

SUPREME COURT OF NEW JERSEY

NOTICE TO THE BAR

Re: Request for Comment on Proposed Rule Prohibiting Attorney-Client Sexual Relationships During the Course of Representation

In February 1999, the Administrative Director of the Courts referred to the Supreme Court's Professional Responsibility Rules Committee (PRRC) the Supreme Court's Administrative Determinations in respect of Recommendation 13 of the Special Committee on Matrimonial Litigation.

That Recommendation would have amended the Rules of Professional Conduct to prohibit sexual relationships between an attorney and his or her client or opposing counsel during the course of representation in a matrimonial matter. The Director's memorandum advised that the Court had determined to adopt Recommendation 13 and was referring to the PRRC "the task of drafting an appropriate amendment to the Rules of Professional Conduct." The PRRC was directed to consider further whether the prohibition should apply to all areas of practice.

The PRRC has submitted a report and proposed rule to the Court. The proposed rule defines sexual conduct and prohibits sexual relations between an attorney and his or her client during the pendency of the representation regardless of the area of practice at issue in the representation. Pre-existing relationships are excepted from the proposed rule.

The Court is seeking comments from members of the bar. The text of the PRRC's report and the proposed rule follow this Notice. Appendices to the report are available for review in the Supreme Court Clerk's Office, Hughes Justice Complex, Market Street, Trenton. Anyone interested in reviewing the appendices should communicate with Carol Hucks, Esq., at (609) 292-4837. Those intending to comment should do so in writing to me by July 2, 2001, at the following address:

Clerk of the Supreme Court
Richard J. Hughes Justice Complex
P.O. Box 970
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Stephen W. Townsend, Esq.
Clerk of the Supreme Court

Dated: April 30, 2001

PROPOSED AMENDMENT TO RULE 1.8, CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

- (a) A lawyer shall not have sexual relations with a current client of the lawyer.
- (b) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the commencement of the legal representation.
- (c) For purposes of this Rule, "sexual relations" means:
 - 1. Sexual intercourse; or

2. Any touching of the sexual or other intimate parts of the lawyer or client for the purpose of arousing or gratifying the sexual desire of either party.

(d) For purposes of this Rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

REPORT OF THE PROFESSIONAL RESPONSIBILITY RULES COMMITTEE RE: PROHIBITING ATTORNEY-CLIENT SEXUAL RELATIONSHIPS DURING THE COURSE OF REPRESENTATION

PREFACE

On February 1, 1999, then Administrative Director of the Courts, James J. Ciance, referred to the Professional Responsibility Rules Committee ("PRRC") the Supreme Court's Administrative Determinations in respect of Recommendation 13 of the Special Committee on Matrimonial Litigation. That Recommendation would have amended the Rules of Professional Conduct to prohibit sexual relationships between an attorney and his or her client or opposing counsel during the course of representation in a matrimonial matter. The Recommendation excepted from the prohibition representation of an existing spouse or "significant other" in matters not involving the attorney. See Appendix A-1.

In his referral memorandum, Director Ciance indicated that the Court had determined to adopt Recommendation 13 and was referring to the PRRC "the task of drafting an appropriate amendment to the Rules of Professional Conduct." Director Ciance further noted that the Court had requested the PRRC also to consider whether the prohibition should be extended beyond the area of matrimonial litigation and become a rule of general application. See Appendix A-2.

THE PRRC'S PROCEDURE

The Committee first discussed this matter at its April 27, 1999, meeting. At that point, the Committee decided to communicate with other jurisdictions to learn how they defined terms such as "sexual relations," and about the scope of the prohibition on such relations. The Committee accomplished this by submitting to the National Organization of Bar Counsel a "Jurisdictions Survey" inquiry.

In addition to the jurisdictions survey, the Committee solicited comments on any proposed expansion of the prohibition outside of the matrimonial litigation area. Thus, it published a Notice to the Bar in May 1999. See Appendix A-3.

The Committee received a limited number of comments. Some commentators discouraged the adoption of any kind of a broad prohibition based solely on the nature of the relationship. For example, two commentators encouraged instead the adoption of a rule similar to California's, which prohibits sexual relationships that are demanded or required by the lawyer incident to or as a condition of any professional representation; those in which the lawyer has employed coercion, intimidation, or undue influence in entering into sexual relations with the client; and those that prevent a lawyer from performing legal services competently. Those commentators took the position that, absent empirical evidence suggesting that a sexual relationship between a lawyer and his or her client impairs the lawyer's judgment and objectivity, the broad prohibition unduly infringes on both the lawyer's and the client's free choice and free associational rights. See Appendices B-1 and B-2.

Other commentators, including the Office of Attorney Ethics, supported not only a broad prohibition on sexual relationships in the context of matrimonial litigation, but also the expansion of the prohibition to all areas of representation. See Appendix B-3.

Another (anonymous) commentator, who also supported a broad prohibition, suggested that in addition to the potential problems in representation that may develop as a result of the sexual relationship between the lawyer and the client, the relationship consumes the lawyer's attention and diminishes the lawyer's ability to pay the appropriate attention to

other clients.

Noting that "law is no longer considered a noble profession," this commentator viewed Recommendation 13 as a start "towards renewing professionalism in law." See Appendix B-4.

Rutgers Law Professor John Leubsdorf supported a prohibition on sexual relationships between lawyers and clients in all areas of representation, and not just during matrimonial litigation. However, he did not support a similar prohibition as between opposing counsel, taking the position that a sexual relationship between opposing counsel did not pose the same danger of exploiting clients' vulnerability as did sexual relationships with clients themselves. Instead, Professor Leubsdorf suggested that the issue of sexual relationships between opposing counsel was more appropriately addressed by a conflict-of-interest analysis. Thus, he thought clients should be able to give informed consent to continued representation. The New Jersey State Bar Association also supported that approach. See Appendices B-5 and B-6.

Finally, one commentator took no position on the prohibition. He suggested, however, that any prohibition on sexual relationships should address the issue of such relationships between attorneys and the spouses of their clients, as well as the spouses of opposing counsel. See Appendix B-7.

In addition to the specific comments received in response to the PRRC's Notice to the Bar, the Committee considered the November 2000 report of the ABA's Commission on the Evaluation of the Rules of Professional Ethics ("Ethics 2000"). See Appendix B-8.

CONCLUSION

After carefully considering these comments and references, the Committee concluded that the Rules of Professional Conduct should be amended to prohibit an attorney from entering a sexual relationship with his or her client during the pendency of the representation. Like the Special Committee on Matrimonial Litigation, the PRRC concluded that, consent notwithstanding, such relationships could affect the objectivity and judgment of an attorney. Thus, the Committee agrees that the potential risks to both the attorney and the client effectively can be eliminated only by flatly forbidding an attorney from entering a sexual relationship with a client throughout the course of the representation, without regard to whether the sexual relationship is consensual or whether the relationship prejudices the client's cause in any way.

In reaching that conclusion, the Committee considered the rationale of several other jurisdictions that prohibit a sexual relationship between a lawyer and a client during the representation. Noting the somewhat inherently unequal relationship between lawyer and client, those jurisdictions observe that the same factors that may have led the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in the position of vulnerability. See, e.g., comments to California Rule of Professional Conduct 3-120; Florida Rule of Professional Conduct 4-8.4; North Carolina Rule of Professional Conduct 1.18; and Utah Rule of Professional Conduct 8.4.

In addition to its consideration of the somewhat unequal position of the client in the professional relationship, the Committee determined that a broad rule of prohibition (with an exception for pre-existing consensual sexual relationships) will provide clear guidance. A broad rule ultimately will be easier to enforce than would a rule that simply limited the prohibition to cases in which coercion, etc., was employed or in which the personal relationship jeopardized or prejudiced the client's interest.

The Committee further determined that the prohibition should not apply to an attorney-client relationship that preceded the representation. In so deciding, the Committee noted the Ethics 2000 Commission's comment to its proposed amendments to Rule 1.8, Conflict of Interest. In its November 2000 report, the Commission explained its decision to exclude pre-existing relationships between lawyers and clients from the rule, stating:

Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceedings with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client

will be materially limited by the relationship. See Rule 1.7(a)(2).

ABA's Commission on the Evaluation of the Rules of Professional Ethics, Report on the Evaluation of the Model Rules of Professional Conduct, Rule 1.8(j), cmt. 18 (2000). See Appendix B-8.

Finally, the Committee believes that the prohibition on sexual relationships between attorneys and clients should extend to all areas of representation, and not just to matrimonial litigation. The concerns underlying the prohibition in the matrimonial arena apply also to other areas of representation.

In respect of the recommendation of the Special Committee on Matrimonial Litigation that the rule should also prohibit sexual relationships between attorneys and their opposing counsel, the PRRC agrees with Professor Leubsdorf that such relationships are best addressed through conflict-of-interest analysis.

Consistent with the Court's charge, the Committee has fashioned a proposed rule implementing its recommendations. If the Court adopts the rule, the Committee has suggested that it be added to the prohibited conduct enumerated in RPC 1.8, Conflict of Interest: Prohibited Transactions. A copy of the rule is attached to the Committee's report as Appendix C-1.

Respectfully submitted,
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April 24, 2001

[Notices to the Bar](#)