DOES CONSENT MATTER? RELATIONSHIPS BETWEEN DIVORCE ATTORNEYS AND CLIENTS

I. INTRODUCTION

It has been called the legal profession's "dirty little secret."1 Historically, the media,2 the courts, and the bar have ignored the problem.3 As of 1990, no state had promulgated an ethical rule dealing specifically with the issue. However, it is no longer going unnoticed.

The issue is attorney-client sexual relationships. The legal profession has seen a trend in recent years toward regulation of this aspect of the attorney-client relationship. Since 1990, at least eight states have either adopted rules or considered adopting rules which address the problem.4 The ABA Standing Committee on Ethics and Professional Responsibility has stated, "[t]he roles of lover and lawyer 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."5 Still, neither the Model Rules of Professional Conduct (Model Rules) nor the Model Code of Professional Responsibility (Model Code) specifically addresses such conduct.6 The lack of a per se ban, a specific and outright prohibition on attorney-client sexual conduct, does not mean that the problem is not widespread. One study indicates that "[b]ased upon reported cases and anecdotal evidence, attorney-client sexual contact appears to occur fairly frequently."7

So, why then is there no uniform per se ban on such conduct? Both

---

4. Langford, supra note 2, at 1223. The eight states are California, Florida, Illinois, Minnesota, New York, Oregon, Washington, and Wisconsin. Id. at 1223 n.2.
lawyers and their clients are to be blamed for the absence of such a rule. Attorneys are reluctant “to air the improprieties of errant attorneys.” Also, lawyers rationalize the issue by viewing their private interactions as separate from their professional relationships. Some critics, including David Isbell of the ABA’s Committee on Ethics and Professional Responsibility, oppose an absolute ban. Isbell stated, “[t]here are too many circumstances where two consenting adults are involved and it does not impair the ability of the lawyer to render professional services.” Further, Isbell argues that a per se rule is unnecessary due to other ethical rules condemning such behavior.

Clients themselves contribute to the problem. Few complaints are filed alleging sexual misconduct. Often, clients who have been in a sexual relationship with their attorney hesitate to file grievances. They often see no point in filing a grievance because such an action would expose them to humiliation and embarrassment. Also, such accusations may be difficult to prove because these cases are largely based on conflicting testimony.

This Article explores how courts currently deal with the lack of a per se rule, whether consent to the relationship does or should make a difference in the sanctioning of lawyers, and whether a divorce client can ever be competent to consent to a sexual relationship with her attorney.

II. CASE REVIEW

While the personal relationship between attorney and client can be something other than sexual, there seem to be no cases where the attorney has been reprimanded or suspended for a mere personal friendship or

9. Id.
11. Id.
12. Jorgenson, supra note 7, at 463.
15. Dubin, supra note 13, at 589.
dating relationship with the client. Therefore, the following cases review how different jurisdictions deal with the problem of attorney-client sexual relationships. Without the guidance of a *per se* ban on such conduct, courts have been forced to apply the existing ethical rules of the individual state."16 The application of these rules, which are based largely on the ABA’s Model Rules or the Model Code, often creates great disparity in punishment for similar misconduct.17

A. Nonconsensual Relationships

As the following cases from New York and Wisconsin show, where the attorney and client engage in a relationship absent client consent, courts often find suspension as a proper punishment for the offending attorney. For example, in *In re Gilbert*18 the court ordered a one-year suspension of Gilbert’s license for violating disciplinary rules 1-102(A)(7)19 and 5-101(A).20 Gilbert made improper and unwanted sexual advances to two female clients while representing them in divorce actions.21 Further, Gilbert attempted to exploit the attorney-client rela-

16. See A. Craig Fleishman, *Sexual Malpractice*, 26-MAR COLO. LAW. 93, 93 (1997). Violation of an ethical rule does not give rise to a cause of action for the client in these types of cases. A rule violation is not equivalent to a breach of a legal duty. The disciplinary rules are a means to guide a lawyer’s conduct; they are not a basis for civil liability. However, the client can, in addition to filing a grievance with a state bar, file a civil lawsuit. These suits have included actions for intentional infliction of emotional distress, negligent infliction of emotional distress, assault and battery, fraud, negligence, and breach of fiduciary duty. *Id.*

17. Approved by the ABA in 1969, the Model Code of Professional Responsibility was adopted by nearly every state by 1980. However, the ABA revised the Model Code in 1983 to create the Model Rules of Professional Conduct. Today, most states have adopted and use the Model Rules which still closely parallel the Model Code. See Stephen Gillers and Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* 349 (1994).


20. 606 N.Y.S.2d at 478-79; DR 5-101(A) prohibits accepting employment when the exercise of the lawyer’s independent professional judgment on behalf of his client will or may be reasonably affected by his own personal interest. *New York Code of Professional Responsibility* DR 5-101(A) (1993).

21. 606 N.Y.S.2d at 478. Gilbert was also found to have made inappropriate sexual comments and advances to two of his female secretaries. *Id.*
tionship to pressure the clients into a sexual relationship.\textsuperscript{22}

In \textit{In re Bowen},\textsuperscript{23} the attorney, Bowen, was accused of making improper advances to eight female clients and prospective clients.\textsuperscript{24} The women sought Bowen’s advice concerning domestic matters including divorce and child custody.\textsuperscript{25} Bowen operated under a similar pattern with each woman; the experience of “Brenda” illustrated Bowen’s pattern. Brenda acquiesced to Bowen’s sexual demands after he threatened to refuse to take her case.\textsuperscript{26} The court found that Bowen violated disciplinary rules 1-102 (A)(3),(5), (6);\textsuperscript{27} 5-101(A);\textsuperscript{28} and 5-102.\textsuperscript{29} Bowen violated these same rules by entering into a sexual relationship with another client, Carole.\textsuperscript{30} During their initial consultation, Bowen persuaded Carole to begin an affair with him.\textsuperscript{31} Carole moved into Bowen’s home and served as a babysitter for his own two children.\textsuperscript{32} The court held, “the charges sustained against respondent reflect adversely upon his fitness to practice law, as well as upon the legal profession as a whole. . . .”\textsuperscript{33} The court ordered a two-year suspension in order to “deter similar misconduct and preserve the reputation of the Bar.”\textsuperscript{34}

Perhaps the most appalling aspect of these types of cases is the fact that some attorneys intentionally prey on those clients who are emotional-

\textsuperscript{22} \textit{Id}. at 479.
\textsuperscript{24} \textit{Id}. at 45.
\textsuperscript{25} \textit{Id}.
\textsuperscript{26} \textit{Id}. at 46.
\textsuperscript{27} \textit{Id}; DR 1-102(A) provides, “A lawyer shall not: (3) [e]ngage in conduct involving moral turpitude. . . (5) [e]ngage in conduct that is prejudicial to the administration of justice, (6) [e]ngage in any other conduct that adversely reflects on his fitness to practice law.” NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1989).
\textsuperscript{28} 542 N.Y.S.2d at 46; DR 5-101(A) states, “Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s own financial, business, property, or personal interests.” NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1989).
\textsuperscript{29} 542 N.Y.S.2d at 46; DR 5-102 provides for withdrawal by the attorney when the attorney might be called as a witness on behalf of his client. NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1989).
\textsuperscript{30} 542 N.Y.S.2d at 46.
\textsuperscript{31} \textit{Id}.
\textsuperscript{32} \textit{Id}. at 46-47.
\textsuperscript{33} \textit{Id}. at 47.
\textsuperscript{34} \textit{Id}. at 48.
ly unable to resist their advances. In *In re Woodmansee*, the attorney, Woodmansee, discovered that the client had been sexually, physically, and emotionally abused. Further, the client blamed herself for the death of her infant son due to Sudden Infant Death Syndrome (SIDS). Capitalizing on her vulnerability, Woodmansee visited the client’s home where he pushed her on the bed and began to remove her clothes. When the client protested, Woodmansee left. The client was later diagnosed as suffering from post-traumatic stress disorder due to the incident. The Supreme Court of Wisconsin ordered Woodmansee suspended for three years for taking “deliberate advantage of his client’s mental and emotional state for purposes of his own sexual gratification.”

In summary, where there is lack of client consent, courts tend to order suspension for the attorney. The length of suspension may correspond to the severity of the act. Gilbert was suspended for a year for unwanted advances. Bowen, who repeatedly attempted to exploit his position as an attorney, was suspended for two years. Woodmansee received a three-year suspension, the severest of the punishments, for his intentional advances toward a vulnerable client. Clearly, sexual advances by an attorney toward a client are deemed improper where there is a lack of consent. But, what are the sanctions when the client consents to the relationship?

**B. Consensual Relationships**

As the following cases show, consensual relationships between attorney and client vary considerably. The client can consent to the relationship before or after the professional attorney-client relationship begins. Consent can be for economic reasons or for purely personal reasons. Just as consent differs, so too do sanctions imposed by state disciplinary committees and courts.

---

35. 434 N.W.2d 94 (Wis. 1989).
36. *Id.* at 96.
37. *Id.*
38. *Id.* at 95-96.
39. *Id.* at 96.
40. 434 N.W.2d at 96.
41. *Id.* at 95.
42. 606 N.Y.S.2d at 478.
43. 542 N.Y.S.2d at 48.
44. 434 N.W.2d at 96.
The court in Iowa State Bar Association v. Hill addressed the situation of an attorney who pays the client for sex. Hill agreed to represent the client, K.C., in seeking custody of her three children. Being unemployed, K.C. could not afford to give Hill a retainer. She went to Hill’s office and offered to have sex with him for money. Hill gave her fifty dollars for the act. Despite the fact that the client initiated the act, the ethics commission and the court found that having sex with a divorce client when the custody of children was at issue was unethical. The court found that Hill violated disciplinary rules 1-102(A)(3) and (6). The court refused to adopt the Ethics Committee recommendation that Hill’s license be suspended for three months. Rather, the court ordered an indefinite suspension noting that the attorney is responsible for realizing that a reconciliation between spouses is possible during a divorce action or that his actions with the client could affect negotiations including the client’s custody suit.

In In re McDow, the Supreme Court of South Carolina ordered only a public reprimand for the attorney, McDow, whose adulterous relationship with the client during her divorce action resulted in a divorce for the husband on grounds of adultery. Although the court gave no indication that consent played a role in its decision, it is possible that because the client consented to McDow’s advances, he was given only a public reprimand.

The Rhode Island Supreme Court has imposed more serious sanctions for attorneys who become sexually involved with their clients. In In re DiSandro, the court warned that a more serious sanction might have

45. 436 N.W.2d 57 (Iowa 1989).
46. Id. at 58.
47. Id.
48. Id.
49. Id.
50. 436 N.W.2d at 58.
51. Id.
52. Id. at 58; DR 1-102(A) provides that: “A lawyer shall not. . .(3) [e]ngage in illegal conduct involving moral turpitude. . .(6) [e]ngage in any other conduct that adversely reflects on his fitness to practice law.” IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (1989).
53. 436 N.W.2d at 57.
54. Id. at 59.
56. Id. at 383.
been imposed had the extra-marital affair prejudiced the client’s case.\textsuperscript{58} However, based on the facts in \textit{DiSandro}, the court ordered only public censure for DiSandro, the attorney, whose consensual relationship with a client during her divorce proceedings did not negatively impact the case.\textsuperscript{59} DiSandro was found in violation of disciplinary rules 5-101(A) and 1.7(b).\textsuperscript{60}

In another Rhode Island case, \textit{In re DiPippo},\textsuperscript{61} the court ordered a three-month suspension for DiPippo, the attorney, who engaged in a consensual relationship with his client while representing her in a divorce matter.\textsuperscript{62} The court found that engaging in a sexual relationship with a client when issues of child custody, support, and division of marital assets were at issue violated disciplinary rules 1.7(b)\textsuperscript{63} and 1.17(a)(1).\textsuperscript{64}

In \textit{Edwards v. Edwards},\textsuperscript{65} the Appellate Division of the New York

\begin{flushright}
58. \textit{Id.} at 75.
59. \textit{Id.} at 74. The client received custody of her child and 60% of the marital assets. \textit{Id.} at 73.
60. 680 A.2d at 74-75; DR 5-101(A) provides: “Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.” Rule 1.7(b) provides, “[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 consultation.” RHODE ISLAND CODE OF PROFESSIONAL CONDUCT DR 5-101(A) and 1.7(b) (1996).
62. \textit{Id.} at 457. The suspension also related to the fact that the lawyer certified false statements made by the client on an application to a credit union in an attempt to secure a mortgage to buy a new home. The attorney certified that the client was employed by him as an independent contractor performing bookkeeping and filing duties when in fact she was not. \textit{Id.} at 455.
63. \textit{Id.} at 455; DR 1.7(b) provides, “[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 consultation.” RHODE ISLAND RULES OF PROFESSIONAL CONDUCT DR 1.7(b) (1996).
64. \textit{Id.} at 456; DR 1.17(a)(1) provides, “a lawyer shall not represent a client or, where representation had commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law.” RHODE ISLAND RULES OF PROFESSIONAL CONDUCT DR 1.17(a)(1) (1996).
65. 567 N.Y.S.2d 645 (N.Y. App. Div. 1991). The husband accused wife’s attorney, Richard Golub, of being sexually involved with the wife during a divorce mat-
Supreme Court held that a sexual relationship did not \textit{per se} constitute a breach of professional responsibility warranting withdrawal from the case.\textsuperscript{66} In distinguishing such cases as \textit{In re Bowen},\textsuperscript{67} the court said it was not the existence of a relationship between attorney and client which resulted in reprimands, rather it was the "attorney's attempt to exploit the professional relationship to gain unsolicited sexual favors."\textsuperscript{68}

The court went further and said that even assuming the sexual relationship between the attorney and client existed, there was no evidence that the attorney took advantage of the client or the attorney-client relationship.\textsuperscript{69} However, the court cautioned that an attorney's sexual involvement could violate other provisions of the ethics code.\textsuperscript{70}

In \textit{Musick v. Musick},\textsuperscript{71} the West Virginia Supreme Court of Appeals addressed an interesting twist on the attorney-client sexual relationship. The court answered in the affirmative a certified question regarding whether an attorney may be disqualified from post-divorce proceedings due to his intimate relationship with the female client despite the fact that the relationship did not commence until the divorce proceedings had been finalized.\textsuperscript{72} The court refused to order disqualification, but remanded the case to determine whether counsel would be a witness to the proceedings and whether any other Model Rule or state rule would warrant his disqualification.\textsuperscript{73}

In what is perhaps the harshest penalty for consensual relationships, the Supreme Court of Georgia in \textit{In re Lewis}\textsuperscript{74} ordered a three-year suspension for the attorney, Lewis. While the relationship did not jeopardize the client's case,\textsuperscript{75} the court warned that "[e]very lawyer must know that an extramarital relationship can jeopardize every aspect of the client's

\footnotesize{ter. The court found that the husband failed to provide sufficient evidence to compel Golub's withdrawal from the case. \textit{Id.} at 646.

66. \textit{Id.} at 648.
68. 567 N.Y.S.2d at 648.
69. \textit{Id.}
70. \textit{Id.} at 649. The court was particularly concerned with whether an attorney could be a potential witness to the case at issue. \textit{Id.}
71. 453 S.E.2d 361 (W. Va. 1994).
72. \textit{Id.} at 363.
73. \textit{Id.} at 368.
75. \textit{Id.} at 174. The trial court awarded the client custody of her child. \textit{Id.}
matrimonial case—extending to forfeiture of alimony, loss of custody, and denial of attorney’s fees.” 76 Lewis and the client had been in a sexual relationship several years prior to the beginning of the professional relationship. Lewis maintained that the relationship was consensual during the course of his representation of the client; however, the court found that there were “genuine issues of material fact” concerning whether the relationship was in fact consensual. 77 As there was no testimony as to consent, the court ordered summary judgment 78 against Lewis due to his admission of sexual intercourse with the client. 79

As the above cases reveal, courts lack consistency in sanctioning attorneys for engaging in consensual relationships during the attorney’s representation of the client. Sanctions vary between warnings, reprimands, and suspensions. It does not seem to matter whether the attorney pays for the sexual act, or whether the sexual relationship pre-dated the attorney-client relationship. Some courts, such as the court in McDow, may appear to consider consent as a factor to a lighter sanction. But, consent alone does not absolve the attorney of blame. This burden on the attorney leads to the question of whether there can ever be consent to such a relationship.

III. CAN THERE EVER BE CONSENT?

To understand whether there is a need for a per se rule banning attorney-client sexual relationships, the complexities of the attorney-client relationship must be examined. In any attorney-client relationship, the client must have a certain amount of trust and faith in the lawyer. In return, the lawyer must objectively evaluate the needs and wants of the client. The relationship between a divorce attorney and client is even more intense due to the high personal stakes involved. Four main factors that courts consider when deciding if the client is truly capable of consenting to a sexual relationship with her divorce attorney are emotional

76. Id. at 175.
77. Id.
78. The court’s order of summary judgment was based on Georgia Standard 30 which is substantially similar to DR 5-101(A) which provides, “Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1980).
79. 415 S.E.2d at 175.
vulnerability, knowledge, dependence, and transference.\textsuperscript{80}

A. \textit{Emotional Vulnerability}

Divorce signifies an extreme change in life.\textsuperscript{81} Often during this change, matters of child custody, alimony, and property settlement arise. Many cases reveal that clients come to their attorneys in a state of extreme vulnerability. For example, in \textit{In re Woodmansee}\textsuperscript{82} the client had been sexually, emotionally, and physically abused by her husband. In \textit{In re Bowen}\textsuperscript{83} Carole's husband had left her at the bus station with ten dollars and told her to go home. These women were in difficult situations and looking for someone to understand and help them, not take advantage of them.

B. \textit{Lack of Knowledge}

There are two types of knowledge which make a client vulnerable: knowledge of the legal system and knowledge of the client's personal situation. Each of these types of knowledge creates an imbalance of power in favor of the attorney.\textsuperscript{84} Many of the women seeking a divorce or defending against a divorce action are uneducated as to the legal system.\textsuperscript{85} Such ignorance of the law creates an anxiety in the client which makes them more willing to allow the attorney to control the situation.\textsuperscript{86} The client is often so emotionally distraught that it is a relief to allow the attorney to handle the problem. The attorney often exacerbates the problem by attempting to shield the client from involvement.\textsuperscript{87} In such circumstances, the client can come to have an inflated view of the entire legal profession.\textsuperscript{88}

Furthermore, the client is forced to reveal extremely personal infor-

\textsuperscript{80} See Dubin, supra note 13, and Lyon, supra note 8.
\textsuperscript{81} Dubin, supra note 13, at 604.
\textsuperscript{82} 434 N.W.2d 94 (Wis. 1989); see supra text accompanying notes 35-41.
\textsuperscript{83} 542 N.Y.S.2d 45 (N.Y. App. Div. 1989); see supra text accompanying notes 23-34.
\textsuperscript{84} Pincus, supra note 10, at 258-59.
\textsuperscript{85} Dubin, supra note 13, at 605.
\textsuperscript{86} Lyon, supra note 8, at 171.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
mation such as sexual history, episodes of spousal abuse, financial conditions or psychological problems. The lawyer should never return such personal information. This unbalanced sharing of personal information intensifies the inequality in the attorney-client relationship.

C. Dependence

Vulnerability and lack of knowledge can lead the client to become overly dependent on the attorney. The client is often physically and emotionally exhausted; she is not knowledgeable about the legal system. Many times, such clients rely completely on their lawyer's advice and counsel. The dependent nature of the attorney-client relationship creates a "significant possibility that the sexual relationship will have resulted from exploitation of the lawyer's dominant position and influence" rather than from consent.

D. Transference

The shift in control and responsibility from client to attorney often leads to transference. Transference is defined as an "[u]ncious phenomenon in which the feelings, attributes and wishes originally linked with important people in one's early life are projected on to others." In psychoanalytic terms, transference "occurs when the patient directs towards the physician [or attorney in this case] a degree of affectionate feeling... which is based on no real relation between them and which—as is shown by every detail of its emergence—can only be traced back to old wishful phantasies [sic] of the patient's which have become unconscious." The close nature of the divorce attorney-client relationship places the client in a position to transfer feelings of love on to the attorney during what is possibly the most stressful and confusing time in that person's life. The client's emotional needs "may manifest themselves

89. Pincus, supra note 10, at 259.
91. See Dubin, supra note 13, at 605; Lyon, supra note 8, at 162.
92. Dubin, supra note 13, at 605 n.66.
as a desire or willingness to be accepted which may, in turn, result in a perceived consent to sexual relations. Thus, the culmination of vulnerability, lack of knowledge, dependence, and transference may lead the attorney and client to believe the relationship is consensual when, in fact, it is not. The client, due to a variety of factors, is simply unable to provide true consent to the relationship.

V. CONCLUSION

The legal profession’s “dirty little secret” is no longer going unnoticed. But, efforts to recognize and address the problem have resulted in confusion. The lack of a per se rule concerning attorney-client sexual relationships leaves courts to draw their own lines and limits.

When the client does not consent to the sexual conduct, courts tend to order suspension for the attorney. However, as case review shows, the length of suspension varies considerably. Gilbert was suspended for a year for his unwanted sexual advances. Bowen was suspended for two years for his repeated attempts to exploit his position as an attorney. Woodmansee received a three-year suspension for his conduct towards an emotionally vulnerable client.

When the client consents to the sexual relationship, sanctions vary between warnings, reprimands, and suspensions: Hill was suspended indefinitely despite the fact that it was the client who instigated the sexual relationship. Yet, McDow was only reprimanded despite the fact that his conduct had a detrimental impact on his client’s case. The Rhode Island Supreme Court ordered public censure, for DiSandro, and a suspension, for DiPippo. Yet, the Supreme Court of Georgia ordered Lewis to a three-year suspension for conduct similar his fellow attorneys in different states who received much milder sanctions.

With such varied punishments for such similar conduct, one is left wondering whether consent makes any difference. Some courts, consider-

94. Pincus, supra note 10, at 259-60.
95. 606 N.Y.S.2d at 479.
96. 542 N.Y.S.2d at 48.
97. 434 N.W.2d at 96.
98. 436 N.W.2d at 59.
99. 354 S.E.2d at 383.
100. 680 A.2d at 75.
101. 678 A.2d at 457.
102. 415 S.E.2d at 175.
ing the factors of vulnerability, lack of knowledge, dependence, and transference seem to find that the divorce client is simply in no position to provide informed consent. These courts place the burden of the relationship on the attorney and hold him responsible for the sexual conduct.

Without a per se rule concerning such conduct, and in the face of such varied and conflicting messages concerning sexual relationships between attorneys and their clients, today’s attorney would be well advised to avoid sexual conduct with a client regardless of consent. 103

AUTHOR’S NOTE

Subsequent to the completion of this Article, some states passed ethical rules specifically addressing attorney client sexual conduct. For example, the New York Code of Professional Responsibility now considers it misconduct for an attorney to “begin a sexual relationship with a [matrimonial] client during the course of the lawyer’s representation of the client.” 104 However, most states have not passed such explicit rules. Therefore, the issue of how to address the ethical problems arising from attorney-client sexual relationships still exists in many states.

Jennifer Tuggle Crabtree

103. See Fleishman, supra note 16, at 94.