

Sex, Lies, and the OPC

by Kate A. Toomey

Utah has a Rule of Professional Conduct explicitly forbidding sex with a client if it “exploits the lawyer-client relationship.” Rule 8.4(g), Rules of Professional Conduct. The rule even defines “sexual relations.”¹ Under the rule, such relations are presumed exploitative, but the presumption may be rebutted. *See id.* at (g)(2). Complaints about attorneys having sex with their clients seldom reach the Office of Professional Conduct, and oftentimes, the sexual relationship preceded the attorney/client relationship and therefore would not constitute a prima facie violation of the rule. *See* Rule 8.4(g)(2) (spousal relationships and relationships that “existed at the commencement of the lawyer-client relationship” are not presumed to be exploitative).

What lawyers sometimes don't realize, though, is that sexually-charged conduct need not violate the sex-with-clients rule and yet it might still violate the Rules of Professional Conduct. Here is an example from Maryland: An attorney spanked a personal injury client,² a divorce client, and a person he was interviewing for a position as his secretary.³ In Maryland, this constituted, among other things, a violation of Rule 8.4(d), which provides that it is professional misconduct for a lawyer to “engage in conduct prejudicial to the administration of justice.”⁴ Although this conduct might not have amounted to a violation of Utah's sex-with-clients rule, it certainly could have been prosecuted here. As one court has noted, conduct prejudicial to the administration of justice doesn't take a typical form; “[t]he common thread . . . is that . . . the attorney's act hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely.” *Iowa Supreme Court Bd. of Professional Ethics and Conduct*, 588 N.W.2d 121, 123 (Iowa 1999); *see also State v. Oklahoma Bar Ass'n v. Sopher*, 852 P.2d 707 (Okla. 1993) (attorney looked down client's blouse, commenting “don't expose yourself,” then repeated this behavior with client's mother, commenting “how's it going down there?”); *In re Bergren*, 455 N.W.2d 856 (S.D. 1990) (sexual relations with clients violated rule prohibiting conduct prejudicial to administration of justice). Verbal harassment can also constitute a violation of Rule 8.4(d). *See In re Brown*, 703 N.E.2d 1041 (attorney serving as clerk of

court made numerous unwelcome sexual advances to employees, mostly involving his desire to see and kiss their feet).

A complaint involving sexual conduct also could be evaluated pursuant to one of the rules governing conflicts of interest: “A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interest, unless: . . . The lawyer reasonably believes the representation will not be adversely affected; . . .” Rule 1.7(b), Rules of Professional Conduct. A Wisconsin attorney was disciplined for conflict of interest in connection with having sexual contact with a client and providing her beer, in violation of her parole. *See In re Ridgeway*, 462 N.W.2d 671 (Wis. 1990); *see also People v. Zeilinger*, 814 P.2d 808 (Colo. 1991) (attorney disciplined for conflict of interest and conduct that reflected adversely on fitness to practice law for having sexual relationship with divorce client). This rule could even apply to a relationship that pre-existed the attorney-client relationship – such as a consensual extramarital affair that leads to a divorce, during which the client's interests could have been compromised by the attorney's personal involvement. *See e.g. In re Lewis*, 415 S.E.2d 173 (Ga. 1992); *In re Schambach*, 726 So.2d 892 (La. 1999) (consensual relationship interfered with attorney's professional responsibilities to client).

Some jurisdictions have even prosecuted verbal sexual harassment as a form of conflict of interest. For example, an Arizona attorney was disciplined for conflict of interest predicated upon asking clients inappropriate questions concerning their sexual conduct, commenting about their physical appearances, and making lewd suggestions, then indicating he would have to charge more if they didn't cooperate. *See In re Piatt*, 951 P.2d 889 (Ariz. 1997).

Attorneys who solicit the exchange of legal services for sexual services are also prosecuted for conflict of interest. *See e.g. In re Wood*, 358 N.E.2d 128 (Ind. 1976) (attorney offered discount in

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exchange for nude photographs and sexual relations with client).⁵ So, too, are attorneys who threaten abandonment of the representation if the relationship ends. See *In re Rudnick*, 581 N.Y.S.2d 206 (A.D. Dept. 1992) (complainant continued relationship because attorney threatened to abandon case, telling her she could lose custody of child if she terminated relationship).

Does the OPC want to get involved in attorneys' private lives? Of course not. The thing to keep in mind is that an attorney's effectiveness can be diminished when loyalties and interests conflict. Lawyers often develop close emotional ties with their clients – a bond that sometimes arises from a client's soul-baring recounting of details and events necessary to the representation, not to mention the emotional ups and downs inherent in legal representation. Keeping perspective and emotional distance is always a good idea (medical professionals call this “clinical distance”), and arguably it's essential for avoiding burnout or worse. The sex-with-clients rule is but one manifestation of a variety of problems stemming from over-involvement, whether it be an inappropriate intimacy, or an exploitative relationship, or too much identification with your client's cause even when the relationship has nothing to do with sex, romance, family ties, or friendship.

Questions about this sort of relationship are rare on the Ethics Hotline, but you're welcome to call the OPC at 531-9910. Better yet, check those impulses (if you've got them!) until your judgment about the representation is beyond question, and tell your actual or potential friends, family, lovers, and anyone else for whom you care, that you can refer them to an excellent attorney.

1. See Rule 8.4(g)(1), Rules of Professional Conduct (“sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; . . .”).
2. The client was accidentally shot by a deer hunter and the attorney became upset when the client got engaged, believing that this might make the client's injury less sympathetic to jurors. He spanked her, he claimed, as punishment.
3. The seventeen-year old accepted the job and the attorney spanked her once a week for typing errors. She testified that she took the job because “I was young and wanted to do well. I wanted, I needed a job that I could go to after school and after I graduated, and if I was going to be a good secretary, I thought this is what I guess I have got to do.”
4. Utah's Rule 8.4(d) is identical.
5. Although barter exchanges are permitted, bartering for the exchange of sexual services arguably isn't.