Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule

Nancy E. Goldberg
SEX AND THE ATTORNEY-CLIENT RELATIONSHIP: AN ARGUMENT FOR A PROPHYLACTIC RULE

by

NANCY E. GOLDBERG*

[S]exual episodes with clients jeopardize the attorney client relationship and have a strong potential to involve the attorney in a breach of one or more Disciplinary Rules.¹

INTRODUCTION

The initiation of a sexual relationship between an attorney and client, during the course of the attorney's representation of the client, raises ethical problems. Although many² agree that attorneys should avoid such relationships, they balk at drawing a bright line rule which explicitly prohibits an attorney from extending the parameters of the professional relationship to include personal interaction with clients. In at least one state, California, the need for drawing such a bright line has been recognized by the bar. The California Bar recently submitted Proposed Rule 3-120 to the California Supreme Court.³ The proposed rule expressly governs sexual relations between an attorney and a client. The express recognition given to this ethical question is anomalous.

Despite a relative dearth of case law and commentaries on this specific issue, another closely related profession, the medical profession, has advanced cogent arguments for proscribing similar activity within those professional relationships.⁴ Although the bright line drawn in the medical field appears to be readily accepted, the application of a similar proscription to attorneys is deemed to be unnecessary and unduly burdensome. The same rationales which are applied to the physician-patient relationship also apply to the attorney-client relationship. Therefore, a

¹ Matter of Liebowitz, 516 A.2d 246, 248 (N.J. 1985) (citation omitted) (quoting Special Ethics Master).
² References to positions proposed by many throughout the paper refer to arguments raised to the author by attorneys in informal conversations. A number of the comments were raised by a helpful, albeit skeptical, group of law school professors at the A.A.L.S. Workshop for New Law Teachers held in the summer of 1989. Although the majority of those who discussed the issue were skeptical of the need for such a proposal, no quantificational studies were undertaken. Thus, the use of many is used as a shorthand method of referring to these informal discussions and is in no way intended to suggest a position held by the majority of the Bar.
³ CALIFORNIA RULES OF PROFESSIONAL CONDUCT, Rule 3-120 (Draft Rule F 1991) (adopted by the California Supreme Court, in modified form, on August 13, 1992).
similar conclusion is mandated: the express prohibition of sexual relationships between an attorney and client.

In this paper, I argue that the initiation of sexual contact during the tenure of an attorney-client relationship is unethical and should be explicitly proscribed by the rules governing professional conduct. Although such behavior may be implicitly prohibited by existing disciplinary provisions, I advocate the promulgation of a bright line rule. Drawing such a line is required by reasons similar to those applicable in the medical profession. Additional rationales exist as well, which are unique to the legal profession.

Opponents of a bright line rule might grudgingly concede that intimate contact between an attorney and a client should not be condoned in the family law setting. According to these objectors, if the regulation of such conduct must occur, it should be narrowly tailored to these clear cut situations which unquestionably offend our ethical intuitions. Although such behavior seems most egregious in domestic cases, this alone does not preclude drawing bright line rules. The proscriptions advanced here are not limited to any specific type of legal problem with which the client is faced; that is, the bright line being advanced applies to all attorneys and to all areas of law.

Furthermore, the focus of this paper is on sexual relationships arising after the attorney-client relationship has begun. Representation of a client with whom the attorney is already sexually involved, and sexual relations arising subsequent to termination of the attorney-client relationship raise different issues. Rather than detract from the argument in support of the proposed new bright line rule, these issues are being left for another day, another paper.

The first part of this paper discusses the scope of the problem. Justifications for establishing a bright line rule prohibiting attorney-client sexual relations are then considered. Proposed solutions, including specific language for a line-drawing rule, and potential objections are then advanced and discussed.

SCOPE OF THE PROBLEM: ATTORNEY-CLIENT SEXUAL RELATIONS

Attorneys who have engaged in sexual relationships with clients have sometimes faced an array of disciplinary actions. Such conduct, however, is
Sex and Attorney-Client Relationship

frequently not reported to disciplinary authorities. This leads some attorneys to scoff at the idea that such conduct takes place. Others may concede that it takes place but deny that it is detrimental to the client. Nonetheless, as a review of the existing cases shows, the problem is real and the consequences can be harmful.

In Committee On Professional Ethics and Conduct v. Durham, an attorney was publically reprimanded and admonished for her conduct of kissing, caressing, and fondling her client when she visited him in a professional capacity at the penitentiary. The Supreme Court of Iowa imposed a public reprimand and admonishment for the attorney's violation of Ethical Considerations (EC) 1-5 and 9-6 and Disciplinary Rule (DR) 1-102 (A)(6) of the Iowa Code of Professional Responsibility for Lawyers (ICPRL). While acknowledging that the Code offered little guidance on the question of sexual conduct, the court stated that "[s]exual contact with a client in a professional context is not activity which a reasonable member of the bar would suppose to be allowed by the ICPRL. Such conduct is well outside that which could be termed temperate and dignified and would amount to professional impropriety. . . ."

The Supreme Court of Iowa again faced a case involving sexual contact between an attorney and client in Committee On Professional Ethics and Conduct of the Iowa State Bar Association v. Hill. Hill was a domestic matter involving dissolution of marriage and custody issues. The client was indigent and offered to engage in sexual relations with her attorney for money. Noting the potential prejudice to the client from this sexual contact and her minor children, the court

---

8 Reported cases of such misconduct may be the tip of the iceberg, as is the case for reported rapes. For example, a law student reported an incident in which, shortly after her eighteenth birthday, she found herself possibly facing criminal charges for involvement with a juvenile who had been stealing checks from his grandfather, cashing them, and using the money to purchase marijuana. The student's mother called an attorney whom they knew and set up an appointment for her. When she visited the attorney, he told her that he wanted to show the prosecution that she had suffered enough from the boy's accusation. To this end, the attorney said that he needed to take her blood pressure and heartbeat. He took her blood pressure and lifted her shirt up to place the stethoscope over her heart, asking her "you don't embarrass easily, do you?" The student, who was already emotionally upset, having lost 15 pounds in a week and fearing that her future dream to be a lawyer was ruined, would have done most anything the attorney asked to get out of the trouble; nonetheless, his demeanor made her very apprehensive and she terminated the interview. The student never met with the attorney alone again, although he suggested to her several times that they meet after hours at his office. She did not inform anyone of the attorney's actions until years later. When asked why she did not report the attorney, she indicated that no one would believe her, as it was her word against his, and that if anyone believed her, no one would care, as he has a good reputation as a lawyer and is related to many individuals in that town. Of most concern to the student was the fact that her coming forward would adversely affect her professional future, precluding her from ever obtaining a job in this small West Virginia town or perhaps in West Virginia at all.

9 See Hazard, supra note 6, at 14.

10 279 N.W.2d 280 (Iowa 1979).

11 The court noted that "EC 1-5 calls upon an attorney to be 'temperate and dignified.' DR 1-102(A)(6) bars conduct 'that adversely reflects on his (or her) fitness to practice law.' EC 9-6 prohibits conduct indicating professional impropriety or the appearance thereof." Durham, 279 N.W.2d at 283.

12 Id. at 284.

13 436 N.W.2d 57 (Iowa 1989).
upheld the commission's finding that Hill's conduct violated DR 1-102 (A)(3) and (6) and EC 1-5 and EC 9-6. In suspending Mr. Hill's license to practice law indefinitely, with no possibility of reinstatement for three months, the court stated that "[w]e require lawyers to maintain high standards of ethical conduct and to avoid conduct which would reflect negatively upon the integrity and honor of the profession... Sexual contact between an attorney and client in a professional context constitutes professional impropriety." The two dissenting justices advocated license suspension for not less than nine months, noting that the attorney's "acts constitute grossly unethical and unprofessional conduct."  

Yet another example of misconduct occurred in Matter of Wood. Attorney Wood was disciplined for attempting to exchange legal services for sexual favors. The Supreme Court of Indiana indicated that it did not intend to regulate the sexual conduct of its bar except where the conduct is professionally related and the attorney's fitness to practice law is in question. The court suspended the attorney from practicing law for not less than one year, finding a violation of DR 1-102(A)(6) and DR 5-101(A).

14 DR 1-102(A)(3) and (6) provide, in pertinent part:

(A) A lawyer shall not:

(3) Engage in illegal conduct involving moral turpitude.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102 (A) (3), (6); quoted in 436 N.W.2d at 58.

EC 1-5 provides:

A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession.

EC 9-6 provides:

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession... to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 1-5, 9-6; quoted in 436 N.W.2d at 58.

15 Id. at 59 (Snell, J., dissenting). After reinstatement, Mr. Hill received a public reprimand from the Supreme Court of Iowa on an unrelated disciplinary action. Committee On Professional Ethics and Conduct of the Iowa State Bar Association v. Hill, 463 N.W.2d 1 (Iowa 1990).

16 436 N.W.2d at 59 (Snell, J., dissenting).

17 358 N.E.2d 128 (Ind. 1976).

18 The court noted that DR 5-101(A) of the Code of Professional Responsibility for Attorneys at Law and the Oath of Attorneys for members of the Indiana State Bar "provides that 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 personal interests." 358 N.E.2d at 133. Since it did not find "the requisite disclosure
The Indiana court had the opportunity to review Mr. Wood’s behavior ten years later when he offered to reduce his legal fees to a client in exchange for sexual favors. The court determined that he had violated DR 1-102 (A)(3),(4),(5) and (6) and DR 5-101 (A). Noting the attorney’s exploitation of the client, lack of professionalism, disdain for professional ethics, and the need for integrity and protection of the public, the court disbarred the attorney.

In *Matter of Adams*, an attorney was publicly reprimanded and admonished for exploiting the dependence of a client for his own pleasure when he grabbed her, kissed her, and raised her blouse. The Indiana court disciplined the attorney for violation of DR 1-102 (A)(3) and (6).

Similar problems have been reported in other jurisdictions. The Colorado Supreme Court addressed the issue in *People v. Gibbons*. The attorney in *Gibbons* was alleged to have had sexual relations with a client. The attorney admitted that the relationship violated DR 5-101 (A) and DR 7-101 (A)(3). The Grievance Committee found that the client was dependent and possibly not able to wisely choose relationships. The court noted that the client was 43 years younger than the attorney, had a ninth grade education, and was a defendant in a criminal proceeding. Considering all the violations together, the court disbarred the attorney.

Similarly, in *Matter of Liebowitz*, the Supreme Court of New Jersey publicly reprimanded an attorney for making sexual advances toward a client in violation of DR 1-102 (A)(5). The attorney had told the client, an indigent matrimonial client assigned to him, that his associate would represent her. The court relied on the Special Ethics Master’s findings of the attorney’s superior position, the presence of coercion, and the consequent lack of consent by the client. The court also indicated that the relationship must be viewed from the

---

22 Id. at 175.
23 Id.
25 Id. at 249.
26 Id. at 247.
27 Id. at 248.
client's perspective. Hence, his assignment of the case to an associate did not excuse his behavior.\textsuperscript{28} The court ordered public reprimand,\textsuperscript{29} stating that the purpose of disciplinary procedures is to protect the public.

The list of examples goes on. The Alabama Supreme Court ruled on a question of sexual impropriety by an attorney in \textit{Courtney v. Alabama State Bar}.\textsuperscript{30} In that case, the attorney was charged with violating DR 1-102 (A)(6)\textsuperscript{31} when he touched his client's guardian during a scheduled meeting. Noting that the attorney had received private admonition in response to a similar claim two months earlier and had other prior violations as well, the court affirmed the ordering of public censure.

In \textit{Kentucky Bar Association v. Meredith},\textsuperscript{32} an attorney had been representing a woman, individually and as guardian of her child, in several suits arising out of a will contest. The attorney had entered into an intimate sexual relationship with the client. The Supreme Court of Kentucky, in publically reprimanding the attorney for violating DR 1-102 (A)(6) and 5-101(A),\textsuperscript{33} noted the trial commissioner's finding that the relationship could have affected the client's credibility as a witness. The court further stated that "there was reasonable probability that the lawyer's personal and emotional involvement with the mother could have adversely affected the advice or services rendered during his employment."\textsuperscript{34}

The Supreme Court of Wisconsin has also taken a stand on the ethics of attorney-client sexual relations. The court suspended an attorney's license for three years after he had sexual contact with a client. Here, the attorney had represented the client in a divorce case involving custody, and he knew that she had been emotionally, physically, and sexually abused.\textsuperscript{35} The referee noted the seriousness of the conduct, as well as the client's vulnerability and the attorney's knowledge of and indifference to that vulnerability.\textsuperscript{36}
The Supreme Court of Wisconsin recently suspended a public defender's license for six months after he engaged in sexual relations with a client. The court adopted the referee's findings and conclusions, which cited both conflicts of interests and the client's vulnerability as reasons for suspension.

The Supreme Court of New Hampshire also recently suspended an attorney's license for two years for engaging in sexual relations, on three occasions, with a divorce client who was under psychiatric care for agoraphobia. The court accepted the referee's findings that such conduct violated Rule 1.7 (b), Rule 1.8 (b), and Rule 1.14 (a).

Sexual relations between attorneys and clients have also been the subject of several Ethics Opinions. An opinion in Maryland noted that a sexual relationship between attorney and client "reflects negatively on the integrity of the legal profession . . . [and] may have an adverse effect on the lawyer's ability to protect his client's interests." The Opinion recommended that the attorney withdraw from representation.

An Ethics Opinion of the Oregon State Bar stated that an attorney-client sexual relationship is unethical in a divorce action since the attorney's judgement might be impaired and the client's best interest might be harmed. Further, the Bar explained that:

the client may be unable to give a voluntary and informed consent to continued representation. The attorney-client relationship is a fiduciary relationship, one of trust. The nature of that fiduciary relationship tends to make the client intellectually and, in many cases, emotionally dependent upon the attorney. If the client becomes involved in a love affair with the attorney, that dependency would only be increased.

In an earlier Legal Ethics Opinion, the Oregon Bar had stated that sexual relations with a client was permissible as long as the legal proceeding was not a divorce action in which the affair would be harmful to the client's interest or interfere with the attorney's aggressive representation. This advisory opinion was...
withdrawn, however, in June, 1982 when the later opinion was issued. The Oregon bar explained its change of position, noting that an affair would render the attorney unable to determine if the relationship would interfere with the client’s interests.

Hence, the above review of case law and Ethics Opinions shows that attorney-client sexual contacts during the course of representation do exist, and further reveals that such contacts, when reported, have not been condoned by those responsible for enforcing the ethical standards of the profession. Although these decisions hold that the sexual relations are unethical, no explicit proscriptions have provided the basis for imposing sanctions. Rather, such conduct is found to be implicitly barred by the governing disciplinary codes. Review of these existing provisions shows how tenuous the relation is between the general cited provision and the proscribed behavior.

The use of such implicit prohibitions permit varied interpretations, fudging, and frequent denial. Although implicit proscriptions are concededly better than none, many cases which would fall within the ambit of an express rule go unnoticed and unpunished. Furthermore, the sole use of implicit prohibitions fails to deter the unwanted behavior in the first instance.

ATTORNEY-CLIENT SEXUAL RELATIONS
SHOULD NOT BE PERMITTED

Various justifications exist for prohibiting sexual relations between an attorney and client during representation. Some are drawn from the analogous situation in the medical profession and focus on the client, namely, the notions of transference and fiduciary responsibility. Others recognize effects on the attorney, including conflicts of interest and diminished competency. Yet others look to the reputation of the profession and the appearance of impropriety which such attorney-client relationships implicate. Each of these rationales is considered in turn.

Client-Oriented Rationales

The impropriety of sexual contact between a professional and a client has been explored most thoroughly in the therapist-patient context. The primary reasons for prohibiting such contact include the existence of the transference phenomenon and the fiduciary nature of the professional’s role. These doctrines, which are explained below, are equally applicable in the attorney-client context.

45 See, e.g., Shaffer, supra note 4; Simon, supra note 4.
a. Transference

In the most general of terms, transference refers to the feelings a patient develops toward her therapist, while countertransference denotes the feelings the therapist has for the patient. Psychiatrists, psychologists, lawyers, and courts have attempted to define the phenomenon. In psychoanalytic terms, transference refers to the patient's displacement of:

the feelings he originally directed toward the earlier objects onto the analyst, who then becomes alternately a friend and an enemy, one who is nice to him and one who frustrates his needs and punishes him, one who is loved and hated as the original objects were loved and hated. Moreover, this tendency persists, so that to an increasing extent the patient's feelings toward the analyst replicate his feelings toward the specific people he is talking about or, more accurately, those whom his unconscious is talking about.

More generally, the term has been defined as an "[u]nconscious phenomenon in which the feelings, attitudes, and wishes originally linked with important figures in one's early life are projected onto others who have come to represent them in current life." This definition makes no explicit reference to therapists.

Other definitions of "transference" have been offered. Carl Rogers has indicated that transference refers to "attitudes transferred to the therapist which were originally directed, with more justification, toward a parent or other person." Ernest Jones has claimed that it is "displacement of an affect, either positive or negative, from one person on to the psycho-analyst." One court, in discussing transference, noted that the phenomenon refers to:

the emotional reaction which the patient in therapy has toward the therapist. The patient in therapy 'unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed towards his own parents.'... 'Inappropriate emotions, both hostile and

---

46 For purposes of this paper, references to patients are applicable to clients and vice versa.
48 ALFRED FREEDMAN, HAROLD KAPLAN, and BENJAMIN SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY II 563 (2d ed. 1975).
49 Id. at 2608.
50 C. ROGERS, CLIENT-CENTERED THERAPY 198 (Houghton Mifflin ed. 1965), cited with approval, Shaffer, supra note 4, at 205.
51 E. JONES, PAPERS ON PSYCHO-ANALYSIS 500 (Beacon ed. 1961), cited with approval, Shaffer, supra note 4, at 205.
loving, directed toward the physician are recognized by the psychiatrist as constituting...the transference.\textsuperscript{52}

In essence, then, transference denotes the strong feelings the patient develops toward the therapist. These feelings are generally misplaced when directed toward the therapist; that is, they would be more appropriately expressed to other areas of importance in the patient's life. As the above definitions suggest, the patient expresses towards the therapist unconscious feelings and emotions which arose in the past, in connection with another important person. In developing the therapeutic relationship, the patient transfers these past feelings onto the therapist, in the present. Although this transfer of feelings is present in all relationships in which a person is engaged, it is greatly intensified in the therapeutic relationship.

Transference is the tool used in therapy. The therapist offers himself as a sort of blank slate upon which the transference can develop or be expressed. With this "recreation" of the feelings in the therapeutic setting, then, analysis and evaluation of the transfer of emotion accesses the patient's unconscious and enables the therapist to help the patient.

It is often the misuse or mishandling of the transference phenomenon that results in sexual relationships between therapists and their patients. As one doctor notes, "[s]exual intimacy with patients is...an occupational hazard of psychotherapists who work intensively with patients."\textsuperscript{53} A patient experiencing transference is dependent upon the therapist\textsuperscript{54} and vulnerable to exploitation.\textsuperscript{55} Since positive transferences are often expressed in sexual terms,\textsuperscript{56} mismanagement of these transfers by the therapist may lead to acting on the feelings rather than an analysis of them. And since the patient is so dependent on and vulnerable to the therapist, such action on the therapist's part constitutes abuse of the transference phenomenon and exploitation of the patient.

Abuse and mismanagement of the transference phenomenon, resulting in a sexual relationship between therapist and patient, has been the subject of litigation. One case which discusses transference is \textit{L.L. v. Medical Protective Co.,}\textsuperscript{57} which involved issues relating to the liability of a psychiatrist's malpractice insurer for harm resulting from sexual acts with a patient. In discussing coverage, the Wisconsin appellate court included lengthy discourse about transference and the deleterious effects of therapist-patient sexual contact. The court cited many authorities, including the American Medical Association's Principles of Medical

\textsuperscript{53} Simon, supra note 4, at 47.
\textsuperscript{54} L.L., 362 N.W.2d at 177; Shaffer, supra note 4, at 211.
\textsuperscript{55} Simon, supra note 4, at 48.
\textsuperscript{56} Freedman et al, supra note 48, at 1552.
\textsuperscript{57} 362 N.W.2d 174 (Wis. Ct. App. 1984).
Ethics with Annotations Especially Applicable to Psychiatry, for its assertion that sex with a patient constitutes malpractice in that it harms and exploits the patient. The court defined transference and recognized the dependence of the patient. After further noting the trust required for a therapeutic relationship and the abandonment of the relationship which occurs when the therapist takes advantage of that trust, the court concluded that:

a sexual relationship between therapist and patient cannot be viewed separately from the therapeutic relationship that has developed between them. The transference phenomenon makes it impossible that the patient will have the same emotional response to sexual contact with the therapist that he or she would have to sexual contact with other persons. Further, by introducing sexual activity into the relationship, the therapist runs the risk of causing additional psychological damage to the patient.

This court recognized, then, the kind of coloring effect that transference has on the patient. It is not just that the patient is unable to consent or that the therapist and patient are on an unequal footing, notions which are dealt with in the next section; rather, because of the transference the patient does not respond to the contact with the therapist similarly to contact with other people.

Another case in which the court mentioned the transference phenomenon is Vigilant Insurance Co. v. Employers Insurance of Wausau. The district court cited L.L. for its assertions concerning transference and patient dependency and vulnerability. The court noted that "the patient believes the doctor is always acting in her best interest, to make her well. What to the therapist may seem extraneous is, to the patient, part of the whole relationship." In addition to the added factor of the patient's belief that the doctor's actions are solely for her benefit, this court, like the court in L.L., noted the coloring of the patient's perception by the transference, particularly of her perception of the relationship and her inability to separate the various components thereof.

Misuse of the transference relationship by medical professionals, then, has been a litigated issue. Courts recognize that therapists should not have sex with

---

58 See infra text accompanying notes 119–20.
60 362 N.W.2d at 178.
61 See infra text accompanying notes 75–101.
63 626 F. Supp. at 266.
64 Id.
their patients since the transference phenomenon makes patients dependent, vulnerable, and colors their perspective and ability to respond.\textsuperscript{65}

The transference phenomenon is not limited to therapist-patient relationships, but also pervades other professional relationships, including that between attorneys and clients. Transference is prevalent in relationships where the client is dependent on the professional to whom she has turned for help, where a "rapport" has been established in the professional relationship. The professional is important to the client and is to heed the best interest of the client. Dr. Stone has recognized that "there is no doubt that transference enters into many relationships: teacher-student, lawyer-client, physician-patient, and so on."\textsuperscript{66}

Another commentator refers to other authors who have noted the prevalence of the phenomenon:

Dr. Andrew S. Watson suggests that transference is an essential ‘tool’ in the relationship between lawyer and client \ldots\ . He quotes former Justice Abe Fortas and Talcott Parsons in support of the proposition that transference and countertransference are commonplace in the law office. \ldots\ Dr. Peck suggested that transference is likely to exist in any professional relationship in which good rapport has been established.\textsuperscript{67}

Hence, it is evident that other professional relationships, including attorney-client, involve transference.

Some have objected to the application of this rationale to professionals other than therapists. Though acknowledging transference in various professional relationships, these objectors attempt to distinguish therapy from other professional relationships in that the presence of transference is not as prominent in non-therapy relationships. For example, in discussing vulnerability and coercion, Dr. Stone claims that:

these same considerations are often equally relevant to the physician-patient and the divorce lawyer-client relationship, contexts in which sexual exploitation allegedly is at least as common as it is in psychotherapy. Yet courts have not, for example, allowed patients to sue obstetricians and gynecologists for malpractice when there is also arguably sexual exploitation of the patient based on transference. Although in these instances the moral wrong may be as great as it is

\textsuperscript{65} Another court which recognized the emotional vulnerability of the client, a divorce client already under psychiatric care for agoraphobia who suffered further rejection when the lawyer terminated the affair, is the Supreme Court of New Hampshire in Drucker's Case, 517 A.2d. 1198 (N.H. 1990).
\textsuperscript{66} ALAN STONE, LAW, PSYCHIATRY, AND MORALITY 196 (1984) (emphasis added).
\textsuperscript{67} Shaffer, \textit{supra} note 4, at 214-15 (footnotes omitted).
when therapists have sexual conduct with patients, obstetricians, gynecologists, and lawyers do not hold themselves out as providing a service or a treatment that has as a central feature managing the transference and countertransference. This feature of the therapist's role is a valid justification for the law's singling out psychotherapists.68

Two points, though, show how this distinction is misguided.

First, contrary to Dr. Stone's assertion, courts do recognize sexual exploitation in relationships other than therapist-patient. For example, in Hoopes v. Hammargren,69 the Supreme Court of Nevada examined a patient's claim that her doctor, a neurosurgeon, took advantage of the doctor-patient relationship and had sexual contact with her. The court examined the claim more as a violation of a fiduciary relationship rather than as a misuse of transference, although it did mention the betrayal of trust, abuse of power, and exploitation inherent in mismanagement of transference.70 The court rejected the doctor's assertion that this type of claim should be limited to therapists. The court stated that "we believe the fiduciary relationship and the position of trust occupied by all physicians demands that the standard apply to all physicians."71 Consequently, the suggestion that only psychiatrists have been held liable for sexual exploitation is clearly wrong.

Second, critics such as Dr. Stone attempt to distinguish therapists on the basis that their jobs entail primary manipulation of the transference phenomenon. This distinction seems artificial, however, as the preceding analysis suggests. Transference exists in all relationships. However, it is intensified in professional relationships where the close interaction involves a great deal of confidence, trust, and vulnerability.72 Although transference is the primary tool used in psychotherapy, the fact is that it does exist in other professional relationships.73 If it does exist, the person transferring the emotions is likely vulnerable, dependent, and subject to exploitation.74 This exploitation by a trusted authority figure, of another who is vulnerable and needy, is so offensive that liability is imposed upon the professional provider. The fact that the therapist uses transference primarily and is trained specifically to encourage and handle the phenomenon makes an abuse by him especially egregious. It does not, however, excuse professionals in other disciplines who exploit the vulnerable client.

68 STONE, supra note 66, at 199.
69 725 P.2d 238 (Nev. 1986).
70 725 P.2d at 242.
71 Id.
72 See supra text accompanying notes 46-52.
73 See supra text accompanying notes 66-67.
74 See supra text accompanying notes 46-56.
Consequently, the assertion that transference appears in many professions and renders the client vulnerable is accurate; and the related attempt to "single out" therapists and, in a sense, excuse other professionals is most certainly misguided. When attorneys and non-therapist physicians exploit their patients/clients, their conduct is similarly reprehensible.

Since an attorney-client relationship includes transference, an attorney should not engage in sexual relations with his client. The client believes that the attorney is acting in her best interest. She is unable to judge the intimacy between them in the same fashion as she could with other people, and she does not separate the sexual parts of the relationship from the professional parts. Hence, sexual conduct between the attorney and client constitutes abuse of the transference phenomenon.

b. Fiduciary Responsibilities

Another rationale offered for the proscription of professional-client sex is that the professional is a fiduciary and such conduct is violative of fiduciary duties. A fiduciary relationship is a legal relationship in which one person places complete trust in the other who is bound to act in good faith, in the best interest of the trusting party. Such a relationship exists:

[w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence; where confidence is reposed and accepted, whether the origin is moral, social, domestic, or merely personal; or where a person has knowledge and authority which he is bound to exercise for the benefit of another person.

As with the existence of transference, a fiduciary relationship renders the one reposing trust vulnerable to exploitation by the fiduciary. One court's description precisely explicated the concept: "[t]he essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." A fiduciary, then, is one in whom great trust is placed, one who must advance the best interest of the client without exploiting her inferior position.

76 37 C.J.S. Fraud §2 (1943).

http://ideaexchange.uakron.edu/akronlawreview/vol26/iss1/3
A physician acts in a fiduciary capacity with regard to his patient. One doctor has pertinently observed that a "therapist is in a fiduciary relationship with patients and thus must act in their best interests. Initiating a sexual relationship is a betrayal of that trust."  

Several cases have been reported where the court discussed a doctor's engaging in sexual relations with a patient as a breach of his fiduciary duty. One frequently cited case is Roy v. Hartogs. In denying the defendant's motion to dismiss, the court found that a fiduciary relationship existed between psychiatrist and patient and that this relationship was analogous to the fiduciary relationship between guardian and ward. The court cited a prior case involving seduction of a ward by a guardian in which the court had said that consent was no excuse: "[c]onsent obtained under such circumstances is no consent, and should stand for naught." The defendant claimed that plaintiff's suit was barred by public policy. The court rejected this argument, finding that "there is a public policy to protect a patient from the deliberate and malicious abuse of power and breach of trust by a psychiatrist when that patient entrusts to him her body and mind in the hope that he will use his best efforts to effect a cure.

This decision was cited by a Washington court of appeals in addressing a claim relating to sexual relations between psychiatrist and patient. In Omer v. Edgren, the court indicated that Washington also recognizes the fiduciary nature of the doctor-patient relationship, entailing trust by the patient and requiring good faith by the doctor. In such a relationship, the patient is held unable to consent to the sexual relationship.

Horak v. Biris depicts the same principle in yet another setting, that of social worker malpractice. The plaintiff brought an action against the defendant for having sex with the plaintiff's wife while the couple was undergoing marriage counseling. The court found the therapist to have been a fiduciary and stated that:

the very nature of the therapist-patient relationship . . . gives rise to a clear duty on the therapist's part to engage only in activity or conduct which is calculated to improve the patient's mental or emotional well-being, and to refrain from any activity or conduct which carries with it a foreseeable and unreasonable risk of mental or emotional harm to the patient.
The court went on to discuss the defendant's mishandling of the transference phenomenon and the public policy supporting plaintiff's cause of action.

The court in the Hoopes case, considered above, also discussed the fiduciary nature of a professional relationship. The court based its assertion that all physicians are bound by the proscriptions on the fact that Nevada recognizes doctor-patient relationships as fiduciary relationships requiring the "utmost good faith." The court noted that trust and confidence are implicit elements of fiduciary relationships; the unequal positions of the fiduciary and the client were also found to mark such relationships. The court also indicated that a fiduciary's taking advantage of a vulnerable client "would violate a trust and constitute an abuse of power. This court would condemn any such type of exploitation. Such conduct would fall below the acceptable standard for a fiduciary. . . . [T]he physician's primary obligation has been, above all, to do no harm."

Hence, it is evident that the courts recognize that doctors and therapists have fiduciary relationships to patients. The doctor is in a superior position, and in him reposes a great deal of patient trust and confidence. He is expected to act in the client's best interest rather than do her harm. The client is dependent, vulnerable, and exploitable and is unable to consent to a sexual relationship with the fiduciary. Such contact on the part of the fiduciary represents an abuse of his power and a breach of his fiduciary duties.

Like the doctor-patient relationship, an attorney's relationship with his client is also of a fiduciary nature. It has been suggested that "[t]he relationship between an attorney and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity [sic] and good faith." A court reiterated this notion that "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity. . . ." Like the physician, then, an attorney should not exploit his client due to the disparity of power devolving onto the attorney from his position as a fiduciary.

One case in which the court discussed breach of fiduciary duty by an attorney who had sex with his client is Barbara A. v. John G. In this case, the

85 See supra text accompanying notes 69-71.
86 725 P.2d at 242.
87 Id.
88 Id.
91 One case which recognized the emotional vulnerability of the client, the special relationship between attorney and client, and the power that the attorney holds over the client is McDaniel v. Gile, 230 Cal. App. 3d 363 (1991).
attorney misrepresented to the client that he was sterile, and she subsequently suffered an ectopic pregnancy.\textsuperscript{93} In offering comments for the lower court, the appellate court defined "fiduciary" and noted that if the court finds such a relationship, "it is presumed that the one in whom trust and confidence is reposed has exerted undue influence"\textsuperscript{94} and the burden has shifted to the fiduciary.

An appellate court in Illinois recently took a clear stance on the relationship between attorney-client sexual contact and the attorney's fiduciary duty to the client when it affirmed the dismissal of an action alleging sexual conduct between an attorney and client.\textsuperscript{95} The court in \textit{Suppressed v. Suppressed} held that the plaintiff's complaint failed to adequately plead a breach of fiduciary duty, a legal malpractice action, in that the breach of duty alleged was not one arising from the attorney-client relationship.\textsuperscript{96} The court acknowledged that a fiduciary relationship exists between an attorney and client, but it believed that this duty requires only that an attorney provide competent legal representation. It also claimed that this duty is dissimilar from a psychotherapist's fiduciary duty, thereby distinguishing precedent arising in this analogous situation.\textsuperscript{97} Absent evidence that the attorney made the representation contingent upon the sexual contact or that the contact impaired the attorney's representation of the client, the court declined to find that the breach rose to the level of legal malpractice.\textsuperscript{98}

The court's conclusion was based on its view that an attorney-client relationship differs from a psychotherapist-patient relationship in that the latter involves the transference phenomenon, while implying that the former does not.\textsuperscript{99}

\textsuperscript{93} 145 Cal. App. 3d at 374.
\textsuperscript{94} Id. at 383.
\textsuperscript{96} 565 N.E.2d at 104. The court also found that the complaint failed to allege actual damages. Based on its finding that the plaintiff failed to allege an action for legal malpractice, the court concluded that the five year statute of limitations did not apply; thus, the claim was time-barred.
\textsuperscript{97} Id. at 105.
\textsuperscript{98} Specifically, the court stated:

An attorney, just like the client, is at best and at worst, a human being fraught with all the frailties that the status entails. For this reason, we do not believe that the higher standard of care required of a fiduciary should extend to an attorney's personal relationships with his client, unless there is tangible evidence that the attorney actually made his professional services contingent upon his sexual involvement or that his legal representation of the client was, in fact, adversely affected.

\textsuperscript{99} Id.
As discussed above, transference most certainly occurs in attorney-client relationships, albeit sometimes to a lesser degree. Nonetheless, the phenomenon does exist, and the existence can color the client's perception of whether the services are contingent on engaging in the sexual conduct or whether the client's best interests are being served. Contrary to the court's view, it seems obvious that the client cannot be said to have given informed consent. Although the Illinois court appears to have erred in its conclusion concerning the extent of the fiduciary duty owed by an attorney to a client, the court nonetheless admitted that "[a]lthough defendant's behavior may have been unethical, we do not think that it equates to legal malpractice."  

Despite the Illinois court's claims, the obligations and responsibilities of a fiduciary are as applicable to an attorney as to a psychotherapist. The attorney must act in a manner that improves rather than harms the client, without exploiting her inferior position. Sexual relations with the client, who is not capable of giving her informed consent in such a situation, would constitute exploitation, as well as a breach of the attorney's fiduciary duties. As with doctors and therapists, such behavior on the part of the fiduciary should not be condoned.

We feel that the breach of duty alleged in a legal malpractice action must be more clearly linked to the attorney's legal representation.

*Id.* at n.2.

It appears that, when imposing liability upon a psychotherapist of malpractice, courts have relied upon the fact that the psychological dependency of a patient undergoing therapy often results in a medically recognized phenomenon known as "transference," whereby the patient transfers feelings to the therapist. The mishandling of this phenomenon by a trained therapist, resulting in sexual involvement with the patient, has been deemed malpractice. 

100 See *supra* text accompanying notes 46-74.

101 565 N.E.2d at 105. The court's inability to grasp the dynamics inherent in an attorney-client relationship and the resultant harm of sexual contact on the professional relationship surfaced again in its discussion of the damage component of a malpractice action, where it expressed its belief that:

to allow an action for legal malpractice based upon the fact that an intimate relationship occurred between the attorney and his client during the course of the legal relationship, when supported only by damages such as mental anguish, shame, humiliation, injury to feelings, defamation or some unspecified injury to character, would be tantamount to allowing a claim for seduction, alienation of affections, or criminal conversation to proceed under less strict standards than required by statute for actions of this type, merely by virtue of the fact that the parties involved happened to have met in the context of a legal relationship. Additionally, we feel an obligation to proceed most cautiously because creation of such a new cause of action could have a serious chilling effect upon all attorney-client relationships. . . .

565 N.E.2d at 106 n.3.

The attorney in *Suppressed* subsequently faced an action by a different client, stemming from allegations of sexual relations, in Doe v. Roe, 756 F. Supp. 353 (N.D. Ill. 1991). The Doe factual scenario depicts an egregious and continuing course of sexual relations and intimidation. The district court dismissed the amended complaint since there was no allegation of injury to business or property to support the plaintiff's claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and since it then lacked jurisdiction over the plaintiff's pendant state claims based on breach of fiduciary duty and intentional infliction of emotional distress theories. *Id.* at 360.
Thus, the attorney-client relationship involves the transference phenomenon, and the attorney is imbued with fiduciary responsibilities to the client. Although a parallel drawn to the medical profession is not perfect, the same concerns affect the legal profession. Like the medical profession, the legal profession should expressly preclude its members from exploiting the professional relationship through sexual involvement, thereby obviating the harms resulting from misuse of transference and breach of fiduciary responsibilities.

**Attorney-Oriented Rationales**

In addition to the deleterious effect that sexual contact may have on the client, there are reasons to prohibit such activities which focus on the attorney. Sexual relations between attorney and client are likely to raise conflicts of interests for the attorney, as well as to interfere with the attorney's assessment of the client's best interest. If an attorney becomes emotionally involved with a client, he may lose sight of what is in the client's best interest and may not be as good of an advocate for that position.

A difficulty with the initiation of a sexual relationship between an attorney and client during the course of professional representation is that it results in a conflict of interest for the attorney. Professor Hazard has stated that "[a] sexual relationship with a client to some degree always constitutes a professional conflict of interest."\(^\text{102}\) This conflict is likely to render an attorney unable to fulfill his duty to act in his client's best interest.\(^\text{103}\)

The Code prohibits an attorney from representing a client if there is or may be a conflict of interest. DR 5-101 (A) precludes an attorney from accepting 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."\(^\text{104}\) This rule is supported by EC 5-1 and EC 5-2 which state that a lawyer's professional judgement and duty to the client should be free from partiality resulting from his personal interests.\(^\text{105}\)

---

\(^{102}\) Hazard, *supra* note 6, at 13. *Contra* Suppressed v. Suppressed, 565 N.E.2d 101, 105 (Ill. App. Ct. 1990) ("In the present case the only charge against defendant that alleges a breach of his legal duty to his client is the allegation that defendant's relationship with plaintiff created a 'potential conflict of interest.' While this may be true, we also note that plaintiff did not charge that an actual conflict of interest existed or that she was harmed in her legal action by such a conflict.").

\(^{103}\) See *CHARLES W. WOLFRAM, MODERN LEGAL ETHICS* § 7.13 (2d ed. 1986) (discussing the loyalty principle as underlying conflict of interest rules).

\(^{104}\) DR 5-101 (A) excepts such situations where the client consents after full disclosure. *MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101 (A)* (1991). As noted above, however, the client is unable to consent to a sexual relationship with the attorney, who is a fiduciary.

\(^{105}\) EC 5-1 provides:
The Rules also address the conflict of interest prohibition. Rule 1.7 provides, in pertinent part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests . . . .

The Comments to this rule clearly state that the requisite loyalty to a client is "impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." The Comments to the rule enumerate factors to be considered in assessing a potential conflict. Those factors include "the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise."

As the above review of case law and ethics opinions shows, real conflicts do arise between the client's interest and the attorney's personal interests in attorney-client sexual relationships. It is not difficult to imagine potential conflicts arising from such relationships. The conflict might interfere with the professional relationship, or it might result in the attorney placing the client's best interests second to his own personal interests. Nonetheless, the attorney has a professional duty which mandates that he act in the client's best interest.

Exploitation of a client's vulnerability is hardly in her best interest. Although some may argue that sexual relations with the client renders the attorney more
protective of the client's interest, it is easy to see how the interests of attorney and client could diverge. As a result, the attorney's judgement could become colored rather than remaining detached and professional.

Engaging in sex with a client is tantamount to exploitation and can result in emotional damage to the client, as well as injure the client's legal position or ability to effectively obtain legal counsel in the future. Such behavior, implicitly prohibited by the Code and Rules provisions, implicates an attorney's duty to refrain from situations generating conflict of interests and to pursue the client's best interest.

**Profession-Oriented Rationales**

In addition to the concerns about the client and about the attorney's ability to function objectively, another important reason for expressly prohibiting sexual relations during representation is the cloud that it places over the profession. Public perception of the profession is already very negative, and tales of attorneys who "hit on" their clients may be cited as evidence of this veritable truth. Simply put, such behavior gives the profession a black eye.

The public's perception of the legal profession should be a concern to lawyers. Condonation of attorney-client sexual relations would further denigrate the already poor impression that the public has of the profession. This could further attenuate levels of public confidence and trust in the profession.

Although the primary purpose of the ethical rules governing the profession is to protect the public, the rules also seek to maintain the integrity of the profession. EC 9-6 provides:

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession;... to observe the Code of Professional Responsibility;... to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the

109 *See supra* text accompanying notes 46-74.

110 It is conceivable that such a relationship could occur and not result in emotional damage to the client. The level of transference involved in an attorney-client relationship concerning, say, a real estate closing might be minimal, and sexual conduct might not result in harm. Nonetheless, in those instances when harm occurs, the result is so egregious that it warrants regulation by the drawing of an explicit, bright line rule.


112 One court, in disbarring an attorney for various acts of harassment, intimidation, and vandalism toward a client following a sexual relationship, noted that the attorney's "conduct has lessened public confidence in the legal profession. ... [His conduct] could not do other than increase the resulting damage to the image of the legal profession." *In re Frick*, 694 S.W.2d 473, 481 (Mo. 1985) (en banc) (quoting the special master).

113 7 AM. JUR. 2d Attorneys at Law §26 (1980).
public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

EC 9-1 and EC 9-2 likewise reflect concern over the promotion of public confidence, as does EC 1-5 which discusses the maintence of high professional standards and avoidance of "all illegal and morally reprehensible conduct" and expresses concern over lessening public confidence. Similarly, EC 8-7 states that attorneys "should be persons of integrity" and should act in ways to help protect the public. Although there are no specifically comparable Rules provisions, the Preamble to the Rules suggests the importance of the public image of the profession. Since sexual contact with a client is an exploitation of the client's dependence on and trust in the attorney, such behavior violates these Code and Rules considerations. It decreases the profession's integrity in the eyes of the public and exploits, rather than protects, the public.

114 EC 9-1 provides, in pertinent part: "A lawyer should promote public confidence in our system and in the legal profession." EC 9-2 provides, in pertinent part: "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer." EC 1-5 provides, in pertinent part: "A lawyer should maintain high standards of professional conduct, . . . He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-1 (1991).

115 EC 8-7 provides, in pertinent part: "Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-7 (1991).

116 The closest rule to these Code provisions is Rule 8.4 of the Rules, included within the "Maintaining the Integrity of the Profession" section. This rule provides:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.


117 "The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar . . . . Neglect of . . . . responsibilities compromise the independence of the profession and the public interest which it serves." MODEL RULES OF PROFESSIONAL CONDUCT, Preamble.
PROPOSED SOLUTION

Other professions prohibit their members from engaging in sexual relations with their patients/clients by the respective codes regulating ethical conduct in those professions. Applicable to doctors is The Principles of Medical Ethics of the American Medical Association (Principles). The American Psychiatric Association (APA) has published annotations to the Principles which are applicable to psychiatry. Although there is no express provision prohibiting sexual contact between doctor and patient, the APA annotation to the section regulating physician interaction with patients and colleagues states that:

[t]he requirement that the physician conduct himself with propriety in his/her profession and in all the actions of his/her life is especially important in the case of the psychiatrist . . . . [T]he necessary intensity of the therapeutic relationship may tend to activate sexual and other needs and fantasies on the part of both patient and therapist, while weakening the objectivity necessary for control. Sexual activity with a patient is unethical.

In an opinion by the Ethics Committee on the Principles, the APA explained its pronouncement: "[t]he psychiatrist is exploiting his patient by not helping him or her to see that his or her affection for him is a projection of feelings appropriate to another person at another point in time." And, as indicated previously, the court in *L.L.* cited the APA's annotations in its discussion of therapist-patient sex.

Thus, medical ethics clearly prohibit a psychiatrist from having sex with his patient. Acceptance of the APA's interpretation of the Principles yields a comparable, albeit implicit, result for physicians in general.

Other professions also address the issue of sexual contact between their professionals and clients in their ethical codes. For example, the Rabbinic Code of Ethics states:

We recognize the power that the position of a rabbi frequently entails, and note particularly the trust our position automatically evokes from

---

118 For the doctor, the proscription begins with the Hippocratic Oath which states that "[i]n every house where I come, I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women and men." Cited in L. Riskin, *Sexual Relations Between Psychotherapists and Their Patients: Toward Research or Restraint*, 67 Cal. L. Rev. 1000, 1002 (1979).

119 *THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY* 4, annotation 1 to Section 2 (1985 ed.).

120 *OPINIONS OF THE ETHICS COMMITTEE ON THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY* 15, Section 2-d (June 1985).

121 See supra text accompanying notes 52-60.
others. We must therefore not engage in exploitative practices which destroy our moral integrity. It is unethical, for example, to engage in extra-marital sexual activity or sexual activity with a child, an unwilling adult, or someone we are counseling. Sexual relations with staff members and colleagues who are dependent upon us similarly are unethical.¹²²

A rabbi who violates this rule is subject to disciplinary action by the Committee on Ethics and Appeals.¹²³

Unlike the medical or rabbinical codes of ethics, there is no comparable provision in the Code prohibiting attorney-client sex during representation. As we have seen, however, such a proscription is implicit throughout the Code, in both the Ethical Considerations, the Disciplinary Rules,¹²⁴ and the Rules. An attorney's sexual contact with a client may constitute unethical behavior in violation of Code and Rule provisions dealing with upholding the integrity of the profession, protection of the client, and conflicts of interest. The implicit provisions in the Rules are not as extensive as those in the Code. The provisions specifically violated are EC's 1-5, 5-1, 5-2, 7-11, 7-12, 8-7, 9-1, 9-2, and 9-6, DR's 1-102 (A)(6), 5-101 (A), and 7-101 (A)(3), and Rules 1.7 and 8.4. An attorney who disregards these standards, set by the profession, is subject to disciplinary proceedings.¹²⁵

¹²³ Id. at § 1, In 13-14.
¹²⁴ Even though the Ethical Considerations are considered aspirational only, they have been held to be violable. See, e.g., Comm. on Professional Ethics v. Bitter, 279 N.W.2d 521, 523 (Iowa 1979) ("We conclude this respondent has violated EC 5-8 and DR 5-103 (A). . . . "); Comm. on Professional Ethics & Conduct of Iowa State Bar Ass'n v. Hill, 436 N.W.2d 57, 58 (Iowa 1989). ("Ethical considerations not only illuminate the disciplinary rules; a violation of an ethical consideration alone is sufficient to support attorney sanctions.").
¹²⁵ Besides being subject to disciplinary proceedings, an attorney who engages in sex with a client may be faced with additional punishments, notably civil action and criminal proceedings. See Cotton v. Kambly, 300 N.W.2d 627, 629 (Mich. 1981). Most frequently, redress against a doctor who has had sexual contact with his patient is in the form of a medical malpractice action, while the analogous violation in the legal arena results in disciplinary proceedings. Since the principles for an action for professional negligence are the same for the medical and legal professions, such a cause of action should be equally applicable to an attorney. Contra Suppressed v. Suppressed, 565 N.E.2d 101 (Ill. App. Ct. 1990). Actions have also been brought against attorneys involved in these sorts of cases for the intentional infliction of emotional distress, McDaniel v. Gile, 230 Cal. App. 3d 363 (1991) (attorney's actions constituted outrageous conduct), and under the Racketeer Influenced and Corrupt Organizations Act (RICO), Doe v. Roe, 756 F. Supp. 353 (N.D. Ill. 1991). Criminal sanctions may also be available. Masters and Johnson state that they "feel that when sexual seduction of patients can be firmly established by due legal process, regardless of whether the seduction was initiated by the patient or the therapist, the therapist should initially be sued for rape rather than for malpractice . . . ." William Masters and Virginia E. Johnson, Principles of the New Sex Therapy, 133 AM J. PSYCHIATRY 548, 552 (1976). Although prosecutions for rape have been rare, several states have enacted statutes which adopt Masters and Johnson's suggestion. Wisconsin, for example, has a statute which expressly makes it a crime for a therapist to have sex with a patient. See STONE, supra note 66, at 196; see also Simon, supra note 4, at 51 (noting that sexual relations with a patient is a crime in New Hampshire, Michigan, and Wisconsin, and may be criminal also under the Model Penal Code). One author states that fifteen states have statutes making such behavior criminal. Simon, supra note 4, at 51.
Whether or not the existing provisions actually prohibit sexual relations with clients and whether they are sufficient to protect the public have been the subject of some controversy. Enacting a well thought out explicit rule, such as California's proposal, ends such controversy by clearly prohibiting an attorney from engaging in conduct which might be harmful to the public. The time has come to include an express prohibition on such potentially harmful conduct.

Although absent from the Code and the Rules, the American Trial Lawyer's Code of Conduct (ATLA Code), a revision of the Code drafted by the Roscoe Pound-American Trial Lawyers Foundation, provides such an explicit prohibition. Under the section on maintaining integrity and competence, Rule 8.8 of the ATLA Code states that "[a] lawyer shall not commence having sexual relations with a client during the lawyer-client relationship." The comments to the Rule explain:

Rule 8.8 forbids a lawyer to commence having sexual relations with a client during the lawyer-client relationship. This rule, like Rule 5.1, recognizes the dependency of a client upon a lawyer, the high degree of trust that a client is entitled to place in a lawyer, and the potential for unfair advantage in such a relationship. Other professionals, such as psychiatrists, have begun to face up to analogous problems. 126

Hence ATLA, in drafting its code, recognizes not only the transference and fiduciary elements present in the attorney-client relationship, but also the serious nature of such behavior and its similarity to that occurring between psychiatrist and patient.

California also has recently acknowledged the problem of sexual relations in an attorney-client relationship. In response to a bill requiring the state bar to adopt a rule addressing sexual relations between attorneys and their clients, 127 the Board of Governors of the State Bar of California adopted Draft Rule F of the Proposed Rule of Professional Conduct 3-120, on April 20, 1991. The adopted version of Rule 3-120, entitled "Sexual Relations With Clients", specifies:

Although many of these statutes expressly prohibit therapist-patient sex, there is no reason not to extend the liability to attorneys since, as has been shown above, the dynamics and seriousness of the behavior is comparable to that of therapist-patient relationships. Criminal liability would extend to attorneys under the statutes phrased in terms of lack of consent since a client is not able to give informed consent to a sexual relationship with her attorney.

Consequently, an attorney's liability for breaching the attorney-client relationship and exploiting the vulnerability of the client by engaging in sexual relations during representation of the client could result in criminal liability, civil liability, and disciplinary proceedings against the attorney.

126 ATLA CODE, Rule 8.8 cmt. (Revised Draft 1982). The Preamble to the ATLA CODE indicates that the "Rules are followed by Comments, which are not intended to be the basis of disciplinary action, but to enhance understanding of the disciplinary rules."

For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

A member shall not:

1. Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
2. Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
3. Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.

Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

A member who engages in sexual relations with his or her client will be presumed to violate rule 3-120, paragraph (B)(3). This presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606.128

This rule is more detailed than the ATLA Code rule in that it defines "sexual relations" specifies what is proscribed, excepts relationships which predate the

128 California Rules of Professional Conduct Rule 3-120 (Draft F 1991) [hereinafter Draft Rule F] (adopted by the California Supreme Court, in modified form, on August 13, 1992. Finding the adopted version of the rule to be inadequate, Assemblywoman Roybal-Allard introduced Assembly Bill No. 1400 to the California legislature. The legislation further regulates attorney-client sexual relationships by prohibiting attorneys from conditioning representation on the client's willingness to engage in sexual relationships. This new statute, amending the Business & Professions Code Section 6106.9, was enacted on September 18, 1992 and took effect on January 1, 1993. See 8 ABA/BNA Law. Man. Prof. Conduct 319).
professional relationship, exempts firm members not representing a firm's client, and indicates where the burden of proof lies. The California rule reflects a recognition of the difficulties involved in drafting an explicit rule proscribing attorney-client sexual relations.

The drafters of California's rule also recognized the underlying rationales mandating such a rule. The discussion following the rule notes that "a client exhibits great emotional vulnerability and dependence upon the advice and guidance of counsel" and that "[t]he relationship between an attorney and client is a fiduciary relationship of the very highest character ...." The Subcommittee was created to draft the new rule, after examining provisions governing therapist/patient relations, various ethical opinions, existing implicit proscriptions, and the constitutionality of an express rule, and recommended Draft Rule F, noting that:

in light of the strong emotional nature of sexual relationships, even if an attorney were able to predict the consequences of such sexual relations and explain them to the client, it is doubtful that the client's consent to continued representation could ever be deemed truly informed and voluntary. In short, such consent would still beg the very question it was intended to answer, that is whether sexual relations were truly consensual and the client's consent truly voluntary or whether such relations and consent were obtained through undue influence on the part of the attorney.

Hence, the drafters of the rule seem to have recognized the need for client protection based on the existence of transference in an attorney-client relationship and on the fiduciary nature of the relationship.

POTENTIAL OBJECTIONS

Two potential objections might be raised to the argument that an express proscription is required. First is that a per se prohibition is unnecessary because it is the rare exception when attorney-client sexual relations occur or are harmful. Second is that such a rule, though necessary, should be limited only to domestic law cases.

129 A situation whereby the attorney falls under paragraph (D) but not under paragraph (C), that is where he initiates sexual relations with a firm's client during the course of the firm's representation of the client, should still be ethically proscribed. This issue, however, is left for another day, another paper.

130 Draft Rule F, supra note 128, at 1.

131 Id. at 2.

The first group of objectors might acknowledge that attorney-client sexual contacts do occur and that such conduct might, at times, be egregious and harmful to the client. Nonetheless, they argue that a per se rule prohibiting intimacy between an attorney and client is unnecessary since it is the rare bad apple who engages in this type of behavior. Yet, there is a need for a clear cut rule to assist attorneys in distinguishing proper from improper behavior. The need for such a rule is underscored by the seriousness of the harm to clients who fall prey to attorneys who cannot distinguish improper from proper behavior absent a clear line.

These bright lines are drawn in many areas of attorneys’ conduct governed by ethical rules. For example, both the Code and the Rules preclude a lawyer from obtaining publication rights to subject matter related to the representation while the representation is continuing. Although the frequency with which this scenario arises is relatively small, the profession has nonetheless imposed a carte blanche proscription. Similarly, lawyers are prohibited from taking an interest in the subject matter of litigation. Even though many attorneys could take such an interest

133 This is Joel Feinberg’s prohibition objection recloaked. In his Philosophy of Law seminar, Phil 596G, at the University of Arizona during the Spring of 1991, Professor Feinberg raised the prohibition example, which essentially questions why prohibition should be imposed upon all because of a few. More specifically, why should we all be prohibited from drinking because of the few who cannot drink and behave?

134 Professor Hazard has stated:

Of course, there can be cases where the relationship is genuine and not exploitive. But the probabilities are stronger the other way. Hence, a per se rule might be justified, making it professional misconduct to have sexual relations with a client under any circumstances.

Hazard, supra note 6, at 13.

135 DR 5-104 (B) states:

(B) Prior to the conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.


Similarly, Rule 1.8 (d) states:

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.


136 DR 5-103 (A) states:

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

without harming the client, the result in those few cases where the client is harmed is so egregious that we preclude all from doing so. Thus, although the problem of attorney-client sexual conduct appears to already be implicitly proscribed by existing ethical rules governing attorneys, the seriousness of the consequences of these acts also warrants drawing a bright line.  

The second group of objectors might argue that such a rule should be drafted to apply only to the domestic law arena. Although sexual contacts between attorneys and clients occur more often and seem more egregious in the family law context, they are not limited to a specific specialty. Transference is found in various types of attorney-client relationships, as is the attorney's role as a fiduciary. At this point, however, the objector might fine-tune her objection and argue that the proscription should apply only to those attorney-client relationships which involve transference or in which the attorney functions as a fiduciary.

Admittedly, there may be instances in which sexual contact could occur between an attorney and client and not be detrimental to the client or to the professional relationship. However, these instances are the exception rather than the rule. Even if they were not, drawing a narrow rule is unworkable. Problems in identifying harmful circumstances and in determining where to draw the line render the drafting of such a fine-tuned rule difficult and would result in ad hoc determinations. Furthermore, like the bright line drawn in the publication rights and subject matter of litigation prohibitions, the difficulty in tailoring a fine-tuned rule to address only these instances and the seriousness of the consequences of exploiting a vulnerable client are such that a clear bright line, such as that drawn by a well thought out prohibition like the California rule, is warranted.

At this point, the objector might contend that, unlike the clear-cut prohibitions in the publication rights and subject matter of litigation arenas, a clear-cut proscription against attorney-client sexual relationships violates the right to

Similarly, Rule 1.8 (j) states:

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.


137 See Hazard, supra note 6, at 14: "In my opinion, having a sexual relationship with a client is prohibited by the present rules against conflict of interest between lawyer and client. Many lawyers contend otherwise. In any event, there is still grounds for having a specific rule."

138 Jim Friedberg, Professor of Law at West Virginia University, raised the scenario of a corporate attorney with a sophisticated banker-client, a possibility involving no disparity in power or dependence by the client.

139 See supra text accompanying notes 135–36.
privacy. Though perhaps addressing a compelling state interest, the argument might proceed, such a bright line rule would not be the most narrowly drawn means of achieving that end.\textsuperscript{140} The Supreme Court has noted, however, that "any claim that [the right to privacy] cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."\textsuperscript{141} Thus, the right to privacy cannot be used to shield private sexual contact with potential deleterious effects.

CONCLUSION

Sexual relations do occur between attorneys and their clients during the course of representation. Such contact between an attorney and client should be proscribed for the same reasons that therapist-patient sexual relations are banned: the existence of transference and the fiduciary nature of the professional relationship. In addition, conflict of interest principles, the duty to represent the client's best interest, and the public's perception of the profession also mandate the drawing of a bright line rule.

The relationship between an attorney and client involves the phenomenon of transference, whereby the client transfers emotions more appropriately directed toward another in her life to the attorney who holds an important position in her life. While experiencing these strong feelings, the client is dependent, vulnerable, and unable to accurately perceive the relationship. Although an attorney does not use transference as a primary tool, as does a therapist, nonetheless the phenomenon is much more intense in the attorney-client setting than in everyday relationships. Sexual relations with a client exploits the client's vulnerability and dependence.

Furthermore, an attorney is a fiduciary, that is, he is in a superior position and is reposed with the client's trust. As such, he has a duty to act in good faith and to further the client's best interest without harming her or exploiting her inferior position. Sexual relations with a client constitutes a breach of an attorney's fiduciary duties.

In addition to these client-oriented rationales, sexual relations between an attorney and client should be prohibited based on attorney-oriented rationales, including conflicts of interests for the attorney and a duty to the client's best interest, as well as profession-oriented rationales, such as the public perception of the profession. Sexual contact between attorney and client during representation proves deleterious to the public's perception of the profession. Such a relationship appears improper, is not in the best interest of the client, and prohibits the attorney

\textsuperscript{140} Jim Friedberg brought this objection to my attention. A similar argument was raised in opposition to the recent rule proposed by the Oregon State Bar. Don J. DeBenedictis, \textit{Sex-With-Client Ban Fails}, 78 ABA 1 24 (Feb. 1992).

from exercising his best judgement. It might result in actual or potential conflicts of interest.

Due to the deleterious effects that an attorney-client sexual relationship has on the client, the attorney, and the profession, intimacy between an attorney and client during representation is unacceptable. Such behavior has been found to be violative of the Code and the Rules and to warrant disciplinary proceedings. These proceedings, however, rely on implicit interpretations of the applicable provisions.

This reliance on provisions which implicitly prohibit such behavior yields uncertainties, gray areas, and numerous interpretations. Thus, a clear bright line needs to be drawn, establishing an explicit proscription on sexual relations between an attorney and client. The ATLA Code takes a step in the right direction by expressly prohibiting attorney-client sexual contact. As depicted in the work of the State Bar of California, such a rule must be well thought out and carefully drafted.

One might argue that such a draconian application is paternalistic and overlooks the fact that not all clients are dependent or vulnerable. Nevertheless, the circumstances when harm does not result are the exceptions rather than the rule. Tailoring a rule to except those situations makes the rule unworkable and results in ad hoc determinations. Due to the seriousness of the consequences of the prohibited behavior, it is more practical to draw a bright line and to require these few exceptions to seek new counsel. The time has come for such a line to be clearly and expressly drawn.142

---

142 The author would like to thank James J. Friedberg, Patrick C. McGinley, Laurel Terry, and William L. Wilks for extensive comments on previous drafts of this paper. Special thanks must be extended to my brother, Joseph K. Goldberg, Esq., for help with the more technical aspects involved in the writing of this, as well as his patience with the interruptions that providing that assistance caused to his law practice.