7-2000

Shedding a Little Light on a Well-Kept Secret

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legal perspectives

Faculty viewpoints on today's current issues

Shedding a little light on a well-kept secret

Lawyers should be bound by the same standards and ethics as other professions, but they're not

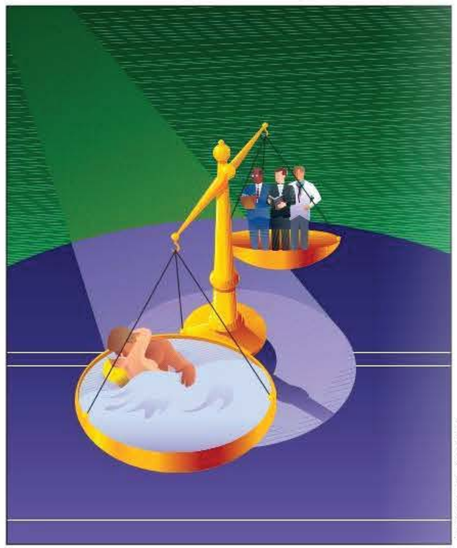

Illustration by Rick Sales

Professor Malinda Seymore has been with Texas Wesleyan School of Law since 1990. Seymore has taught criminal law, criminal procedure, evidence, feminist jurisprudence, Texas criminal procedure and property. She currently serves on the Gender Bias Reform Task Force of Texas by appointment of the Texas Supreme Court.

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Doctors can't do it. Psychotherapists can't do it. Ministers can't do it. But lawyers can.

No doubt you are aware of the many things lawyers can do that these other professionals can't – lawyers can advise clients about legal rights, can advocate for clients in court and can draft documents affecting legal rights. Attorneys serve as virtually the only entrée to the legal system. But there is one more thing lawyers can do that other professionals cannot: lawyers can have sex with their clients without violating a standard of professional responsibility.

Sex between lawyers and clients occurs far more frequently than many believe. In a 1993 nationwide survey of attorneys, 18.9 percent of the respondents had sex with a client themselves or knew of at least one other attorney who had. Despite this near-20 percent figure, there are only a handful of cases where attorneys have been disciplined for having sex with their clients. The reported cases run the gamut – some involve "quid pro quo" situations where the attorney required sex in exchange for legal services, others involve forcible rape and a few involve consensual sexual relations. Those that appear to be consensual relationships often involve vulnerable clients – clients who are suicidal, clients who are victims of domestic violence and clients who are facing criminal charges. Many are divorce cases. Virtually all of the cases involve a male lawyer and a female client.

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Lawyers proudly proclaim that, like doctors and clergy, they are members of a learned profession. One noted professor has identified the following characteristics that distinguish professions from other jobs: (1) the professions require a substantial period of formal education; (2) the professions require the comprehension of a substantial amount of theoretical knowledge; (3) the professions are governed by a code of ethics and are self-regulated; (4) persons who seek the services of a professional are often in a state of appreciable concern, if not vulnerability, when they do so; and (5) the professions almost always involve at their core a significant interpersonal relationship between the professional and the patient or client. In all of these ways, the "job" of lawyer, doctor and minister are alike.

Clients who seek the services of an attorney, like those who seek the aid of other professionals, often do so while in a vulnerable state, when involved in a situation that they are not capable of handling on their own. They must rely on the expertise of the professional, and will often idolize and idealize the helpful professional. The opportunities to exploit such trusting relationships are great. For that reason, the governing codes of ethics of all professions – except law – explicitly prohibit the professional from engaging in sexual relations with those they are seeking to help. In fact, in Texas, we criminalize sex between health care providers/mental health care providers and patients, and between clergy and parishioners when the professional "causes the other person to submit or participate by exploiting the other person's emotional dependency on the [professional]." Such violations constitute sexual assault, just as violent, nonconsensual sexual intercourse is sexual assault. Yet there is no such provision applicable to lawyers (I am sure that the fact that most legislators are lawyers has nothing to do with this omission!).

There have twice been attempts to introduce an ethical rule prohibiting sexual relations between lawyers and clients in Texas, and both attempts died in the relevant state bar committee. This does not make Texas unique – only 10 states currently have rules explicitly prohibiting sexual relationships between lawyers and clients. Texas lawyers had another opportunity to speak out in favor of a new rule at the State Bar of Texas annual meeting in San Antonio in June. The women in the profession committee proposed a resolution recommending that the following rule be submitted to the membership of the state bar:

> *A lawyer may not engage in a sexual relationship with a client, unless the lawyer and client are married to each other or already had a consensual sexual rela-*

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It can easily be argued that an attorney who is engaged in an intimate relationship with a client may make decisions that are not in the client's interest, but are affected by the lawyer's personal interest in the client. For example, a lawyer may want to prolong litigation because that will allow continued contact with the lover/client. Or a divorce lawyer may not encourage a reconciliation when having an affair with a divorcing client.

tionship before the lawyer-client relationship commenced.

Critics of an express prohibition of sexual relations between attorneys and clients advance several reasons: (1) existing rules of professional responsibility adequately address the problem; (2) the private lives of attorneys should not be regulated, especially with regard to consensual sexual activity; and (3) adopting such a rule would suggest to the public that lawyers are participating in such inappropriate behavior, and thus damage the reputation of all lawyers.

Existing rules of professional responsibility, in particular, conflict of interest rules, have been used to regulate attorney-client sexual relations. The Texas Disciplinary Rules of Professional Conduct provide, with regard to conflict of interest, that "a lawyer shall not represent a person if the representation of that person … reasonably appears to be or become adversely limited by … the lawyer's … own interests."

It can easily be argued that an attorney who is engaged in an intimate relationship with a client may make decisions that are not in the client's interest, but are affected by the lawyer's personal interest in the client. For example, a lawyer may want to prolong litigation because doing so will allow continued contact with the lover/client. Or a divorce lawyer may not encourage a reconciliation when having an affair with a divorcing client. While these situations may be covered by the conflict of interest rule, there is little in the rule that places lawyers or clients on notice that they are treading close to ethical violations. Furthermore, an attorney who can establish a reasonable belief that the representation was not adversely affected by the attorney's own interest is not guilty of a rules violation. In that 1993 survey of attorneys, those who had sex with their clients unanimously rated their overall behavior as at or above average.

And the conflict rule provides a simple escape for those attorneys who reasonably believe that the representation is not materially affected – if the client consents after disclosure of the potential conflict, there is no rules violation. The same vulnerability and reliance that often causes clients to consent to sex with their attorneys is also likely to cause them to consent to any potential conflict. The Texas Penal Code recognizes that the exploitation in doctor/patient, minister/parishioner and psychotherapist/patient relationships renders the sexual intercourse "without the consent of the other person." It is hard to imagine that the sex could be without consent, but that the waiver of the conflict of interest is with valid consent.

Proponents of any kind of regulation of sexual behavior are often labeled as repressed, prudish or radically feminist. Popular dogma is that all consensual sexual relationships between adults are positive and should not be discouraged, especially when conducted in the "privacy of one's home." Similar privacy arguments arise with proposals of explicit rules prohibiting sexual relations between lawyers and their clients.

Objections regarding regulation of the private lives of attorneys are misplaced. An explicit prohibition against attorneys having sex with clients in no way regulates who an attorney has sex with; rather, it regulates who an attorney can represent. If an attorney wants to have sex with a particular person, that attorney can avoid or terminate a professional relationship with that person. After doing so, nothing in the rules of professional conduct would regulate that personal relationship. States have always regulated the professional lives of attorneys, and prohibitions on having sex with clients would be simply more regulation of the profession.

Constitutional privacy arguments are also unavailable. The U.S. Supreme Court made clear in *Bowers v. Hardwick* that the right to privacy does not extend to "the proposition that any type of private sexual conduct between consenting adults is insulated from state proscription." Furthermore, doctors, psychotherapists and clergy are subject to prohibitions on sex with patients/parishioners without running afoul of privacy law.

A final reason sometimes expressed for why Texas should not adopt an explicit rule is that, in doing so, we might convey to the public that there are lawyers having sex with their clients, and that such a suggestion would undermine confidence in the legal profession. If we were to follow that line of thinking, then we should repeal all of the rules of professional responsibility – to say that lawyers must zealously represent their clients suggests that there are some who do not. To say that lawyers should not commingle trust fund monies suggests that there are some who do.

The State Bar of Texas recently launched an initiative to increase the public's trust and confidence in the legal profession. A public survey revealed that the majority of Texans rated teachers (85%), doctors (77%) and judges (71%) as honest and ethical. Significantly fewer Texans provided the same rating to lawyers (40%), auto mechanics (39%) and politicians (26%). Enacting a rule prohibiting lawyers from representing clients with whom they have a sexual relationship would be a significant step toward increasing confidence in the legal system. Not only is it the right thing to do, but bringing lawyers in line with all other professionals could only improve the public image of lawyers. ■

Confidentiality (in negotiations) run amok:

The good idea now protects the dishonest

Illustration by Rick Sales

Lynne Rambo joined Texas Wesleyan University School of Law in 1997 after 10 years of practicing trial law. Rambo has taught constitutional law, criminal law and evidence. Look for Rambo's article, "Impeaching Lying Parties with Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Rule 408 and the Mediation Privilege," from which this short article was adapted. It will be published by the Washington Law Review *in October 2000.*

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