



Jeff Geiger Counters

Talking Sex With Lawyers

By: Jeff Geiger. *This was posted Thursday, March 25th, 2010*

Looking at her e-mail message from Don, Juanita realizes that he is asking for her to represent him in a professional liability action. Sighing, Juanita thinks to herself that she is having another “they sure didn’t teach you this in law school” moment. Handling the litigation is, of course, not the problem. Instead, Juanita wonders whether she can represent Don, when she is romantically involved with him.

[Stories](#) involving lawyers who have sexually assaulted or engaged in sexual activities with their clients resulted in a consideration as to whether to amend the [Rules of Professional Conduct](#) to expressly ban such conduct. Ultimately, cooler heads prevailed and no additional rule was imposed. More on that later.

Even though the rules governing conflicts do not contain an express provision governing sexual relations between a lawyer and a client, it is not safe to assume that the absence of language dealing with sexual relationships connotes their approval. While not adopted in Virginia, [Rule 1.8\(j\)](#) of the ABA Model Rules of Professional Conduct states that: “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” Thus, to address the hypothetical, Juanita may be heartened in believing that because her relationship with Don preceded any legal representation of him, no ethical strictures apply. The absence of a prohibition, however, does not equate to a license. In highlighting some of the concerns associated with such relationships, the comment to Model Rule 1.8 cmt. [17] states that:

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer’s fiduciary role, in violation of the lawyer’s basic ethical obligation not to use the trust of the client to the client’s disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer’s emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger

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of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Juanita should, at a minimum, resolve whether her independent professional judgment and the emotional involvement of the client would conflict in her representation of Don. The bottom line: Juanita can likely both represent Don and continue her sexual relationship with him. But, as a practical matter, she should be very wary of doing so given the heightened disciplinary and professional liability issues surrounding lawyer-client sexual relationships.

And recall, I wrote, "cooler heads prevailed" in not creating an outright ban. From my vantage point, the rules already address sexual relationships. Rule 1.7 provides that a lawyer shall not represent a client if the representation will be limited by the personal interest of the lawyer. Rule 8.4 prohibits deliberately wrongful acts that reflect adversely on the lawyer's fitness to practice law. I don't need a rule to tell me not to have sex with a client anymore than I need a rule to tell me not to get drunk and appear in court. I am not advocating turning the law office into a television series. Instead, I am promoting a return to judgment.

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