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SEX AND THE CLIENT: TEN REASONS TO SAY "NO!"**

HOWARD W. BRILL*

* Professor, University of Arkansas School of Law; J.D., 1970, University of Florida School of Law; LL.M., 1979, University of Illinois School of Law.

** "Sex" is not defined in these notes. The cases include activity up to and including sexual intercourse.

The scope of this piece is very limited. Not included are the related topics of (a) married attorneys practicing in different offices; for a discussion of this topic, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(i); (b) romances within law firms; for a discussion of this topic, see Cheryl Frank, *Office Romances: Dating Grows; So Does Worries*, 70 A.B.A. J. 37 (1984); Mary Ann Galante, *Lawyers in Love Pose Dilemmas for Some Firms*, NAT'L L.J., Sept. 3, 1984, at 1; (c) romantic relations between opposing counsel; for a discussion of this topic, see, e.g., *People v. Jackson*, 213 Cal. Rptr. 521 (Ct. App. 1985) (where a new trial was granted because the criminal defendant did not know that his lawyer was dating the prosecutor); note, *Lawyers as Lovers: How Far Should Ethical Restrictions on Dating or Married Attorneys Extend?*, 1 GEO. J. LEGAL ETHICS 433 (1987); (d) romances between lawyers and the spouses of clients; for a discussion of this topic, see, e.g., *Sikes v. Segers*, 587 S.W.2d 554 (Ark. 1979); (e) sexual contact in an academic environment; for a discussion of this topic, see, e.g., *In re Discipline of Geoffrey Peters*, 428 N.W.2d 375 (Minn. 1988) (law school dean reprimanded for sexual harassment of female employees and students); (f) relationships that offend the moral or statutory law; for a discussion of this topic, see, e.g., *Dayton Bar Ass'n v. Sams*, 535 N.E.2d 298 (Ohio 1989) (attorney solicited a female client for sexual intercourse in return for a waiver of his legal fees and received a six month suspension); see also *In re Complaint as to the Conduct of Howard*, 681 P.2d 775 (Or. 1984) (attorney reprimanded after misdemeanor prostitution conviction for providing legal services in return for sexual conduct).

This article also does not include any discussion of relationships of an entirely different nature, namely those in which the client is non-consenting. E.g., *Florida Bar v. Samaha*, 557 So.2d 1349 (Fla. 1990) (lawyer suspended for one year for deceiving personal injury client into undressing, taking embarrassing photos, and touching the client); *In re Darrell Adams*, 428 N.E.2d 786 (Ind. 1981) (attorney reprimanded for grabbing client, kissing her and raising her blouse); *In re Sheldon M. Liebowitz*, 516 A.2d 246 (N.J. 1985) (where the client did not truly consent to the sexual advances of an assigned attorney whose position involved an inherent element of coercion, the attorney was reprimanded); *In re Disciplinary Proceedings Against Gibson*, 369 N.W.2d 695 (Wis. 1985) (repeated unsolicited sexual advances of a verbal and physical nature merited 90 day suspension).

Further, two caveats should be kept in mind while reviewing this piece. First, dissenting judges frequently call for tougher or lengthier discipline of the attorney. See, e.g., *In re Lewis*, 415 S.E.2d 173 (Ga. 1992); Committee on Prof. Ethics and Conduct of the Iowa State Bar Ass'n v. Hill, 436 N.W.2d 57 (Iowa 1989); *In re Disciplinary Proceedings Against Gibson*, 369 N.W.2d 695 (Wis. 1985). Second, charges against an attorney frequently encompass non-sexual related charges. See, e.g., *People v. Gibbons*, 685 P.2d 168 (Colo. 1984) (conflict of interest); *In re Disciplinary Proceedings Against Gibson*, 369 N.W.2d 695 (Wis. 1985) (deceit in bankruptcy court).

See generally Gregory Sarno, Annotation, *Sexual Misconduct as Ground for Disciplining Attorney or Judge*, 43 A.L.R.4th 1062 (1986); Robert Simpson, *Sexual Misconduct as*

1. The lawyer may be censured,¹ reprimanded,² suspended,³ or

Ground for Disciplinary Action Against Attorney, 36 A.L.R.3d 375 (1971). For more extensive (and traditional) treatment of this subject, see Lawrence Dubin, *Sex and the Divorce Lawyer - Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585 (1988); Marvin H. Firestone & Robert I. Simon, *Intimacy Versus Advocacy: Attorney-Client Sex*, 27 TORT & INS. L.J. 679 (1992); Caroline Forell, *Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues*, 22 GOLDEN GATE U. L. REV. 611 (1992); Linda Jorgenson & Pamela K. Sutherland, *Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact*, 45 ARK. L. REV. 459 (1992); Yale Levy, *Attorneys, Client and Sex: Conflicting Interests in the California Rule*, 5 GEO. J. LEGAL ETHICS 649 (1992); Thomas Lyon, *Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?*, 10 HARV. WOMEN'S L.J. 159 (1987); John M. O'Connell, Note, *Keeping Sex out of the Attorney-Client Relationship: A Proposed Rule*, 92 COLUM. L. REV. 887 (1992).

1. See, e.g., *People v. Zeilinger*, 814 P.2d 808 (Colo. 1991) (public censure of attorney who engaged in a sexual relationship with a divorce client; the potential for harm to the client was substantial and obvious).

2. See, e.g., *Committee on Prof. Ethics and Conduct of the Iowa State Bar Ass'n v. Durham*, 279 N.W.2d 280 (Iowa 1979). A female attorney who engaged in kissing, embracing, caressing, and fondling an incarcerated client was publicly reprimanded. *Id.* at 286. Since the female attorney had signed into the prison in a professional capacity, her conduct reflected adversely on her fitness to practice, was not "temperate and dignified," and demonstrated "professional impropriety." *Id.* at 285.

See also *Office of Disciplinary Counsel v. Rassing*, 559 N.E.2d 1359 (Ohio 1990). An attorney engaged in numerous sexual encounters with a female client seeking divorce. *Id.* The attorney's conduct reflected poorly on his fitness to practice law and warranted a public reprimand. *Id.* Although he did not charge for his legal services, the evidence did not demonstrate they were exchanging legal and sexual services on a quid pro quo basis. *Id.*

See also *In re McDow*, 354 S.E.2d 383 (S.C. 1987). A male attorney had a sexual relationship with a client seeking a divorce. *Id.* The divorce was granted to her husband on the ground of adultery. *Id.* at 384. The attorney received a public reprimand. *Id.* The relationship damaged or prejudiced the client, had the appearance of impropriety, and was prejudicial to the administration of justice. *Id.*

3. See *In re Lewis*, 415 S.E.2d 173 (Ga. 1992). An attorney had an on-going sexual relationship for several years with a woman, and subsequently commenced representation of the woman in a contested divorce and custody action. The attorney was suspended for three years. *Id.* at 175. Three judges mentioned they would have disbarred the attorney, stating that "[e]very lawyer must know that an extramarital relationship can jeopardize every aspect of a client's matrimonial case . . ." *Id.*

In another case, an attorney, while representing a female client and her husband in a foreclosure action, had sexual relations with the woman. *In re Wood*, 358 N.E.2d 128 (Ind. 1976). In an unrelated adoption matter, the attorney offered to reduce his legal fees if the client would allow him to take nude photographs of her. *Id.* at 130. The court ruled that the "fee arrangement" and sexual relationship violated Model Code of Professional Responsibility DR 1-102(A)(6) and DR 5-101(A) (1979). *Id.* at 133. The attorney was suspended for at least one year. *Id.*

An attorney had sexual intercourse with a divorce client, who was addicted to drugs and emotionally unstable, and was seeking to repay a personal loan of \$50, was suspended for at least 3 months. *Committee on Prof. Ethics and Conduct of the Iowa State Bar Ass'n v. Hill*, 436 N.W. 2d 57, 59 (Iowa 1989).

In *Drucker's Case*, sexual intimacy with an emotionally fragile client who was seeking a divorce violated Model Rules of Professional Conduct (hereinafter Model Rules) 1.7(b), 1.8(b) and 1.14(a) and resulted in suspension for two years. *In re Drucker*, 577 A.2d 1198, 1202-03 (N.H. 1990). The attorney failed to warn the client that a sexual relationship might have an

disbarred.⁴

2. The lawyer may be denied admission to the practice of law in another state.⁵

adverse affect upon her or her divorce proceedings. *Id.* The attorney violated Model Rule 1.14(a) by engaging in the sexual relationship, thus failing to maintain the normal lawyer-client relationship. *Id.* at 1203.

Other examples include: *In re Rudnick*, 581 N.Y.S.2d 206 (N.Y. App. Div. 1992) (the attorney received a two year suspension for a three year intimate relationship with divorce client which resulted in emotional harm and inadequate representation); *In re Bowen*, 542 N.Y.S.2d 45 (N.Y. App. Div. 1989) (the attorney was suspended for two years for making improper advances to six women and maintaining sexual relationships with some of them while representing them on various domestic relations matters); *In re Wolf*, 826 P.2d 628 (Or. 1992) (the attorney received an 18 month suspension for celebrating a personal injury settlement by renting a limousine, serving wine to 16 year old client and engaging in sexual intercourse in the back seat); *In re Discipline of Bergren*, 455 N.W.2d 856 (S.D. 1990) (the attorney was suspended for one year for having sexual relationships with clients who were led to believe that their fees would be reduced); *In re Disciplinary Proceedings Against Ridgeway*, 462 N.W.2d 671 (Wis. 1990) (an assistant public defender's license was suspended for six months for violation of Model Rule 1.7(b) where he had a brief sexual contact with his client and provided her with beer in violation of her probation terms).

4. In *People v. Gibbons*, 685 P.2d 168 (Colo. 1984), a sixty-six year old attorney was disbarred when he had numerous sexual relationships with his twenty-three year old client, who only had a ninth grade education, during representation of her and her husband for criminal charges, and was also disbarred for other disciplinary rule violations, *Id.* at 175. The client "was placed in a position in which she was unduly dependent on [the attorney] and in which she may not have been able to exercise free choice." *Id.* The court further noted that this violation, standing alone, would have warranted censure or suspension at the minimum. *Id.*

For additional examples, see, *In re Wood*, 489 N.E.2d 1189 (Ind. 1986) (attorney disbarred for reducing legal fees in exchange for sexual services and arranging for minors to appear in pornographic movies); *In re Frick*, 694 S.W.2d 473 (Mo. 1985) (attorney disbarred for having an affair with a divorce client, and subsequently engaged in a campaign of embarrassment, harassment, intimidation, vandalism and violence toward her); *In re Disciplinary Proceedings Against Heilprin*, 482 N.W.2d 908 (Wis. 1992) (attorney who had a lengthy history of, and prior sanctions for, asking intimate sexual questions of clients and making sexual comments to satisfy his own prurient interest, was disbarred).

In *Bourdon's Case*, the attorney's sexual intimacy with a twenty-four year old mother seeking divorce resulted in disbarment. *In re Bourdon*, 565 A.2d 1052, 1059 (N.H. 1989). The attorney in this case violated Model Rule 1.7(b) since he failed to consult or seek consent from his client concerning possible limitations on her case and his ability to represent her. *Id.* at 1057. Model Rule 1.8(b) was violated when the attorney, after inquiring into the client's sexual habits, used the information to acquire a sexual advantage detrimental to his client. *Id.* at 1056. Further, Model Rule 2.1 was violated because the attorney's professional judgment was "clouded" due to his efforts to impress his client. *Id.*

5. In *In re Bellino*, 478 N.W.2d 507 (Minn. 1991), an attorney serving as a legal assistance officer in the United States Marines, who pled guilty to charges of engaging in sexual contact with a female client and indecent assault upon three clients while in the service, was denied admission to the Minnesota Bar. *Id.* at 510. The court stated, *inter alia*, that sexual contacts with clients did not demonstrate the requisite showing of good character and fitness to practice law, and the attorney had failed to present any evidence of reformation or rehabilitation from his misconduct. *Id.* at 509; see also *In re Bellino*, 417 S.E.2d 535 (S.C. 1992) (Marine Corps attorney suspended for six months for making physical advances toward clients

3. The lawyer may be sued for malpractice,⁶ outrage,⁷ fraud,⁸ or RICO.⁹

and subordinates).

6. In *Suppressed v. Suppressed*, 565 N.E.2d. 101 (Ill. App. Ct. 1990), a 40 year old mother of three brought a complaint against her divorce attorney, claiming that numerous sexual encounters initiated by the attorney amounted to legal malpractice. *Id.* at 102. The complaint was dismissed for failure to state a cause of action. *Id.* at 104. The plaintiff alleged that the attorney insisted she inhale a substance from a brown bottle which caused her to "tingle" before she surrendered to his request for sexual intercourse. *Id.* at 103. The court stated an intimate relationship with a client does not constitute malpractice unless sexual favors are made a quid pro quo for legal representation, or unless legal representation was in fact adversely effected. *Id.* at 105. The court held that in determining whether legal representation has been adversely affected, more than emotional harm to the client must be alleged and proven. *Id.* at 106.

See also Rosalind Resnick, *Ex-Bunny Suit*, NAT'L L.J., Oct. 5, 1992, at 2 (an ex-Playboy Bunny sued Miami attorney Anthony Barranco, Jr., alleging that he seduced her during representation, and that as a result, he benefited by excessive legal fees and she was harmed by a less favorable settlement in her divorce action).

7. A lawyer sued his former client for \$2,362 in legal fees incurred in representing her in a divorce. *McDaniel v. Gile*, 281 Cal. Rptr. 242, 244 (Ct. App. 1991). She counter-claimed, alleging malpractice, sexual harassment, and intentional infliction of emotional distress, claiming pecuniary and emotional harm. *Id.* The appellate court found that the allegations of the attorney's sexual inquiries, comments, and advances raised triable issues of fact. *Id.* at 247-50. The lawyer had power or apparent power over her due to her impending divorce, and she was in a particularly vulnerable state. *Id.* at 247. He therefore violated his fiduciary duty to exercise the most conscientious fidelity to her. *Id.* Further, his threat to withhold legal services, unless she complied with his sexual demands, supported a claim for legal malpractice. *Id.* at 249.

8. In *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983), a lawyer's suit for \$1,520 in legal fees was met with a counterclaim alleging fraud. *Id.* at 425. Believing her attorney's statement that he was unable to father a child, the client submitted to sexual intercourse and became pregnant. *Id.* at 426. The resulting ectopic pregnancy caused sterility, financial loss and emotional harm. *Id.* The court refused to dismiss the lawsuit and the trier of fact was asked to evaluate whether a fiduciary or confidential relationship existed between attorney and client, and whether the attorney had exerted undue influence. *Id.* at 432.

9. In a case involving the same attorney as *Suppressed v. Suppressed*, 565 N.E.2d. 101 (Ill. App. Ct. 1990), a client sued her former attorney under the Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO), 18 U.S.C. §§ 1961-1968 (1988). *Doe v. Roe*, 756 F. Supp. 353, 354 (N.D. Ill. 1991), *aff'd*, 958 F.2d 763 (7th Cir. 1992). She alleged that over a five-year period she had submitted to his sexual demands because she feared she would lose his representation and because she was emotionally dependent on him. *Id.* Without notice or disclosure, the attorney induced her into a settlement agreement for his fees and placed a lien on her house. *Id.* at 355. In a letter, he verbally abused her and referred to his "Italian friends" who might witness physical injury to her. *Id.* After she terminated the attorney-client and sexual relationship, he allegedly continued to threaten, harass and intimidate her. *Id.* at 356. The court dismissed the complaint because a RICO violation requires injury to business or property that has been proximately caused by the racketeering acts. Here, the client alleged only physical or emotional injury. *Id.* at 358. The \$7,500 retainer fee did not amount to recoverable damages since the attorney's scheme to defraud occurred after the fee arrangement was made. *Id.* Further, the allegation that the attorney failed to zealously pursue a court order requiring the client's husband to pay additional fees did not amount to recoverable RICO injuries. *Id.* at 359. Since the fees were paid by sexual favors, which were construed as per-

4. The lawyer's conduct may be publicly disclosed.¹⁰
5. The lawyer may lose fees¹¹ or be required to pay the cost of the disciplinary proceedings.¹²
6. The attorney may be disqualified from representation.¹³
7. The lawyer may be assaulted by a third party.¹⁴
8. The client's case may be hampered, impaired or lost.¹⁵
9. The client may allege ineffective assistance of counsel.¹⁶

sonal injuries, not injuries to property, RICO was not available. *Id.*

10. A lawyer was publicly censured for conduct that the court found adversely reflected upon his fitness to practice law. *Courtney v. Alabama State Bar*, 492 So. 2d 1002 (Ala. 1986). When the lawyer's client, a single mother, and her minor child were in the lawyer's office, the lawyer asked her about her dating habits, came behind her, put his arm around her waist, squeezed her on the buttocks, and kissed her on the cheek. *Id.* at 1003.

11. See *In re Marriage of Kantar*, 581 N.E.2d 6, 15 (Ill. App. Ct. 1991). In this case, a divorced woman moved to set aside both her divorce decree, and a corresponding judgment that required her to pay attorneys' fees to her lawyer. *Id.* at 7. She alleged that at least 20 acts of sexual intimacy during the representation rendered her incapable of making meaningful decisions and further alleged that the fees billed included time spent in sexual relations. *Id.* at 9. The appellate court reversed a summary judgment for the attorney and remanded the case for a determination of the merits. *Id.* at 11. A concurring justice wrote that "a domestic relations client ought to be freed of the obligation of paying attorney fees from and after the time that the lawyer has a conflict of interest." *Id.* at 15.

12. See *People v. Gibbons*, 685 P.2d 168 (Colo. 1984) (awarding \$990); *In re Wood*, 358 N.E.2d 128 (Ind. 1976); *In re Disciplinary Proceedings Against Ridgeway*, 462 N.W.2d 671 (Wis. 1990); *In re Disciplinary Proceedings Against Gibson*, 369 N.W.2d 695 (Wis. 1985).

13. See, e.g., *Edwards v. Edwards*, 567 N.Y.S.2d 645 (N.Y. App. Div. 1991) (where husband moved to disqualify attorney who began a sexual relationship with the wife while representing her in the divorce proceedings, the attorney voluntarily withdrew).

14. See *Ohio State Bar Ass'n v. Weisenberger*, 426 N.E.2d 790 (Ohio 1981) (when the husband found his wife and her divorce attorney in a "compromising situation," he assaulted them both, causing the attorney to be hospitalized).

15. In *Howard v. State*, 783 S.W.2d 61 (Ark. 1990), the client pled guilty to kidnapping and robbery charges. *Id.* at 62. She subsequently moved to set aside the guilty plea, alleging ineffective assistance of counsel by her attorney due to his inadequate knowledge of the likelihood of prison time and his sexual relationship with her during the representation. *Id.* Concluding that his extraordinary influence over her had a prejudicial impact upon her, the court set aside her guilty plea. *Id.*

Because of a "social relationship" with his client, an attorney neglected the client's legal problems, and was suspended for 60 days. *In re Disciplinary Proceedings Against Pump*, 355 N.W.2d 248, 250 (Wis. 1984). "Because of the blurring of his attorney-client and personal-social relationships with the client, [the] [a]ttorney . . . should have been especially alert to the problems inherent in the dual relationship, and he should have taken appropriate steps to inform the client what he was or was not doing on her behalf as an attorney." *Id.*

But see Marriage of Lehr, 583 P.2d 1157 (Or. 1978). In this case, the wife left her husband and moved in with her lawyer, who filed a divorce action on her behalf. *Id.* at 1158. Reversing the trial court, the appellate court concluded that despite the conduct of the mother, the best interest of the child dictated that the mother have custody. *Id.*

16. *United States v. Babbitt*, 26 M.J. 157 (Ct. Mil. App. 1988) (a female client's assertion that she had received ineffective assistance of counsel, because she had a voluntary sexual relationship with her defense attorney the evening prior to the final day of her trial, was

10. Four millennia of Western culture teach that sexual activity outside of marriage is immoral and to be discouraged.¹⁷

denied because the relationship caused the attorney to work more diligently or enthusiastically).

17. See, e.g., *Suppressed v. Suppressed*, 565 N.E.2d 101, 104 (Ill. App. Dist. 1990). "The activity involved has been considered a wrong since biblical times." *Id.* at 104.

"An attorney should never have a sexual relationship with a client or opposing counsel during the time of representation." AM. ACAD. MATRIMONIAL LAW, STANDARDS OF CONDUCT § 2.16 (1991). The accompanying comment states:

Persons in need of a matrimonial lawyer are often in a highly vulnerable emotional state. Some degree of social contact (particularly if a social relationship existed prior to the events that occasioned the representation) may be desirable, but a more intimate relationship may endanger both the client's welfare and the lawyer's objectivity.

Id.

The Iowa Supreme Court has stated, "Sexual contact between an attorney and client in a professional context constitutes professional impropriety." Committee on Prof. Ethics and Conduct of the Iowa State Bar Ass'n v. Hill, 436 N.W.2d 57, 59 (Iowa 1989). Justice Greiman, concurring in *In re Marriage of Kantar*, 581 N.E.2d 6 (Ill. 1991), stated, "In Illinois, a divorce lawyer who has sexual intercourse with his client has engaged in a per se violation of rules governing conflict of interest." *Id.* at 13.

The clarity and simplicity of the ancient rule stands in sharp contrast to the exceptions, limitations and obfuscations of ill-advised contemporary efforts to address the problem.

The Alaska Bar Association concludes that a sexual relationship between a client and an attorney is improper in at least six situations: 1) if the client lacks the ability to make a free choice; 2) if legal services are exchanged for sexual favors; 3) if the relationship is prejudicial or damaging to the representation; 4) if the client is emotionally unstable; 5) if the conduct is illegal; or 6) if the sexual relationship and the professional representation are inconsistent. Alaska Bar Ass'n, Ethics Op. 88-1 (1988).

California has tried various drafting techniques to give guidance to lawyers. A 1987 advisory opinion of the State Bar of California evaluated the factors and ultimately rejected any per se ban on sexual relations with a client as "overly broad and unnecessary." Cal. State Bar Comm. Prof. Resp., Formal Op. 1987-92 (1987). The California State Bar proposed a rule in 1991, but the California Supreme Court adopted a modified version in August 1992. Unlike the Bar proposal, the modified version, CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-120, does not create a rebuttable presumption that sexual relations result in incompetent legal representation. *Id.* In September 1992, California enacted a statute providing for attorney discipline if an attorney's sexual relationship caused incompetent legal services. CAL BUS. & PROF. CODE § 6106.9 (West Supp. 1992).

The Oregon State Bar concluded that, at least in divorce proceedings, and even in the absence of any prejudice to the legal representation, sexual relations between the attorney and the client require full disclosure of the potential adverse impact, a recommendation that the client seek independent legal advice, and meaningful consent. Or. State Bar Ass'n, Formal Op. 1991-99 (1991).