

# Proposed Rule 1.8(k) Banning Sexual Relations with Clients

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# The Proposed Rule 1.8(k)

- A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
- Recommended by Standing Committee on Legal Ethics.
- Published for Comment
- Not yet presented to Council and/or SCV for review.
- 43 States have adopted rules or comments explicitly prohibiting sexual relations with clients.
- The VA RPC contains no language addressing this issue.

# VA Legal Ethics Op. 1853 (2009)

- If a sexual relationship develops during the attorney-client relationship, the lawyer risks more probable ethical breaches and in most instances forms the basis for lawyer discipline.
- Lawyer must not use the fiduciary relationship to influence client to have sexual relations.
- 1<sup>st</sup> time the Ethics Committee addressed the issue of lawyer-client sexual relationships. Citing ABA Formal Op. 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.”

# *In the Matter of Sterling H. Weaver, Sr., VSB Docket No. 97-010-0846 (VSB Disc. Bd. 1997).*

- 1<sup>st</sup> Case before the VSB Disciplinary Board to address the issue of a lawyer having a sexual relationship with a client. Lawyer had sex with the client in his office during one-hour consultation.
- The client testified that she did not consent, but she did not cry out or object because she “did not believe this was happening to her.” [there were other clients waiting outside Weaver’s office]. Weaver claimed the sexual intercourse was consensual and the Board made a finding of fact that it was. Mr. Weaver’s defense was “that sexual conduct between two consenting adults, even in the context of an attorney-client relationship is a private matter and no concern of the Virginia State Bar.”
- The Board issued a Public Reprimand.

# Reasons why Rule 1.8(k) is necessary

- Sexual relationship during the professional engagement damages the lawyer's objectivity and independent professional judgment.
- There is an imbalance of power in the attorney-client relationship and therefore the opportunity for exploitation and overreaching.
- Clients consult with lawyers during times of crisis, emotional stress and vulnerable to coercion; consent is in fact not true, volitional, or uncoerced.
- Sex with clients undermines the integrity of the profession as a whole.

# Reasons why Rule 1.8(k) is necessary

- Sex with clients violates the trust and confidence of the professional relationship; calls into question the lawyer's ability to fulfill fiduciary duties.
- Disciplinary cases in VA focus too narrowly on whether the sexual relationship has adversely affect the legal representation without consideration of any emotional or mental harm to the client even in the absence of any harm to the legal representation.
- Protection of the fiduciary relationship between attorney and client outweighs the lawyer's interest in having sex with a client *during the professional relationship*.
  - If the lawyer wants to have an intimate relationship with the client, the lawyer can withdraw from the professional relationship and pursue the personal relationship.

# Arguments Against a Per Se Rule

- Existing rules and professional regulation of lawyers is adequate to address the problem. This is a solution in search of a problem.
- Consensual Sexual Relations may pose a potential conflict of interest but most conflicts can be cured by informed consent.
- Per se rule is overly broad and unwarranted intrusion by the bar into personal life and choices made by two consenting adults.
- The term “sexual relations” is too vague and needs to be defined.
- Rule should not ban sexual relations with in-house counsel or corporate officer
- If lawyer had a close intimate relationship (without sex) before the professional relationship the rule should not ban sexual relations once the professional relationship has begun.

# Possible Definition of “sexual relations”

- For purposes of this rule, "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.

# The Mental Health Professions

- Universally condemn sexually relationships as “exploitive.”
- Psychiatrist Peter Rutter: “the forbidden zone”--the factors of power, trust and dependency remove the possibility of the client freely consenting to sexual contact, because the lawyer has the greater power. Therefore, the responsibility is on the lawyer to guard this "forbidden boundary.” Peter Rutter, *Sex in the Forbidden Zone* 28 (1989).
- The American Psychiatric Association expressly states in its code of ethics that “. . . sexual contact with a patient is unethical.” Am. Psychiatric Ass’n, *Principles of Medical Ethics With Annotations Applicable to Psychiatry* §2 at 1 (1986).

# The Mental Health Professions

- The American Psychiatric Association expressly states in its code of ethics that ". . . sexual contact with a patient is unethical." *Am. Psychological Ass'n, Ethical Principles of Psychologists* §6(a) (1991).
- The National Association of Social Workers has adopted a code which states that "The social worker should under no circumstances engage in sexual activities with clients." *Nat'l Ass'n of Social Workers, Code of Ethics* §II(F)(5)(1980)
- The ancient Hippocratic Oath still demanded of all physicians entering the practice states: "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 seduction, and especially from the pleasures of love with men and women . . ." *Stedman's Medical Dictionary* 650 (24<sup>th</sup> Ed. 1982).

# The Medical and Mental Health Professions

- Notwithstanding this clear prohibition, sexual involvement with patients is a leading cause of malpractice claims against psychotherapists.
- The mental health professions have documented evidence in surveys and studies that sexual exploitation of clients causes damage to the therapeutic relationship and to the client directly. Nanette Gartrell, M.D. et al., *Reporting Practices of Psychiatrists Who Knew of Sexual Misconduct by Colleagues*, 57 AM. J. ORTHOPSYCHIATRY 287, 292-93 (1987).
- The American Medical Association (AMA) condemns sex relations between patients and physicians as it jeopardizes patient care. AMA Council on Ethical and Judicial Affairs, Op. 8.14 Sexual Misconduct (1989)

# A Comparison of the Medical and Legal Professions

- The parallel is the fiduciary relationship which both professions share.
  - The professional's expertise
  - The trust and confidence the patient/client places in the professional.
  - The confidential nature of the relationship
  - The relationship is not equal
  - The fiduciary may not overreach, abuse or take personal advantage in any way
  - The fiduciary works solely in the patient's/client's interests

There is ample justification for clear boundaries in the area of sexual relations with clients.

# A Comparison of the Medical and Legal Professions

- Lawyers must recognize that the burden is squarely on the legal profession to demonstrate why its clients are less likely to experience similar damage from such conduct than that which has been clearly shown to be experienced by doctors' patients thus abused. Suggesting that the different nature of the help sought in some way outweighs the identity of trust reposed in the two professions, or the identity of harm caused by any breach of that trust, simply is not credible.
- Anthony E. Davis & Judith Grimaldi, *Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 57 (1993) (stressing the need for a specific rule prohibiting attorney-client sexual relations)

# Conclusion

- The state's interest in regulating the legal profession and client protection outweighs the lawyer's private and personal interest in pursuing a sexual relationship with a current client.
- Having sex with a client during the legal representation undermines the fiduciary relationship.
- An absolute ban on sex between attorney and clients, affords clients complete protection from negative consequences of the sexual relations. The ban may preclude relationships that do not involve problems of overreaching, but this prohibition is temporary, lasting only the duration of the legal relationship. The restriction will only interfere with sexual autonomy, if the sexual relationship and the legal relationship exist contemporaneously.
- The risk of compromising a client's interest, overreaching or manipulating a client for the attorney's self gratification must be avoided.

# Conclusion (cont'd)

- No convincing argument has been advanced by the bar stating why the legal profession should not treat itself in any way differently from the medical, psychotherapy or social work professions.
- Lawyers are (or should be) entitled to no greater constitutional protections than these other professions.
- Nothing in the proposed rule prevents any sexual relationship; what it prohibits is the sexual and professional relationship from *co-existing*.
- Freedom of choice, freedom of association and privacy rights are maintained unimpaired. The attorney (and the client) are merely required to *choose* which relationship is paramount.

# Polling Question—You decide!

- Should Virginia have a rule explicitly prohibiting sexual relations with a client:
- A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
- Please vote “Yes” or “No.”

