconduct.[Ftn 6](#)

Sorting through these difficult questions will take time and the thoughtful contributions of many groups and individuals. The Minnesota State Bar Association has appointed a committee of lawyers and nonlawyers to study these matters and make recommendations. The committee, chaired by Bloomington lawyer Phil Arzt, includes several Lawyers Board members. It will be soliciting the comment of interested persons, with the expectation of completing its work next spring.

NOTES

¹ *The Vermont rule provides, “A lawyer shall not discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, place of birth or age, or against a qualified handicapped individual in hiring, promoting, or otherwise determining the conditions of employment of that individual.”*

The New York high court is considering a petition for a rule similar to Vermont's. The Florida bar met on September 9 to consider what rule, if any, to recommend to its court.

Wisconsin has used its general rule SCR 21.05 as a basis for disciplining attorneys for sexual misconduct. Rule SCR 21.05 provides:

Grounds for Discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates: '... (5) A standard of professional conduct as defined by the supreme court by rule, order or decision.'

Previous Wisconsin Supreme Court decisions are thus a basis for future discipline.

² *Or. ethics op. No. 476* (June 20, 1982); *Cal. Formal op. 1987-1992*; *Md. ethics op. No. 84-9* (September 7, 1983); *Alaska Bar Assn. Ethic Com., op. 88-01* (January 29, 1988).

³ *Dubin, Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 *Geo. J. Leg. Ethics* 585 (1988). Most lawyer discipline in sexual matters occurs in family law cases, but there are also criminal cases and other contexts. See Annot. *Sexual Misconduct as Ground for Disciplining Attorney or Judge*, 483 *A.L.R. 4th* 1062 (1986), *Comment*; *Disciplining Attorneys for Non-Professional Conduct Involving Alcohol and Sex*, 1975 *Ariz. St. L.J.* 411.

⁴ *In re Ruffalo*, 390 *U.S.*, 544, 555 (1968).

⁵ See *In re Agerter*, 353 *N.W.2d* 908 (Minn. 1984) (judge's right of privacy outweighed Judicial Board's interest in investigating alleged private adulterous relationship). See also Rule 8.4, *R. Prof. Con., Comment*, indicating that the professional responsibility system should not be involved in discipline even of criminal conduct in ". . . some matters of personal morality, such as adultery and comparable offenses, . . . [which] have no specific connection to fitness for the practice of law."

⁶ See e.g. *In re Littleton*, 719 *S.W.2d* 772, 776 (Mo. 1986); *Disciplinary Proceedings Against Gibson*, 369 *N.W.2d* 695, 699-700 (Wis. 1985); *People v. Gibbons*, 685 *P.2d* 168, 175 (Colo. 1984); *Matter of Adams*, 428 *N.W.2d* 786, 787 (Ind. 1981); *Com. on Prof. Ethics v. Durham*, 279 *N.W.2d* 280, 284-285 (Iowa 1979).