POINT/COUNTERPOINT—

Sex With Clients:

Prohibition or Permission?

ETHICALLY SPEAKING

by Carole J. Buckner and Robert K. Sall

Should a lawyer be permitted to commence a sexual relationship with the lawyer's client, or should such conduct be prohibited? The California Commission for the Revision of the Rules of Professional Conduct (the "RRC") continues to wrestle with whether California should follow a flat prohibition (the ABA Model Rules approach to the subject), or continue with the current more permissive rule, which has been California's historical approach. This month's columnists, both members of the OCBA's Committee on Professionalism and Ethics, address the pros and cons of each approach.

Carole Buckner: California Should Adopt the Prohibition

I propose that California adopt a rule similar to ABA Model Rule 1.8(j), which provides that "a lawyer shall not have sexual relations with a client unless a consensual relationship already existed between them when the client-lawyer relationship commenced." The primary impetus for the ABA's adoption of this rule was the exoneration of lawyers involved in sexual relationships with their clients due to the lack of a specific prohibition. (Thomas D. Morgan and Ronald D. Rotunda, PROFESSIONAL RESPONSIBILITY, PROBLEMS AND MATERIALS 221 (9th ed. 2006).) California's enactment of such a rule would result in the application to lawyers of a standard of conduct already imposed on other California professionals such as physicians, psychotherapists and drug counselors. (Bus. & Prof. Code § 729(a)).

The problem of lawyers engaging in sex with their clients is reportedly most prevalent in the family law arena. In one reported case, a divorce client testified that her lawyer had twice taken her to his apartment where he had her inhale something that disoriented her and then had sex with her. (*Suppressed v. Suppressed,* 565 N.E.2d 101 (Ill.App.Ct.1990).) Her charges were dismissed by the disciplinary authorities, and her malpractice action was dismissed by the court, despite the lawyer's fiduciary obligations to the client.

The ABA observed the potential for abuse of the fiduciary relationship, particularly where a lawyer represents a vulnerable client, as well as the loss of the emotional separation appropriate to the exercise of sound professional judgment. (ABA Formal Opin. 92-364 (1992).) Lawyers and clients involved in a sexual relationship may also have difficulty distinguishing which communications are personal and which are professional. (*Id.*) The ABA also found that a client's consent to such a relationship would not be effective, but more likely vitiated by the lawyer's undue influence over the client. Ultimately, the ABA concluded that lawyers should refrain from sexual relationships with clients because of the danger that such relationships will impair the lawyer's representation of the client.

Prior to adoption of any rule or statute in California, the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) issued Formal Opin. 1987-92 in which the Committee struggled to balance the lawyer's interest in private relationships with the need to protect vulnerable clients, particularly in family law practice. While the Opinion concluded that a sexual relationship between lawyer and client did not *per se* impair the lawyer's representation, and that a ban on lawyer-client sexual relations was unnecessary, COPRAC cautioned that "even the most competent of lawyers may find it difficult to insulate sound judgment from the emotion or bias which may result from a sexual involvement."

California's legislature recognized that "it is difficult to separate sound judgment from emotion or bias which may result from sexual involvement between a lawyer and his or her client during the period that an attorney-client relationship exists, and that the emotional detachment is essential to the lawyer's ability to render competent legal services." (Cal. Bus. & Prof. Code § 6106.8(a).) The current permissive California Rule of Professional conduct provides that a lawyer shall not (1) require sexual relations as a condition of professional representation, (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 a member to perform legal services incompetently, in violation of 3-110. (Cal. Bus. & Prof. Code § 6108.9; Cal. Rule Prof. Conduct 3-120(B).) The term sexual relations is defined more broadly in California than under the ABA Model Rule. (Cal. Bus. & Prof. Code § 6109(e); Cal. Rule Prof. Conduct 3-120(A).) However, the reference to competence perhaps raises the disciplinary threshold, given that incompetency requires intentional, repeated or reckless failure to perform legal services. (Cal Rule Prof. Conduct 3-110(A).) It is important to note that both the ABA and California Rules provide that the prohibitions on sexual relations shall not apply to ongoing consensual sexual relations that predate the lawyer-client relationship. (Cal. Rule Prof. Conduct 3-120(C); ABA Model Rule 1.8(j).)

Carol Langford, who specializes in representing lawyers, believes: "The Rule needs to be re-written. It allows lawyers to get away with harassing clients by alleging consent, much like in a rape case. And women who complain have to file a signed affidavit – unlike any other complaint." She sees the statute as an impediment, observing that "[t]he problem is, [the Rule] was legislatively mandated, so change would take legislative action." Langford believes that "[t]he Bar should lead that charge." Others, including some RRC members, believe that the statute merely establishes a baseline for minimal regulation, and that the RRC is within its mandate to adopt a prohibitory rule.

The OCBA's own Committee on Professionalism and Ethics has also concluded that the California Rule does not go far enough, and that the ABA rule should be adopted. (OCBA Formal Opin. 2003-02.) The OCBA Opinion observes that the vulnerability of clients, not just in divorce and custody cases, but also criminal defendants and indigent clients, as well as the imbalance of power in the lawyer client relationship, makes genuine consent to sexual relations impossible. The OCBA Opinion catalogs a parade of horribles that can flow from the attorney's sexual relationship, from impairment of the attorney's judgment due to conflicts of interest, to disclosure of confidential communications.

Absent coercion or a *quid pro quo* relationship, California disciplinary authorities

must prove not only the sexual relationship, but also the adverse impact on the representation in order to discipline a lawyer. Thus situations in which the lawyer adequately represents the client, but has sexually exploited the lawyer client relationship (e.g., *Tante v. Herring,* 453 S.W.2d 686 (Ga. 1994)) will not be reached by California's rule. The State Bar's Office of Chief Trial Counsel advised the RRC that "the current rule regarding sexual relations with a client does not work." (Memorandum from Mike Nisperos, Chief Trial Counsel to RRC dated 9/27/01.) Such relationships, Nisperos stated, "create conflicts and a host of problems ... best resolved, as the ABA does in proposed Model Rule 1.8(j) by prohibiting all sexual relationships with a client, unless they predate the commencement of the attorney client relationship." (*Id.*) Perhaps that is why 18 states that have considered ABA Model Rule 1.8(j) have adopted it outright, and four more have adopted the prohibition with some additional restriction or modification.

Rob Sall: California's Existing Rule is Sufficient, if there needs to be a Rule at All

Imposing on lawyers a blanket prohibition on sexual relations with clients is a statement that lawyers and clients who become sexual partners cannot act as adults in their interpersonal relations and must instead be told "no," like children. While I believe that lawyers should refrain from initiating sexual relationships with their clients, when such a relationship develops it does not warrant discipline unless the lawyer has engaged in unlawful or coercive behavior or the relationship results in a failure to competently perform legal services.

Prosecutors want a bright line test – a flat prohibition that makes it easy to prove when a lawyer has crossed the line. Crudely put, if you haven't already been "doing it" you can't start after the retainer has been signed. But is such a rule really necessary, and more importantly, is it appropriate?

As a prelude to writing this article, I solicited the thoughts of ethics lawyers throughout the country and not all agree with an absolute prohibition:

> *"Many states have a per se rule prohibiting sex with clients and I agree with those who condemn that approach. The law – criminal, civil, and disciplinary – is full of rules which, if strictly applied to all cases will result in an injustice."* Mike Gross, Esq., Colorado

> *"Young lawyers in large firms often work very long hours with little time for socializing outside of the work context. A junior lawyer may develop a relationship with a junior corporate client employee. To prohibit such a relationship is, to my mind, overly intrusive. The California rule sounds much more sensible to me."* Janet G. Perry, Esq., Pennsylvania

> *"The relationship does not need to be about "who has the power?" or "who is the abuser?" Sometimes people just wind up in bed together because they both want to be there. If there is no coercion involved, then the fact of one party having a bar card in their purse or wallet or the other a legal bill, is just not a big deal."* Roy A. Bourgeois, Esq., Massachusetts

> *"It's almost equally imprudent to date one of your partners, or for a partner to date an associate, but we don't treat that as an ethics violation. …An overbroad prohibition just invites people to view the ethics rules as a nanny system and not as a series of norms to protect clients."* Deborah J. Jeffrey, Esq., Washington, D.C.

> *"I find the per se rule to be sexist and patronizing. The underlying assumption that adult women are weak, vulnerable, incapable of objective decision making, in need of protection, and generally, susceptible to undue influence, is offensive to me. … If there must be a rule, I support the current California approach…."* Ellen A. Pansky, Esq., Los Angeles

> *"In the absence of proof of coercion or undue influence, and with the obvious exception of an attorney-client relationship in a domestic relations matter (which I believe would fall under the general conflict rules anyway…), the disciplinary system should have no business concerning itself with consensual sex between attorney and client."* Craig Simpson, Pennsylvania

> *"I cannot imagine what legitimate state interest justifies greater restrictions in private lives beyond those set forth in California's rule."* James Ham, Esq., Los Angeles

If the ABA rule were to be adopted in California a lawyer would be subject to discipline unless the sexual relationship with the client predated the attorney-client relationship – no exceptions. This simply fails to recognize a number of things about human nature. Sometimes, people are attracted to each other and sex is a basic human instinct. That sex may happen between consenting adults does not necessarily destroy relationships or breach fiduciary duties. Some will behave responsibly and others won't. A bright line test may help prosecutors, but fails to take into consideration sexual relations that may occur without undue influence, without coercion, without drugs, without turmoil and without destroying the quality of an attorney-client relationship.

What is the rationale for suggesting that becoming the lawyer for someone with whom you've already had sex is any less dangerous a combination than having sex with the person who is already a client? There may be strong emotions, hurt feelings and undue influence in either scenario. In any close human relationship there is always the risk of emotional turmoil. Relationships, especially sexual ones, are often transient in our society. Having sex for some does not equate to love, commitment, responsibility, even affection, so a rule of conduct should not assume that there will always be emotional turmoil and impaired judgment. A separation or divorce can produce the same result but we don't have a rule that says the

lawyer may not represent his or her spouse.

I certainly don't advocate sex with clients as a wise move. I agree with the Legislature's finding in Bus. & Prof. Code section 6106.8, cited by my colleague above, that it is difficult to separate sound judgment from the emotion or bias that may come with a sexual relationship. I do not accept the conclusion that competent legal representation always requires emotional detachment – this might truly come as a surprise to any lawyer who has ever represented close friends, parents, siblings, spouse or children.

We need to recognize that sexual relations do not always adversely affect independent judgment. Sure, sexual relations may interfere with the attorney-client relationship and may even cause great emotional upset, but one cannot say that will occur in every instance. Blanket prohibitions are simply overbroad. They will lead to instances where a lawyer can be disciplined even if there was no lapse of judgment, no loss of professionalism and no harm to the client. The hard and fast rule proposed by my colleague simply fails to recognize that in some aspects of human relations, people can act as responsible consenting adults, and continue to act responsibly in the professional relationship. Discipline should not be presupposed in these cases – it should result only when there has been a coercive event, an unlawful act, or harm has actually resulted to the client.

My colleague's citation to the *Suppressed v. Suppressed* decision case really doesn't make the case for a *per se* rule against sex with a client. In that case, the attorney allegedly drugged the client, an act that could have been criminal if proven. (It should be noted that, after several complaints by clients, this prominent Chicago divorce lawyer was eventually disciplined by the same Committee that passed on charges in the *Suppressed* case.) That Illinois case is one of the earliest known decisions regarding sexual activity between attorney and client, and the matter was dismissed both on statute of limitations grounds, and because the client, who repeatedly had voluntary sex with the lawyer, had failed to allege recoverable damages. California, on the other hand, had already recognized civil liability for battery and deceit where an attorney coerced a client to engage in sexual activity. (*Barbara A. v. John G.* (1983) 145 C.A.3d 369,) The California court specifically declined to find the conduct an ethics violation, suggesting instead that rulemaking be more appropriately considered by the State Bar. Since 1983, the Legislature enacted both Bus. & Prof. Code sections 6106.8 and 6106.9, and we now have ethical guidance and a basis for discipline in egregious cases.

The existing statutory framework prohibits coercion, undue influence, dishonesty and similar acts of moral turpitude. (*See*, Bus. & Prof. Code section 6106 – "*The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor*.")

Bus. & Prof. Code section 6106.9 prohibits California lawyers from certain unethical actions involving sex with clients: (1) we can't condition our employment upon sex; (2) we can't coerce, intimidate or unduly influence our client to have sex; and (3) we must end the representation if the sexual relationship would cause us to fail to provide competent legal services. Items (1) and (2) are already illegal under the Penal Code, and item (3) is common sense. It is a given that forcing a client to have non-consensual sex is a criminal act. A lawyer violating these existing laws is already subject to prosecution under the State Bar Act. Expanding the prohibition to cover any act of sex with a client is simply overbroad.

One can always find extreme bad example cases like the *Suppressed* decision. No one would seriously suggest that if a California lawyer drugged a vulnerable divorce client, forced the client to have non-consensual sex, and then lied about the event (an act of dishonesty), that the State Bar could not find a way to prosecute under existing law. These kinds of cases do not call for an absolute bar to sex; they call for stronger prosecution of bad apples.

To have a blanket rule prohibiting sex with clients goes too far, addresses a problem that rarely arises, and may be better dealt with in a civil arena rather than through the disciplinary process. The present law on this subject needs no further refinement.

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