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Attorney-Client Sex: A Feminist Critique of the Absence of Regulation

Malinda L. Seymore†

Doctors can’t do it.¹ Psychotherapists can’t do it.² Ministers can’t do it.³ Chiropractors⁴ and social workers⁵ can’t do it.⁶ But lawyers can. Lawyers, in most jurisdictions, can have sex with their clients without violating a standard of professional responsibility.

† Professor of Law, Texas Wesleyan University School of Law. My interest in this topic was sparked by my membership in two organizations: the Texas Supreme Court’s Gender Bias Task Force and the District 7A Grievance Committee of the State Bar of Texas. However, the opinions expressed in this article and not otherwise attributed are my own. Special thanks to Susan Phillips, Associate Dean and Law Library Director at Texas Wesleyan University School of Law, for valuable research assistance in the various codes of professional responsibility, and to Stephanie Counselman, student research assistant. Thanks also to colleague Cynthia Fountaine for comments on an earlier draft.


6. A list of Colorado professionals prohibited from having sexual relations with clients or patients includes psychotherapists, acupuncturists, podiatrists, dentists and dental hygienists, persons licensed to practice medicine, optometrists and physical therapists. Ralph H. Brock, Sex, Clients and Legal Ethics, 64 TEX. B. J. 234, 263 n.1 (2001) (citing People v. Good, 893 P.2d 101, 103 (Colo. 1995)). Brock notes further that “sexual misconduct, including such graphic and specific acts as masturbation in the presence of a client or another person, are proscribed in the ethics rules for professional counselors and marriage and family therapists.” 22 TEX. ADMIN. CODE § 681.33 (proffessional counselors), § 801.45 (marriage and family therapists) (West 2000). Sexual relations between clients and other licensed providers are prohibited in §75.1(a)(3)(b) (chiropractors); § 465.13(b)(3-6) (psychologists); § 781.401(a)(9) and § 781.402(0) (social workers); § 741.41(B)(vi) (speech-language pathologists and audiologists); and § 810.62(a)(8) and § 810.92(b)(4) (sex offender treatment providers). Optometrists may lose their licenses for committing an act of sexual abuse, misconduct or exploitation with a patient or for otherwise unethically or immorally abusing the doctor-patient relationship. TEX. OCCUP. CODE ANN. § 351.501(a)(14) (West 2001). Similarly, physician assistants are subject to discipline for sexually abusing or exploiting another person. Id. § 204.304(a)(11). See also Brock, 64 TEX. B. J. 234 at n.3.

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Sex between lawyers and clients occurs far more frequently than many believe. In a 1993 nationwide survey of attorneys, 18.9% of the respondents had sex with a client or knew of at least one other attorney who had.\footnote{7} Despite this 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,\footnote{8} others involve forcible rape,\footnote{9} and some involve arguably consensual sexual relations.\footnote{10} Those that appear to be consensual relationships often involve vulnerable clients—clients who are suicidal,\footnote{11} clients who are victims of domestic violence,\footnote{12} clients suffering from mental and emotional problems known to the attorney,\footnote{13} and clients who are facing criminal charges.\footnote{14} Many are divorce cases. Virtually all of the cases involve a male lawyer and a female client.\footnote{15}

Lawyers, like doctors and clergy, are members of a learned profession, distinguishable from employees in nonprofessional jobs. Professions have the following characteristics that differentiate them from other jobs: 1) professions require a substantial period of formal education; 2) professions require the comprehension of a substantial amount of theoretical knowledge; 3) 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) professions almost always involve at their core a significant interpersonal relationship between the professional and the patient or client.\footnote{16} In all of these ways, the “job” of lawyer, doctor, and minister are alike.

\footnote{8} Cleveland Bar Ass’n v. Feneli, 712 N.E.2d 119 (Ohio 1999); In re Bergren, 455 N.W. 2d 856 (S.D. 1990).
\footnote{9} In re Liebowitz, 516 A.2d 246 (N.J. 1985).
\footnote{10} See, e.g., People v. Boyer, 934 P.2d 1361 (Colo. 1997); In re Lewis, 415 S.E. 2d 173 (Ga. 1992); In re Rinella, 677 N.E.2d 909 (Ill. 1997); In re Manson, 676 N.E.2d 347 (Ind. 1997); In re Berg, 955 P.2d 1240 (Kan. 1998); Drucker’s Case, 577 A.2d 1198 (N.H. 1990); In re Bilbro, 478 S.E.2d 253 (S.C. 1996); In re Gore, 2000 WL 101268 (La. 2000); In re DiSandro, 680 A.2d 73 (R.I. 1996).
\footnote{11} See, e.g., In re Berg, 955 P.2d 1240 (Kan. 1998).
\footnote{12} See, e.g., Bourdon’s Case, 565 A.2d 1052 (N.H. 1989).
\footnote{13} See, e.g., In re Heard, 963 P.2d 818 (Wash. 1998) (attorney representing client suffering from head injury who had been in a coma plied her with alcohol and engaged in sexual relations); Drucker’s Case, 577 A.2d.
\footnote{14} See, e.g., Disciplinary Counsel v. Booher, 664 N.E.2d 522 (Ohio 1996) (attorney had sex in jail meeting room with criminal defendant he was assigned to represent); Iowa Sup. Ct. Bd. of Prof. Ethics and Conduct v. Steffes, 588 N.W.2d 121 (Iowa 1999).
\footnote{15} See also Peter Rutter, Sex in the Forbidden Zone 20 (1989) (Ninety-six percent of sexual exploitation by professionals occurs between a man in power and a woman under his care).
Clients who seek the services of an attorney often do so while in a vulnerable state, when involved in a situation which 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 most professions—except law—explicitly prohibit the professional from engaging in sexual relations with those they are seeking to help. Indeed, in twelve states, the Penal Code criminalizes sex between health and mental health care providers and their patients. In two states, sex between clergymen and parishioners is also criminalized. Yet there is no such criminal provision for sexual assault applicable to lawyers in these jurisdictions.

Only ten states currently even have rules explicitly prohibiting sexual relationships between attorneys and clients. Critics of an express prohibition of sexual relations between attorneys and clients advanced several reasons: 1) existing rules of professional responsibility adequately address the problem; 2) the prohibition starts with the Hippocratic Oath: "In every house where I come, I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and specially from the pleasures of love with women and men." Hippocratic Oath, Linda Fitts Mischler, Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex 10 GEO. J. LEGAL ETHICS 209, 215 n.25 (1997) (quoting CODES OF MEDICAL ETHICS, OATHS, AND PRAYERS: AN ANTHOLOGY 19 (Lewis P. Bird & James Barlow eds. 1989)).


21. MINN. STAT. § 609.344 (2001); TEX. PENAL CODE ANN. § 22.011(B) (10) (Vernon 2002).


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.

Part I of this article will attempt to gauge the scope of the problem of attorney-client sexual relationships. Part II will examine the nature of the attorney-client relationship that makes attorney-client sex a possibility and a problem, and will relate the experiences of professionals and their clients, patients, and parishioners. In Part III, I review ABA-promulgated model rules and state rules of professional responsibility and their application to attorney-client sex. Also included in this section is a discussion of ethics opinions and case law in jurisdictions that lack an explicit rule addressing attorney-client sex. Part IV is a feminist critique of the failure of states to regulate in this area, focusing on issues of consent, privacy, and the subordination of women in today's society. Part V proposes a model rule that would appropriately address the problems of attorney-client sex.

I. THE SCOPE OF THE PROBLEM

A. Nonconsensual Relationships

Sexual relationships between lawyers and clients have great potential to impair the provision of legal services. In nonconsensual sexual relationships, the harm to the client is clear. Unwanted sex, even in the absence of force, is a violation of autonomy. Unconsented-to sex, even when extrinsic force is not used, is a crime in many jurisdictions. It is perhaps not necessary to set forth at great length the well-known harms associated with rape. But is there special danger associated with rape in an attorney-client relationship? Certainly, bar authorities feel that the commission of a crime by an attorney is

Committee or the Proverbial Fox?, 6 MD. J. CONTEMP. LEGAL ISSUES 205 (1995); Davis & Grimaldi, supra note 17, at 57.
26. See Barrie Althoff, Big Brother is Watching: Discipline for "Private" Conduct, 2000 PROF. LAW. 81; Mischler, supra note 19, passim.
30. See, e.g., SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE passim (1975).
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sufficient to lead to a loss of a law license by that attorney. And can one imagine anything more corrosive to the attorney-client relationship than rape? Further, termination of the professional relationship because of such conduct by the attorney is highly disruptive to legal cases. So, in addition to all of the harms associated with consensual sex in the attorney-client relationship, there are additional problems associated with nonconsensual sex in the attorney-client relationship.

One might argue that it is inappropriate to compare nonforceful sexual relations – where consent might be ambiguous – to rape. I certainly understand the problem of minimizing rape by analogizing it to arguably less serious problems. However, the analogy may be closer than it appears on the surface. First, many argue persuasively that there cannot be real consent in the unbalanced relationship between attorney and client. Second, in some jurisdictions, sex between fiduciaries (such as doctors, mental health professionals, and ministers) and clients is considered rape. In fact, in Texas and Georgia, recent bills have been introduced in the legislatures to criminalize sex between lawyers and clients.

B. Consensual Relationships

While all would likely argue that sex-for-services and nonconsensual sex between lawyers and their clients are detrimental to both the victim and the legal profession, few consider the possibility that even so-called “consensual” relationships can negatively impact a client’s legal interest. For example, in a divorce case where custody of children is at issue, any sexual relationships that the client has may affect the outcome of the suit. In law suits where the


32. Although not a case involving rape, in In re Halverson, 998 P.2d 833 (Wash. 2000), the court noted that the client was harmed by the consensual sexual relationship with her attorney because he found it necessary to terminate the professional relationship when his wife discovered the affair.


34. See CA. BUS. & PROF. CODE § 729 (West/Deering 2002); COLO. REV. STAT. § 18-3-405.5 (2001); FLA. STAT. ch. 491.0112 (2002); ME. REV. STAT. ANN. § 253(1)(j)(West 2001); MICH. COMP. LAWS § 750.90 (2002); MINN. STAT. § 609.344 (2001); N.H. REV. STAT. ANN. § 632-A:2 (2002); N.D. CENT. CODE § 12.1-20-06.1 (2002); R.I. GEN. LAWS § 11-37-2 (2001); TEX. PENAL CODE ANN. § 22.01 A(B)(9) (Vernon 2002); WIS. STAT. § 940.22 (2001); WYO. STAT. ANN. § 6-2-303 (MICHIE 2002).


36. See, e.g., In re DiSanDro, 680 A.2d 73, 74 (R.I. 1996) (“[A]ny attorney who practices in the area of domestic relations must be aware that the conduct of the divorcing parties, even in a divorce based on irreconcilable differences (a so-called no-fault divorce) may have a significant impact on that client’s ability to secure child custody and/or may materially affect the client’s rights regarding distribution of marital assets. An attorney who engages in sexual relations with his or her divorce client places that client’s rights in jeopardy.”); Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n
adversary parties were formerly intimates, such as divorce proceedings, the disclosure of a sexual relationship between lawyer and client is likely to cause the adversary to "become less willing to compromise... and... this would increase the complexity and cost [of litigation]."37 Moreover, a breakdown in a seemingly consensual sexual relationship between a lawyer and client can also lead to a serious breakdown in the legal relationship. In In re Halverson, the lawyer withdrew from representation of his client after his wife discovered their sexual affair, requiring the client to find new counsel in the middle of divorce proceedings.38

In addition, a sexual relationship with a client may impair the lawyer's judgment: "Emotional detachment is essential to the lawyer's ability to render competent legal services... It can be difficult, however, to separate sound judgment from the emotion or bias that may result from a sexual relationship."39 An attorney engaged in an intimate relationship with a client may be reluctant to disclose unpalatable facts or potentially undesirable outcomes to the client, out of concern that it might impair the sexual relationship.40 A sexual relationship may also present a conflict between the client's interests and the lawyer's personal interests:41

Once a lawyer manifests personal feelings for the client, a conflict emerges that may skew the attorney's fiduciary duties. The attorney is no longer detached and objective. Rather, the lawyer has assumed a personal interest that may cause the attorney to set the objectives of the case according to his own needs.42

A lawyer might, for example, decline a settlement offer in order to prolong the lawsuit and his continued contact with the client.

Attorney-client sexual relationships also blur the line between business and personal and might lead to waiver of the attorney-client privilege. Only communications between a lawyer and client imparted in the context of the professional relationship are privileged.43 The privilege does not protect confidences given as part of the personal relationship.44 "A blurred line

38. Halverson, 998 P.2d at 482.
40. Id.
42. Id. at 118
43. MUELLER & KIRKPATRICK, EVIDENCE § 5.11 (3d ed 2003); ABA Comm. on Prof'l Conduct, Formal Op. 92-364.
44. MUELLER & KIRKPATRICK, supra note 43 (communications to an attorney as a family member or friend rather than as a professional legal advisor are not privileged) (citing United States v. Tedder,
between any professional and personal relationship may make it difficult to predict to what extent client confidences will be protected. Expectations of confidences will be forced to rest on ever shifting sands. Each of these examples exposes the problems that can arise and lends support for prohibition of attorney-client sexual relationships, consensual and nonconsensual.

C. Reporting Problems

Before examining such relationships in-depth, however, it is important to gauge the extent of the problem. How many attorneys have sexual relationships with their clients and how often? How many of these clients file complaints against their lawyers and what are some of the reasons that clients refrain from filing such complaints? In a nation-wide survey of attorneys, 32% of respondents said they knew of at least one attorney who had engaged in sexual relations with a client. In the same survey, 7% of attorneys admitted that they had had a sexual relationship with a current client. Yet a National Law Journal poll of state bars found that 1% or less of bar complaints nationwide involved attorney-client sexual abuse.

The findings are consistent if one accepts that most attorney-client sexual relationships are not reported to state bars. Some of the reasons that attorney-client sexual relations go unreported mirror the reasons that rapes go unreported. As Susan Brownmiller expressed it:

[W]hile men... convinced each other and [women] that women cry rape with ease and glee, the reality of rape is that victimized women


45. ABA Comm. On Prof'l Conduct, Formal Op. 92-364. A lawyer might also be motivated to reveal confidential communications after the sexual relationship ends, because of interests of his own. See Kentucky Bar Ass'n v. Meredith, 752 S.W.2d 786 (Ky. 1988) (attorney represented mother of a minor child in several actions, including defending removal as guardian of the child; after their sexual relationship ended, attorney filed an affidavit in the district court based on information he obtained during his attorney-client relationship to have the mother removed as guardian of her infant daughter).

46. Murrell et al., supra note 7 at 489.

47. Id. at 491.


49. See Nancy E. Goldberg, Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule, 26 AKRON L. REV. 45, 47 (1992) (reciting story of a law student who was sexually abused by her attorney but did not report it because of fear that she would not be believed, that no one would care, and that it might hurt her future career as an attorney). The National Law Journal reported that one disciplinary committee's chief counsel suggested that the low number of complaints might be due to any one of the following factors: attorneys are asexual; clients do not object; or clients are unaware that state bars would like to be advised of such activity. Jorgenson & Sutherland, supra note 48. An Illinois appellate court, however, stated, "[t]his court is not so naive that it believes that the lack of case law is due to an absence of such activity within the legal community." Suppressed v. Suppressed, 565 N.E.2d 101, 104 (III. App. 1990).
have always been reluctant to report the crime... because of the shame of public exposure, because of that complex double standard that makes a female feel culpable, even responsible, for any act of sexual aggression committed against her, because of possible retribution from the assailant... and because women's... accounts are received with a harsh cynicism that forms the first line of male defense.\textsuperscript{50}

To Brownmiller's list, we can add the fact that women who have been forced by a male acquaintance to have sexual intercourse against their will often do not name the experience "rape"—so that they can avoid labeling themselves victims, so that they can excuse themselves from the failure to do anything in response.\textsuperscript{51}

Nancy Goldberg relates the story of a law student whose attorney behaved in a sexually inappropriate manner.\textsuperscript{52} Her summary of the student's reasons for not reporting the attorney reads chillingly similar to stories of why rape victims fail to report their rapes:

When asked why she did not report the attorney, she indicated that no one would believe her, as it was her word against his, and that if anyone believed her, no one would care, as he had a good reputation as a lawyer and is related to many individuals in that town. Of most concern to the student was the fact that her coming forward would adversely affect her professional future, precluding her from ever obtaining a job in this small West Virginia town or perhaps in West Virginia at all.\textsuperscript{53}

The problem of underreporting is further compounded by the fact that clients may be unaware of their right to report attorney misconduct, and are in fact unaware that attorney-client sex constitutes misconduct.\textsuperscript{54} This is

\textsuperscript{50} S\textsc{usan} B\textsc{rownmiller}, \emph{Against Our Will: Men, Women and Rape} 387 (1975); Michelle J. Anderson, \emph{Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine}, 46 V\textsc{ill. L. Rev.} 907, 935-37 (2000); Binder, \emph{Why Women Don'T Report Sexual Assault}, 42 J. \textsc{Clinical Psychiatry} 437 (1981); Catharine MacKinnon, \emph{Disputing Male Sovereignty: On United States v. Morrison}, 114 H\textsc{arv. L. Rev.} 135, 142-43 (2000); See also Linda S. Williams, \emph{The Classic Rape: When Do Victims Report?} 31 S\textsc{oc. Probs.} 459 (1984).


\textsuperscript{52} The student reported that shortly after her eighteenth birthday, she faced criminal charges as a consequence of her involvement with a juvenile who had been stealing checks from his grandfather, cashing them, and buying marijuana. When she visited an attorney, he told her that he wanted to show the prosecution that she had suffered enough from the boy's accusation. To this end, the attorney said that he needed to take her blood pressure and heartbeat. He took her blood pressure and lifted her shirt up to place the stethoscope over her heart, asking her, "you don't embarrass easily, do you?" The student, who was already emotionally upset, would have done most anything the attorney asked to get out of the trouble; nonetheless, his demeanor made her very apprehensive and she terminated the interview. The student never met with the attorney alone again, although he suggested several times that they meet after hours at his office. Goldberg, \textsc{supra} note 49, at 47 n.8.

\textsuperscript{53} \textsc{Id.}

\textsuperscript{54} The National Law Journal reported that one disciplinary committee's chief counsel suggested that the low number of complaints may be due to any one of several factors, including that clients are
especially true in jurisdictions that do not have an explicit rule prohibiting attorney-client sexual relations.

In light of underreporting, how are we to get a handle on the scope of the problem? Even if we accept the self-reported 7% figure—7% of attorneys in a national survey admitted to having had sex with at least one client—\(^{55}\) the sheer number of attorneys implicated makes this figure alarming. According to the United States Department of Labor’s Bureau of Labor Statistics, there are 464,250 attorneys in the United States.\(^{56}\) If 7% of these attorneys have sex with their clients, then about 32,497 clients are affected.\(^{57}\) Reported cases make clear that some attorneys are serial sexual predators, having sex with numerous clients in the course of their careers.\(^{58}\)

II. THE DYNAMICS OF ATTORNEY-CLIENT SEXUAL RELATIONSHIPS

What is it about the nature of the attorney-client relationship that provides ample opportunities for attorneys to engage in sexual relationships with clients? Perhaps the answer is best summed up in a simple quotation: “Lawyers, it appears, are constantly caught up in the powerful, emotional undercurrents and ambitions of their clients.”\(^{59}\)

A. The Nature of the Attorney-Client Relationship

A common characteristic of the attorney-client relationship is an imbalance of power.\(^{60}\) Marjorie Silver explains that most often it is the lawyer who holds the greater power since the client has a problem that is dependant on the attorney to solve. The relationship between the attorney and client is often intense and “a client seeking to avoid deportation, incarceration or loss of custody of a child is likely to demand a great deal of attention from her attorney, not all of which will be of a legal nature.”\(^{61}\) Silver argues that the attorney-client relationship mirrors other kinds of intense relationships

\(^{55}\) Murrell et al., supra note 7, at 491.

\(^{56}\) UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, 1999.

\(^{57}\) It seems unlikely that the number is actually this high, since some attorneys in the United States have little or no client contact. The lack of empirical data, however, makes it difficult to assess whether the figure is in fact too high or too low.

\(^{58}\) See, e.g., In re Halvorsen, 998 P.2d 833 (Wash. 2000) (attorney admitted to having sex with six clients.); In re Rinella, 677 N.E.2d 909 (Ill. 1997) (attorney’s sexual involvement with two different clients served as the basis of the disciplinary proceeding.); In re Berg, 955 P.2d 1240 (Kan. 1998) (attorney admitted to having sex with two clients.); In re Discipline of Bergren, 455 N.W.2d 856 (S.D. 1990) (attorney had sex with multiple clients).

\(^{59}\) ANDREW WATSON, PSYCHIATRY FOR LAWYERS 3 (1968).

\(^{60}\) Marjorie A. Silver, Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship, 6 CLINICAL L. REV. 259, 260-61 (1999).

\(^{61}\) Id. at 261.
involving inherent power imbalances, such as those between physician/patient, therapist/patient, pastor/counselee, and teacher/student.\textsuperscript{62} "Such relationships," she states, "inevitably invite misplaced emotional reactions," causing both client-initiated and lawyer-initiated sexual relations.\textsuperscript{63} These emotional undercurrents and misplaced reactions can lead to transference and countertransference.

\textbf{1. Transference}

Transference, a psychoanalytical concept first introduced by Freud,\textsuperscript{64} is difficult to define concisely. A fairly simple explanation is as follows:

Throughout life, people tend to reexperience feelings, desires, and attitudes generated in early situations with significant others. Displacing these emotions, needs, and beliefs onto current situations is referred to as a "transference reaction." Transference is a central component of the therapeutic relationship.... The transference reaction may occur in positive or negative form. With positive transference, the client feels unwarranted attachment, love, attraction, or admiration for the transference object. Negative transference, on the other hand, may express itself as anger, hostility, and devaluation.\textsuperscript{65}

According to Freud, the phenomenon of transference was not limited to psychoanalysis, and existed in all relationships.\textsuperscript{66} Dr. Andrew S. Watson discusses the importance of transference to the law:

Fortas states that, "Lawyers have been increasingly aware of the fact that their interrelationships with clients, witnesses, judges and jurors are at least as important as their mastering of the statutes and

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} In every psycho-analytical treatment of a neurotic patient the strange phenomena that is known as ‘transference’ makes its appearance. The patient, that is to say, directs toward the physician a degree of affectionate feeling (mingled, often enough, with hostility) which is based on no real relation between them and which—as is shown by every detail of its emergence—can only be traced back to old wishful phantasies of the patient which have become unconscious. Sigmund Freud, \textit{Five Lectures on Psycho-Analysis, Leonardo da Vinci, and Other Works, Fifth Lecture}, in \textit{XI THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD} 51 (James Stachey ed., 1957). There are, of course, many schools of thought among psychologists and psychiatrists, some of which do not accept the transference phenomenon. \textit{See}, e.g., Matt J. O’Laughlin, \textit{Dr. Strangelove: Therapist-Client Dual Relationship Bans and Freedom of Association, or How I Learned to Stop Worrying and Love My Clients}, 69 UMKC L. Rev. 697, 718-27 (2001).


\textsuperscript{66} Sigmund Freud, \textit{supra} note 64, at 51-52.
The concepts of transference and countertransference describe the nature of these interrelationships... 67

Transference in the attorney-client relationship can cause clients to see their lawyers as all-powerful, their saviors in a time of crisis. These feelings may translate into admiration, love and sexual attraction. Thus, the client may be receptive to sexual advances by the lawyer or may make sexual advances of her own. 68

2. Countertransference

"Even with the strongest feelings on the part of the client, sexual contact is unlikely to occur in the absence of a willing fiduciary." 69 Like transference, countertransference is a psychoanalytic concept. 70 Countertransference refers to the reaction of the service provider whereby feelings, desires and attitudes of that provider are displaced back onto the client. 71 Basking in the glow of the client's admiration, intoxicated by the role of all-powerful savior, the attorney may assume that his feelings for the client are true love, not countertransference. 72

Countertransference achieved notoriety in the psychotherapist-patient context because of well-publicized cases of sexual relations between numerous therapists and vulnerable patients. 73 These relationships are condemned by the American Psychiatric Association and the American Psychological Association 74 and have led to civil liability against therapists. 75 But sexual

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67. ANDREW S. WATSON, PSYCHIATRY FOR LAWYERS, supra n.59 at 4-5.
68. Due to the psychological tendency on the part of the client to invest the counselor with all sorts of power, authority, and a nearly magical belief in their helpfulness, there will be a powerful tendency to bestow affection. These feelings largely are unrelated to truly personal involvement, and are mostly a function of the relationship itself. Gretchen M. Staley, Sex and the Divorce Lawyer, 11 J. CONTEMP. LEGAL ISSUES 24, 25 (2000) (quoting Andrew Watson, The Lawyer as Counselor, 5 J. FAM. LAW 7, 16 (1965)).
70. See ANDREW S. WATSON, LAW AND PSYCHIATRY 7 (1968); see also Harold P. Blum & Warren H. Goodman, Countertransference, in PSYCHOANALYSIS: THE MAJOR CONCEPTS 121 (Moore & Fine eds., 1995).
71. Murdoch, supra note 65, at 492.
72. Staley, supra note 68, at 24-25.
73. Silver, supra note 60 at 265-66.
74. Id. at 266 (citing American Psychiatric Association, The Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry, 130 AM. J. PSYCHIATRY 1058, 1061 (1973)); APA ETHICAL STANDARDS FOR PSYCHOLOGISTS, Principle 6 (APA 1977) ("sexual intimacies with clients are unethical"); APA ETHICAL STANDARDS FOR PSYCHOLOGISTS, Principle 7 (APA 1981) ("psychologists do not exploit their professional relationships with clients, supervisees, students, employees, or research participants sexually or otherwise").
75. Silver, supra note 60, at 267 (citing Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986)); see also Corgan v. Muehling, 574 N.E.2d 602 (Ill. 1991); Cotton v. Kamby, 300 N.W.2d 627 (Mich. 1980); Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1968).
relationships are problematic in other professions as well, and the greater the degree of power-imbalance the higher the incidence of these sexually exploitative encounters. As Silver notes, "[w]e rarely if ever hear about sexual relationships gone wrong between mail carriers and letter receivers, butchers and their customers, or even hair dressers and their clients. There appears to be something inherent in the power relationship of caring professions that fosters opportunities for abuse."77

B. Voices

Story-telling and narrative hold an important place in feminist legal scholarship and, in the context of this Article, can provide insight into the nature of relationships between clients and attorneys. "Most feminist narrative scholars start from a few shared premises: a preference for particularity of description, a belief that describing events or activities ‘from the inside’—that is, from the perspective of a person going through them—conveys a unique vividness of detail that can be instructive to decisionmakers."79 This emphasis on stories—on the personal—harkens back to the early slogan of the feminist movement, "[t]he personal is political."80 Hearing the voices of women and learning of their experiences is critical in feminist legal scholarship. "The starting point of feminist work must be found in women's lives and not in legal definitions."81

76. Silver, supra note 60, at 267.
77. Id. at 267 (citing MARILYN R. PETERSON, AT PERSONAL RISK 34 (1992)).
79. Abrams, supra note 78, at 782.
80. See e.g., MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, supra note 217; Frances Olsen, Constitutional Law: Feminist Critiques of the Public/Private Distinction, 10 CONST. COMMENT 319, 322 (1993) (An illustration of the [feminist movement's] focus on the public/private distinction is the familiar slogan 'the personal is political'); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 124 (1989) (the 'personal is political' is the central message of feminist critiques of the public/domestic dichotomy).
Attorney-Client Sex

Feminist scholars also emphasize the ways in which dominant legal culture ignores the experiences of women. As Robin West puts it, “women suffer in ways in which men do not, and . . . the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture.”

Herein lies the importance of storytelling and narrative to feminist scholars:

So, there are always two sides to a story, voices that are silenced, stories we never hear. This is the power of storytelling, whether in law or in literature—the “distinctive power to challenge and unsettle the legal status quo, because stories give uniquely vivid representation to particular voices, perspectives and experiences of victimization traditionally left out.” The power of storytelling is especially effective in feminist re-vision because it provides an alternative discourse for silenced feminine voices and perspectives.

However, finding the voices of women (and men) involved in attorney client sexual relationship is not an easy enterprise. While litigation involving attorneys who have sex with their clients will be explored in Section III, this Section explores the narratives of professional men and their female clients or patients. Psychiatrist Peter Rutter relates such narratives in Sex in the Forbidden Zone. Rutter defines sex in the forbidden zone simply: “sexual behavior between a man and a woman who have a professional relationship based on trust, specifically when the man is the woman’s doctor, psychotherapist, pastor, lawyer, teacher, or workplace mentor.”

I. Men Explain

Rutter begins by describing his own narrowly averted experience of sex with a patient:

Nothing in my training had prepared me for this moment. As Mia moved closer to me, I sat frozen, neither encouraging nor stopping her. I was overcome by an intoxicating mixture of the timeless freedom, and the timeless danger, that men feel when a forbidden woman’s sexuality becomes available to them . . . . In the moment of deciding whether to cross this line, I felt all at once extremely powerful—and very, very vulnerable.

83. Ayres, supra note 81, at 143 (internal citations omitted).
84. Rutter, supra note 15.
85. Id. at 22-23.
86. Id. at 4.
Rutter reports that he did not cross the line, but that the encounter sparked his interest in why others did. In one interview, a pastor explained:

Could I once again get sexually involved with a member of my congregation? Absolutely, if I’m honest about it. I don’t want to stop being sexually attracted to what is forbidden. To deny that would be to deny part of my manhood. I understand the need for a boundary, but there is an incomparable excitement in the possibility of going across it. I don’t know why it’s so important, but it is. To give it up would be like dying.\(^8\)

Rutter posits that “the underlying psychological reality for a man in power that leads to sexual exploitation is that he is as likely to be ministering to his own inner wounds as he is to those of the woman he serves.”\(^8\) Several of the men he interviewed substantiated that view:

Another pastor –

It was as if Julia was being my pastor at the time, because of my needs. The roles were pretty clearly reversed. She was healing me, even though I knew she wasn’t someone I wanted as a partner in life.\(^8\)

A psychiatrist –

In that moment with Leah I felt that everything that had happened to me in the past – all the pain I had caused others or that others had caused me – could be accepted and forgiven. The slate could be wiped clean, and I could be granted a sense of wholeness and self-esteem more complete than I had ever felt before.\(^9\)

Rutter concedes that “many men who exploit women are in touch with no motivation more complicated than simple sexual desire and opportunism.”\(^9\) Nonetheless, he believes that the search for healing underlies most destructive sexual behavior in men.\(^9\)

2. Women Explain

Rutter summarizes his interviews with women who engaged in sexual relationships with men in power—sex in the forbidden zone—as follows:

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87. Id. at 47.
88. Id. at 57.
89. Id. at 57-58.
90. Id. at 60.
91. Id. at 61.
92. Id.
“Each woman I interviewed who engaged in forbidden-zone sex described the immeasurable nonsexual value she felt that the relationship had attained before any sexual behavior took place. All of them felt that they agreed to sex as a way of maintaining a relationship that had come to have extraordinary importance in their lives.”93 Several women talked about their relationship with psychotherapists:

Patricia –
I had been raised to be a southern belle and to please men sexually. But I was developing a passion for ideas, too. Dr. Stuben was the first man in my life who was willing to talk with me about ideas. I became enormously excited about going to see him. He was carrying a tremendous power for me, but because of the way I was raised, I just didn’t know how to be connected to a powerful man except through seduction. When he said he wanted us to have sex in his office, of course I couldn’t say no. It would have never occurred to me to say no.94

Helen –
Dr. Yount was so important to me then – the enormity of his importance was really indescribable. I felt as if my relationship with him was the only thing keeping me alive at the time. How could I have said no when he approached me sexually?95

Similar feelings are expressed in the attorney-client relationship. Rutter presents the story of Sharon Grant, who engaged in a year-long affair with her attorney while he represented her in a divorce.

You have to understand that I was as depressed as I could be. My husband had left me after tearing me down for years. My self-esteem was completely gone. I was forty-seven. My economic future and actual survival were completely dependent on how my lawyer handled my case. He was being very positive about the outcome. When he first came on to me, something in me responded, but I think it was to the protection and hope he represented, not the sexuality.96

In these narratives, the women emphasize the relationship, rather than the sex. Patricia talks about the tremendous power her relationship with her psychotherapist held for her, even before the sexual relationship began. For Helen, the relationship was the “only thing keeping [her] alive.” Sharon’s

93. Id. at 51.
94. Id.
95. Id. at 52.
96. Id. at 119.
narrative focuses on the “protection and hope” her attorney represented, “not the sexuality.” So, for some women, sexual relationships with men in power have less to do with sex and more to do with relationships. This finding confirms that attorney-client sex is about the legal relationship, not the “private” sexual relationship.

III. EXISTING REGULATION OF ATTORNEY-CLIENT SEX

Until recently, the legal profession has been largely silent on the issue of attorney-client sex. Unlike the medical profession, where the Hippocratic Oath has prohibited sex with clients for hundreds of years, the legal profession only began to regulate attorney-client sex in the late 1980s. The ABA belatedly entered the arena in February 2002, adopting a model rule prohibiting such relationships. States that have prohibited attorney-client sex have done so through disciplinary rules, ethics opinions of ethics commissions, and judicial opinions.

A. ABA Regulation of Attorney-Client Sex

Not surprisingly, the ABA is extremely influential in the arena of professional ethics. The ABA promulgates the Model Rules of Professional Conduct, though the Model Rules are not binding on any jurisdiction, they have been adopted in whole or in part by a number of states.

In 1992, the ABA Commission on Ethics and Professional Responsibility, the body charged with the authority to promulgate the Model Rules, issued a formal opinion addressing the issue of attorney-client sexual relationships. The opinion failed to provide an explicit prohibition. The opinion merely

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97. Mischler, supra note 19, at 215.
98. MODEL RULES OF PROF’L CONDUCT R. 1.8(j) (2002).
99. “For more than eighty years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards which serve as models of the regulatory law governing the legal profession.” Preface to MODEL RULES OF PROF’L CONDUCT (2002).
100. In 1908, the ABA adopted the original Canons of Professional Ethics. In 1983, the ABA House of Delegates adopted the Model Rules of Professional Conduct, which existed with only minor changes, until 2002. Id.
concluded that such relationships may violate the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, thus attorneys are "well advised to refrain from such a relationship." The committee found that exploitative relationships may violate the lawyer's fiduciary obligations to the client, may affect the lawyer's independent judgment, may create a prohibited conflict of interest, and may result in client confidences being revealed.

Also in 1992, the Young Lawyers Division of the ABA adopted a resolution urging that the Model Rules be amended to prohibit attorney-client sex. It was their intention to submit the resolution to the ABA House of Delegates at their Annual Meeting in 1993. Their proposed rule read as follows:

An attorney shall not:
(A) engage in sexual contact with a client, or
(B) demand that a client engage in sexual contact with the attorney, or
(C) attempt to coerce a client into engaging in sexual contact with the attorney,
during the course of the attorney-client relationship. This rule does not apply to ongoing sexual relations which predate the professional relationship.

As a matter of courtesy, the Young Lawyers Division submitted the proposed rule to the ABA's Standing Committee on Ethics and Professional Responsibility. The Standing Committee responded that it would oppose the proposed rule because it felt that Formal Opinion 92-364 adequately addressed the issue. Furthermore, the Committee was unwilling to support a blanket prohibition because in its view, some attorney-client sexual relationships were "perfectly appropriate." In response to this opposition, the Young Lawyers Division decided not to submit the resolution to the ABA House of Delegates.

In 1997, the ABA leadership established the Ethics 2000 Commission to review the Model Rules of Professional Conduct adopted in 1983. The

103. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992). For a cogent discussion of the ABA opinion and attempts to persuade the ABA to adopt an explicit prohibition of attorney-client sex, see Wilks, supra note 25.
105. Wilks, supra note 25, at 209.
106. Id.
107. Id. at 209-10.
108. Id. at 213.
109. Id. (quoting Letter from David B. Isbell, Chair of the Standing Committee to Steven L. Slagel (Sept. 1, 1993)).
110. Id. at 209.
111. CHAIR'S INTRODUCTION, MODEL RULES OF PROF'L CONDUCT (2002).
Ethics 2000 Commission held meetings and public hearings, issued several discussion drafts, and submitted a final report to the ABA House of Delegates at the organization's August 2001 Annual Meeting. Among the many rules proposed by the Ethics 2000 Commission was a prohibition against attorney-client sexual relationships. Reaching the floor of the ABA House of Delegates with the rule was not a smooth journey. Indeed, it took five years for a formal rule to be adopted.

Ethics 2000 first considered a rule concerning attorney-client sex at its meeting in April 1998. As proposed, rule 1.8(k) read:

(k) A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced. For purposes of this paragraph:

1. "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

2. If the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7 rather than by this rule with respect to sexual relations with other employees of the entity they represent.

3. This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.

When the commission discussed whether a rule on sexual relations with clients was needed, participants disagreed about the extent to which clients are vulnerable and need protection. An observer attending the meeting said that the rule was unnecessary because disciplinary agencies were able to prosecute such cases under existing rules. Another observer further stated that disciplinary rules do not change behavior. He felt that a rule should address only relationships that adversely affected representation, and questioned the extent to which such relationships ever affect representation.

112. Id.
114. Id.
115. Id.
116. Id. One wonders, then, why we bother to have disciplinary rules at all!
117. Id.
Others felt that it was important to state, either in the black letter rules or the Comments, that sexual relationships are prohibited.\textsuperscript{118} After much discussion, the Ethics 2000 Commission voted 8 to 5 in favor of incorporating a rule (of some kind) addressing attorney-client sexual relationships.\textsuperscript{119}

The matter was again discussed at the commission's May 1998 meeting.\textsuperscript{120} This discussion also centered on whether there was a need for the rule. One observer again argued that existing rules dealt appropriately with the matter. Nonetheless, the full Ethics 2000 Commission agreed that a rule was necessary.\textsuperscript{121} At the July/August meeting, yet another attempt was made to kill rule 1.8(k) and move its substance to the Comment.\textsuperscript{122} The motion was defeated by a vote of 4 to 3.\textsuperscript{123} Thereafter, discussions of the rule involved its substance, not its merits. There were some revisions of the rule, including the deletion of the definition of sexual relations. Because other subparts were deleted, 1.8(k) was renumbered 1.8(j).

Rule 1.8(j), as proposed by the Commission, provided: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."\textsuperscript{124}

During the ABA House of Delegates floor discussion in August 2001, there were two attempts to eliminate Rule 1.8(j). Both proposals were defeated.\textsuperscript{125} Once the House of Delegates completed its review of the Ethics 2000 Commission's proposals in February 2002, there were no further attempts to amend Rule 1.8(j) and the House of Delegates approved the adoption of the rule.\textsuperscript{126}

The reporter's commentary provides the following rationale for the rule:

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

\begin{footnotes}
\footnotetext{118}{Id.}
\footnotetext{119}{April Minutes, supra note 113.}
\footnotetext{121}{Id.}
\footnotetext{122}{Meeting minutes from the ABA Center for Professional Responsibility Commission on Evaluation of the Rules of Professional Conduct (July 31-August 1, 1998) available at http://www.abanet.org/cpr/073198mtg.htmL.}
\footnotetext{123}{Id.}
\footnotetext{124}{MODEL RULES OF PROF'L CONDUCT R. 1.8(j)(2002).}
\footnotetext{125}{Summary of House of Delegates Action on Ethics (2003) available at http://www.abanet.org/cpr/e2K-summary_2002.html. One proposal was to delete the rule and replace it with a comment reading: "A sexual relationship between lawyer and client runs a significant risk of unfairly exploiting the lawyer's fiduciary position, impairing the lawyer's ability to represent the client completely, and compromising the lawyer-client privilege. As a result, with few exceptions, such conduct will violate these rules." The other proposed amendment simply sought to delete rule 1.8(j).}
\footnotetext{126}{Id.}
\end{footnotes}
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 evidentiary 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 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.\textsuperscript{127}

So, in one decade, the ABA moved from a formal opinion that cautioned against attorney-client sexual relationships\textsuperscript{128} to a rule that expressly prohibits such relationships.\textsuperscript{129}

\textbf{B. Rules Prohibiting Attorney-Client Sex}

Ten states have rules of disciplinary conduct that address the issue of sexual relationships between attorneys and clients: California,\textsuperscript{130} Florida,\textsuperscript{131} Iowa,\textsuperscript{132} Minnesota,\textsuperscript{133} New York,\textsuperscript{134} North Carolina,\textsuperscript{135} Oregon,\textsuperscript{136} Utah,\textsuperscript{137} West Virginia,\textsuperscript{138} and Wisconsin.\textsuperscript{139} The rules fall into three general categories: outright prohibition, prohibition of exploitation, and prohibition in only some cases.

\begin{itemize}
  \item \textsuperscript{127} Model Rules Prof’l Conduct R. 1.8(j) cmt. (2002).
  \item \textsuperscript{128} ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-364 (1992).
  \item \textsuperscript{129} Model Rules of Prof’l Conduct R. 1.8(j)(2002).
  \item \textsuperscript{130} Cal. Rules of Prof’l Conduct R. 3-120(A) (1987).
  \item \textsuperscript{131} Fla. Rules of Prof’l Conduct R. 4-8.4 (1997). See Florida Bar v. Bryant, 813 So.2d 38 (Fla. 2002); Florida Bar v. Scott, 810 So.2d 893 (Fla. 2002).
  \item \textsuperscript{132} Iowa Code of Prof’l Responsibility DR 5-101 (1997). Prior to the adoption of this rule, as early as 1989, Iowa held that an attorney’s having sex with a client who is a party to a divorce action involving custody of children violated rules of professional ethics. See Comm. on Prof’l Ethics and Conduct of the Iowa Bar Ass’n v. Hill, 436 N.W.2d 57 (Iowa 1989).
  \item \textsuperscript{133} Minn. Rules of Prof’l Conduct R. 1.8 (1997).
  \item \textsuperscript{134} N.Y. Code of Prof’l Responsibility 1200.29-A(b)(1) (2000).
  \item \textsuperscript{135} N.C. Rules of Prof’l Conduct R. 1.18 (1997).
  \item \textsuperscript{136} Or. Code of Prof’l Responsibility DR 5-110 (1997). Oregon held that sexual relationships between lawyers and clients could violate rules of professional responsibility even before the adoption of DR 5-110. See In re Hassenstab, 934 P.2d 1110 (Or. 1997).
  \item \textsuperscript{137} Utah Rules of Prof’l Conduct R. 8.4 (1997).
  \item \textsuperscript{138} W.Va. Rules of Prof’l Conduct R. 8.4 (1989).
  \item \textsuperscript{139} Wis. Rules of Prof’l Conduct R. 1.8(k)(1988).
\end{itemize}
1. **Outright Prohibition**

Six states explicitly prohibit sexual relations with current clients. Most simply state that “a lawyer shall not have sexual relations with a current client.” They all, however, provide that such relationships do not violate the rule if the lawyer and client are spouses or if the consensual sexual relationship predates the attorney-client relationship.

These exemptions for pre-existing relationships assume that the only real harm in attorney-client sex is an attorney’s using his influential position to initiate a sexual relationship with a client. The exemptions do not address potential conflicts of interest or impairment of judgment that might arise in pre-existing relationships. Only Iowa recognizes that pre-existing relationships can be problematic, adjuring:

Even in these provisionally exempt relationships [relationships that predate the attorney-client relationship], the attorney should strictly scrutinize his or her behavior for any conflicts of interest to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the attorney should immediately withdraw from the legal representation.

2. **Prohibition of Exploitation**

Two states, Utah and Florida, find the harm in attorney-client sexual relationship to be exploitation. Both prohibit “sexual relations with a client that exploits the lawyer-client relationship.” Utah’s rule goes on to say that sexual relations between lawyers and clients shall be presumed to be exploitative, unless there was a pre-existing sexual relationship. The rule makes clear, however, that the presumption is rebuttable.

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140. Iowa, Minnesota, North Carolina, Oregon, West Virginia, and Wisconsin. Three states, Wisconsin, Minnesota, and Iowa, include the prohibition in their conflict of interest rule, while West Virginia includes the prohibition in its laundry list of professional misconduct. North Carolina and Oregon have specific rules exclusively devoted to attorney-client sexual relations.

141. See, e.g., N.C. RULES OF PROF’L CONDUCT R. 1.18(a).

142. The Iowa rule specifically mentions spouses; the other rules use the all-encompassing “previous sexual relationship” language.

143. See IOWA CODE OF PROF’L RESPONSIBILITY DR 5-101(B), MINN. RULES OF PROFESSIONAL CONDUCT R. 1.8(k), N.C. RULES OF PROF’L CONDUCT R. 1.18(b), OR. CODE OF PROF’L RESPONSIBILITY DR 5-110(a), W.VA. RULES OF PROF’L CONDUCT R. 8.4(g), WIS. RULES OF PROF’L CONDUCT R. 1.8(k)(2).

144. IOWA CODE OF PROF’L RESPONSIBILITY DR 5-101(B).

145. UTAH RULES OF PROF’L CONDUCT R. 8.4(g); FLA. RULES OF PROF’L CONDUCT R. 4-8.4(i).

146. Id.

147. UTAH RULES OF PROF’L CONDUCT R. 8.4(g)(2).
In *Florida Bar v. Bryant*, the Supreme Court of Florida offered guidance on the issue of exploitation. Bryant represented a woman who had been arrested for a misdemeanor violation of a municipal ordinance regulating exotic dancers. Because she had little or no money, the client suggested to Bryant that he represent her in exchange for sex. Bryant agreed and the client performed oral sex several times during Bryant’s representation of her. The municipal ordinance case was concluded in the client’s favor.

Shortly thereafter, the client was arrested on first-degree felony racketeering charges arising from suspicions that she was operating a large prostitution ring. Bryant represented the client in this case as well, but there was no sex-for-services discussion and both the client and Bryant stated that no sexual relations occurred during the felony case.

When disciplinary proceedings commenced, the referee hearing the case concluded that trading sexual favors for legal services was not a per se violation of the Florida rule, which prohibits “sexual conduct with a client that exploits the lawyer-client relationship.” The referee did find as fact what Bryant told the client, “the happier you keep me, the harder I will work.” The referee further found that there was no previous relationship between Bryant and the client and that the sexual relations commenced during the period of legal representation.

In concluding that Bryant had not violated rule 4-8.4(i), the referee focused on the fact that the client, being a prostitute, bartered her services for Bryant’s legal services. The referee noted that the arrangement between the lawyer and client was criminal prostitution, but concluded that there was no showing of the exploitation needed to find a rule violation. The referee’s conclusion is reminiscent of the archaic idea that prostitutes can’t be raped, can’t be exploited, and can’t be victimized. As Sanchez remarks, “to be a victim, one must be innocent, but to be a prostitute is to be construed as anything other than innocent.”

The Florida Supreme Court accepted the referee’s factual findings but rejected the conclusion of the referee:

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148. 813 So. 2d 38 (Fla. 2002).
149. Id. at 41.
150. Id.
151. Id. at 42.
152. FLA. RULES OF PROF’L CONDUCT R. 4-8.4(i).
153. *Bryant*, 813 So.2d at 42.
154. Id.
155. Id.
156. Id.
We conclude that the referee erred by focusing on [the client] being a prostitute and framing the issue as whether, in view of her prostitution, [the client] could be exploited by sex; whereas, the correct focus pursuant to the plain language of the rule is whether a lawyer obtained the sexual activity through an exploitation of the lawyer-client relationship.\textsuperscript{158}

The court concluded that Bryant exploited the lawyer-client relationship—the client performed the sex acts because she required Bryant’s services as a lawyer.\textsuperscript{159}

3. Prohibition in Only Some Cases

The remaining states—California and New York—do not generally prohibit consensual sexual relations between lawyers and clients. The two states provide that an attorney shall not “require or demand sexual relations with a client incident to or as a condition of any professional representation”\textsuperscript{160} or “employ coercion, intimidation, or undue influence in entering into sexual relations with a client.”\textsuperscript{161}

Where the relationships do not involve “quid pro quo” or coercion, California and New York engage in only limited regulation. The California rule prohibits consensual sexual relationships only where the relationship would cause the attorney to render incompetent legal services.\textsuperscript{162} New York provides a blanket prohibition against entering into sexual relations with a client only in domestic relations matters.\textsuperscript{163}

C. State Ethics Opinions Dealing with Attorney-Client Sex

Three states\textsuperscript{164}—Alaska, Maryland, and Pennsylvania—and the ABA’s Commission on Ethics and Professional Responsibility\textsuperscript{165} have issued opinions

\begin{footnotesize}
\begin{enumerate}
\item Bryant, 813 So.2d at 43.
\item Id.
\item Cal. Rules of Prof’l Conduct R. 3-120(B)(2); N.Y. Code of Prof’l Responsibility 1200.29-a(b)(2) (2000).
\item Cal. Rules of Prof’l Conduct R. 3-120(B)(3).
\item N.Y. Code of Prof’l Responsibility 1200.29-a(b)(3).
\item A fourth state, Oklahoma, issued an ethics opinion prohibiting attorney-client sexual relationships, Okla. Adv. Op. 308 (1994), but it was withdrawn in 1995. The original Oklahoma opinion found that, although the Rules of Professional Conduct did not specifically prohibit a sexual relationship between an attorney and client, already-existing rules did prohibit an attorney from representing a client with whom he had a sexual relationship. The opinion identified rules regarding conflict of interest and the requirement to provide competent representation.
\end{enumerate}
\end{footnotesize}
addressing sexual relationships between lawyers and clients.\textsuperscript{166} Those opinions recognize that, although the jurisdiction lacks a specific rule of professional conduct that prohibits an attorney from representing clients with whom he has a sexual relationship, other rules govern such relationships.\textsuperscript{167} The Alaska Ethics Opinion provides a good example.

In 1988, the Alaska Bar Association Ethics Committee was asked whether it is a violation of the Code of Professional Responsibility for an attorney to engage in a sexual relationship with a client during the time the attorney is representing that client.\textsuperscript{168} The committee set forth criteria that would render such a relationship unethical, relying on existing rules of professional responsibility dealing with conflict of interest. The committee stated:

It is the opinion of the Committee that a sexual relationship between a client and an attorney during the time the attorney is representing the client is improper under circumstances that would include, but not be limited to, the following:

1. The relationship is initiated by the attorney under circumstances which may have deprived the client of the ability to exercise free choice;
2. The attorney exchanges legal services for sexual favors from a client;
3. The sexual relationship has an adverse affect on the lawyer’s ability to protect his client’s interest, or is otherwise prejudicial or damaging to the client’s case; or
4. Where the client is in an emotionally fragile condition and the sexual relationship may have an adverse affect on the client’s emotional stability;
5. Where the sexual conduct is illegal.\textsuperscript{169}

The committee expanded on its opinion in 1992, finding that a relationship between an attorney and a client of the attorney’s law firm could also violate the rules of professional responsibility if:

\textsuperscript{165} Ethics opinions from the ABA are not binding on any state. However, they are considered to be quite persuasive authority in light of the ABA’s promulgation of the Model Rules of Professional Conduct, and its role as the national representative of practicing attorneys.

\textsuperscript{166} Several of the states that have adopted rules prohibiting lawyer-client sex also have ethics opinions—predating the rules—that prohibit attorneys from representing clients with whom they have a sexual relationship. See, e.g., CAL. ETHICS OP. 1987-92; OR. ETHICS OP. 1995-140.

\textsuperscript{167} See ALASKA ETHICS OP. 88-1 (1988); ALASKA ETHICS OP. 92-6 (1992); MD. ETHICS OP. 84-9 (1983); PA. ETHICS OP. 97-100 (1997).

\textsuperscript{168} ALASKA ETHICS OP. 88-1 (1988).

\textsuperscript{169} \textit{Id.}
(1) The sexual relationship has an adverse affect on the lawyer's ability to protect the client's interests, or is otherwise prejudicial or damaging to the client's case;

(2) The sexual relationship creates the potential that the attorney will be called as a witness on behalf of the client or to testify on issues prejudicial to the client;

(3) The client is involved in a legal matter of the type that is generally recognized to be emotionally charged; or

(4) The sexual conduct is exchanged for legal services, non-consensual, coercive, or illegal.170

Despite these steps taken to limit attorney-client sex, these ethics opinions, and the ethics opinions of the other states, do not issue a blanket prohibition of attorney-client sex. Instead, they identify certain situations in which such relationships would violate professional ethical norms.

D. Judicial Opinions

Fifteen states that have no explicit rules of professional conduct addressing attorney-client sex do have judicial opinions addressing the propriety of attorneys commencing a sexual relationship with clients or continuing to represent clients with whom they have sexual relationships.171 The rules set out by courts bear considerable resemblance to rules promulgated by bar authorities. Few, however, set out a blanket prohibition on attorneys representing clients with whom they have commenced a sexual relationship.

1. A Harms-Based Approach

In twelve states, the courts have disciplined attorneys who have in some way taken advantage of or harmed their clients.172

170. ALASKA ETHICS OP. 92-6 (1992)
171. Arizona, Colorado, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, South Dakota and Washington. For a compilation of cases, see Awad, supra note 18.
172. See, e.g., In re Walker, 24 P.3d 602 (Ariz. 2001) (attorney who sought to commence a sexual relationship with a personal injury client and who tried to talk her out of terminating their professional relationship when she objected to a sexual relationship, had his loyalty to his client impaired); In re Rinella, 677 N.E.2d 909 (Ill. 1997) (attorney caused clients to believe their interests would be harmed if they refused his sexual advances); In re Grimm, 674 N.E.2d 551 (Ind. 1996) (attorney failed to inform client with whom he had a sexual relationship of the status of her bill, and then filed an attorney's lien when she terminated their personal and professional relationship); In re Berg, 955 P.2d 1240 (Kan. 1998) (attorney manipulated and exploited emotionally fragile clients into having sex with him); Kentucky Bar Ass'n v. Meredith, 752 S.W.2d 786 (Ky. 1988) (when discharged by client with whom he had a sexual relationship, attorney filed an affidavit to have his client removed as guardian of her daughter and revealed confidences gained during the attorney-client relationship); In re Gore, 752 So.2d 853 (La. 2000) (attorney failed to inform matrimonial client that their sexual relationship created a
In re Halverson\textsuperscript{173} provides an example of the "harm-based" approach. Halverson, a former president of the Washington State Bar Association and a noted family law practitioner in that state, admitted to having had consensual sexual relationships with six different female clients.\textsuperscript{174} The disciplinary proceedings arose from Halverson's relationship with Lisa Wickersham who retained him to represent her in a divorce action. A sexual relationship commenced. Halverson told Wickersham that a relationship between them would not be of any significance in the pending divorce action.\textsuperscript{175} When Halverson's wife discovered the relationship, Halverson withdrew as Wickersham's attorney.\textsuperscript{176}

The disciplinary board found that Wickersham depended on Halverson for a favorable property settlement and for sufficient child support and maintenance; this dependence created a large power imbalance between them.\textsuperscript{177} The board further found that Wickersham suffered personal harm and was also harmed in having to change attorneys during the divorce action.\textsuperscript{178} Halverson challenged these findings, relying on the fact that Wickersham received a fair outcome in her dissolution proceeding.\textsuperscript{179}

The Washington Supreme Court upheld these findings, citing

\ldots substantial testimony from mental health professionals that as a result of Halverson's conduct, Wickersham suffered personal harm in the form of depression and anxiety. In addition, Wickersham's relationship with Halverson had an adverse impact upon her relationship with her former husband. In the years following the divorce, Wickersham described the relationship as "brutally adversarial; abusive and emotionally and financially difficult." Further, after her relationship with Halverson, Wickersham was unable to trust her new attorney.\textsuperscript{180}

\textsuperscript{173} 998 P.2d 833 (Wash. 2000).

\textsuperscript{174} Id. at 836.

\textsuperscript{175} Id. at 837.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 838.

\textsuperscript{178} Id.

\textsuperscript{179} Halverson, 998 P.2d at 838.

\textsuperscript{180} Id. at 839.
In light of these factual findings, the court upheld the Board’s conclusions that Halverson violated Rules of Professional Conduct related to conflicts of interest and failure to communicate with a client. The court also held that Halverson had failed in his duty to exercise independent professional judgment: “[a]lthough we do not adopt a per se rule that a lawyer who commences a sexual relationship with a client always fails to exercise independent professional judgment, we find that under the circumstances here Halverson violated [the rule].”

The court’s focus on the harm Halverson caused Wickersham is curious in light of the court’s reliance on the following quote:

Unlike in a civil malpractice suit for damages, a disciplinary proceeding does not require a showing of actual harm. “[A] lawyer may be disciplined even if the misconduct does not cause any damage. The rationale is the need for protection of the public and the integrity of the profession.”

Nonetheless, most states that lack a rule with a per se ban focus on a finding of harm before disciplining an attorney for representing a client with whom he has a sexual relationship.

2. No Harm Required

In three states—Colorado, Georgia, and Rhode Island—the courts found that the attorneys violated ethical rules even though the relationships were consensual and the clients’ interests were not prejudiced.

The Colorado case of People v. Boyer is instructive. Boyer was suspended for 180 days based in part on two sexual relationships with clients. Both cases involved family law disputes. The court stated:

Although the deputy disciplinary counsel states that “there is no evidence of harm to either” of the two women clients who consented to intercourse, we have clearly held in the past and here reaffirm that a

181. Id. at 841. The failure to communicate violation was based on Halverson’s failure to discuss potential complicating effects of the affair on the divorce or custody proceedings.
182. Id.
183. Id. at 840 (citing Hizey v. Carpenter, 830 P.2d 646 (1992)).
185. 934 P.2d 1361.
186. The court accepted Boyer’s mental disability and chemical dependency as mitigating factors, stating that “absent such mitigation, the conduct would certainly warrant more severe discipline.” Id. at 1363.
sexual relationship between lawyer and client during the course of the professional relationship is inherently and insidiously harmful.\(^{187}\)

In Georgia and Rhode Island, the courts’ rulings rested on the fact that every attorney representing matrimonial clients “must know that an extramarital relationship can jeopardize every aspect of a client’s matrimonial case—extending to forfeiture of alimony, loss of custody, and denial of attorney fees.”\(^{188}\) Thus, in Rhode Island, the court held that in any divorce case involving child custody and marital assets, “the attorney must refrain from engaging in sexual relations with the client or must withdraw from the case.”\(^ {189}\)

**IV. FEMINIST CRITIQUE**

It feels almost presumptuous to name something “a” feminist critique, as if there is only one feminist perspective, or only one school of feminist legal thought.\(^ {190}\) A common thread, however, is a belief that the legal system, created by privileged white men, ignores the reality of women’s lives: “Feminists generally agree—it should go without saying—that women suffer in ways which men do not, and that the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture.”\(^ {191}\)

The area of attorney-client sexual relations seems tailor-made for critique from feminist perspectives. It raises questions of power, relationships, privacy, consent and sex, all of which are areas traditionally subject to attention by feminist legal scholars. There has been, however, only one consciously feminist critique in this area. Linda Fitts Mischler argues against per se bans on attorney-client sex, which she sees as “an institutional control of sexuality that has its most egregious effect on women.”\(^ {192}\)

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187. *Id.*
190. As Professor Ayres puts it, “there is not just one feminism, but many feminisms, many different feminist politics.” Ayres, *supra* note 81, at 134. Admittedly there has been a tendency in Western feminist thought to assume an essential “womanness” that all women share despite racial, class, religious, ethnic and cultural differences. See E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT ix (1988). See also DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 4-6 (1991). This tendency toward essentialism has resulted in a feminist movement that is often meaningless for women who differ from the “essential woman.” See, e.g., Kimberle Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).
This control of women's sexuality, she says, is "necessary to sustain a patriarchy dependent on institutionalized motherhood and heterosexuality."\footnote{193} Professor Mischler argues cogently that per se bans of attorney-client sex perpetuate stereotypes of female weakness and dependence, and presume that "a professional relationship reduces a woman to a helpless waif and deprives her of the ability to think rationally."\footnote{194} Thus, she concludes, the rules "strip women of sexual autonomy by denying them choice."\footnote{195}

Mischler's focus on choice and autonomy places her squarely within the strand of feminist thought known as liberal feminism.\footnote{196} There are, however, a number of other influential strands of feminist legal theory that would reject Mischler's arguments.

\subsection*{A. Overview of Feminist Jurisprudence}

Feminist jurisprudence is often broken down into three\footnote{197} or four\footnote{198} general schools of thought, although attempting to sort and classify the diversity of feminist legal theory leads to oversimplification and distortion.\footnote{199} Focusing on the differences in feminist legal thought does, however, provide an organizational framework for an overview of feminist jurisprudence. One can tentatively divide the feminist legal movement into three principal strands: 1) liberal feminism, 2) relational feminism, and 3) radical feminism.

\footnote{193. Id. at 235-36 (citing ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 43 (1976)).}
\footnote{194. Id. at 237. Many feminist legal scholars seem to share Mischler's concern about presumed advances for women that instead reinforce negative stereotypes. For example, much feminist writing tends to be strongly supportive of admitting battered women syndrome evidence at trials of women accused of killing their batterers. \textit{See, e.g.}, Elizabeth Schneider, \textit{Describing and Changing: Women's Self Defense Work and the Problem of Expert Testimony on Battering,} 9 WOMEN'S RTS. L. RPTR. 195 (1986). There is, however, a growing feminist reaction against the battered women syndrome defense. \textit{See, e.g.}, Anne M. Coughlin, \textit{Excusing Women,} 82 CAL. L. REV. 1, 4 (1994) ("The battered women syndrome defense ... institutionalized within the criminal law negative stereotypes of women.") But rules banning attorney-client sex can also be viewed under an equal treatment model as recognizing the vulnerability of male attorneys to countertransference as well as recognizing the vulnerability of female clients to transference. See discussion of transference and countertransference, supra Part II.A.1-2.}
\footnote{195. Mischler, supra note 19, at 236.}
\footnote{196. See discussion of liberal feminism, infra, Part IV.A.1.}
\footnote{197. Christine Littleton analyzed feminist legal theory as "three interrelated theories to explain and resist women's inequality." Christine A. Littleton, \textit{Equality and Feminist Legal Theory,} 48 U. PITT. L. REV. 1043, 1045 (1987). She sets out the three theories as (1) theories of sex discrimination, (2) theories of gender oppression, and (3) theories of sexual subordination.}
\footnote{198. Others have sorted theories of feminist legal thought into four categories: (1) equality or sameness or liberal feminism, (2) "difference" feminism, (3) cultural feminism, and (4) radical feminism. See Gary Minda, \textit{The Jurisprudential Movements of the 1980s,} 50 OHIO ST. L.J. 599, 626-29 (1989).}
\footnote{199. "The richness and diversity of feminist legal theory that has developed over the last two decades is hard to reduce to a simple schema." Littleton, supra note 191, at 1045. \textit{See also} Ayres, supra note 81, at 135 ("[D]escription of different feminisms is an over-simplification that ignores overlaps and similarities between feminism.")}
1. Liberal Feminism

Feminist theory that focuses on the ways men and women are alike is perhaps the most familiar strand of feminist legal thought. It is associated with the early years of the modern American feminist movement and its attempts to eradicate formal barriers that excluded women from employment and other areas of public life. Liberal or “sameness” feminism focuses on the ways in which men and women are alike in arguing for particular treatment. The line of thought goes something like this: If men enjoy rights that women want, then the only way for women to obtain these rights under existing equal protection doctrine is to argue that, as to the right in question, women are similarly situated to men and thus eligible for the rights men enjoy.

The key words in the liberal feminist’s lexicon are “autonomy” and “choice.” “Liberal feminist jurisprudence focuses on the autonomy of the individual and insists that women, like men, are entitled to the freedoms at the core of liberal theory. Liberal feminists furthermore focus on obtaining equality of women and men in the public sphere, i.e., equal opportunity to participate in politics and the marketplace.”

Critics of the “sameness” approach point out that in some ways women and men are different. Consider the one unquestionable difference between men and women—pregnancy. Christine Littleton critiques the traditional concept of equality as assimilation to male norms. She recognizes that equality doctrine has provided access for some women into formerly male enclaves, like law firms, but notes that this notion of equality does not allow challenges to the institutional structure itself:

a structure that moves you off the partnership track if you call any attention to the fact that you are, either biologically or socially, female.
You could call attention to the fact that you are biologically female by


doing something as radical as having a baby. You could call attention to the fact that you are acting in a socially female way by asking for parental leave, whether you are a mother or a father. Despite significant progress in combating overt sex discrimination at the hiring state, it seems clear that young attorneys are moved off the “fast track” to partnership if they behave in such a socially female manner.\textsuperscript{203}

Littleton thus proposes a model of equality as acceptance, which requires social institutions to react to gender differences so as to make those differences costless. For example, employers could be required to restructure workplaces to fit female life patterns to the same extent they fit male ones.\textsuperscript{204} Littleton views her proposal as incorporating and transcending traditional sex discrimination theory “by insisting that equality need not be limited to sameness, but can in fact be applied across difference.”\textsuperscript{205}

2. Relational Feminism

A discussion of relational feminism, sometimes called cultural feminism\textsuperscript{206} or “different voice” feminism must begin with the work of psychologist and researcher Carol Gilligan. Gilligan discovered that psychological theory about the moral development of humans was developed from tests and observations of boys and men.\textsuperscript{207} When she began to explore how girls and women resolved moral dilemmas she discovered “a different voice,” one heretofore ignored in psychological literature. Gilligan reported that boys resolve conflicts by employing a “hierarchical ladder of values,”\textsuperscript{208} while girls use a very different reasoning process focused on preserving relationships.\textsuperscript{209} Gilligan argues that girls and women see “a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules.”\textsuperscript{210}

\textsuperscript{203} Littleton, supra note 191, at 1051-52.
\textsuperscript{205} Littleton, supra note 191, at 1057.
\textsuperscript{206} Gary Minda explains the denomination of “cultural feminism” as follows: “Feminists who advocate the different voice perspective have been called ‘cultural feminists’ because they tend to equate women’s liberation with the development and maintenance of a female-centered counterculture.” Minda, supra note 198, at 627.
\textsuperscript{208} Gilligan, supra note 207, at 26.
\textsuperscript{209} Id. at 28.
\textsuperscript{210} Id. at 29. See also NANCY CHODOROW, FEMINISM AND PSYCHOANALYTIC THEORY (1989); NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978).
The relevance of this psychological work to law is obvious. Feminist legal scholars have used Gilligan’s work to argue that law is essentially male discourse, with the woman’s voice marginalized. Law operates within Gilligan’s male-identified “hierarchy of rights” rather than the female-identified “ethic of care.”

Gilligan’s work has not, however, been free from criticism by legal feminists. Catharine MacKinnon disputes the attribution of the “ethic of care” to women as if it is women’s voice rather than “what male supremacy has attributed to us for its own use.”

Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don’t just speak differently. A lot, you don’t speak. Your speech is not just differently articulated, it is silenced.

Furthermore, the “essentialist” tendency of Gilligan’s work—its attempt to define all women and all men—is troubling, particularly in a society where difference between the sexes is seen as an excuse to discriminate against women. Ann Scales cautions that Gilligan’s work could become “the Uncle Tom’s Cabin of our century,” because lawyers are tempted to use Gilligan’s work in a shallow way.

3. Radical Feminism

Radical feminism sees gender inequality not as the result of mistaken differentiation based on gender, but as the result of the systematic social subordination of women. Radical feminism “received its most theoretically...
sophisticated legal treatment in the work of Catharine MacKinnon,\(^{216}\) who has called radical feminism the only true feminism—feminism unmodified.\(^{217}\) She explains gender as an “inequality of power,” and posits that the differences society attributes to sex are lines inequality draws.\(^{218}\)

MacKinnon argues that “sex equality” is something of an oxymoron, because sex presupposes difference and equality presupposes sameness.\(^{219}\) She criticizes the sameness and difference approaches to equality for their reliance on the male standard as the reference point:

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.\(^{220}\)

Under the theory of radical feminists, women are unequal because they are subordinate. MacKinnon’s solution would dismantle the hierarchy that disempowers women, thus equalizing the power between men and women.\(^{221}\)

MacKinnon’s feminist theory identifies sex as the situs of women’s oppression: “Sexuality is to feminism what work is to Marxism: that which is most one’s own, yet most taken away.”\(^{222}\) Thus, MacKinnon views the objectification of women — and sexuality in general — as a central cause of sexual subordination.\(^{223}\) A frequent challenge to MacKinnon’s work comes from feminists who do not share her view of sexuality. Robin West argues that MacKinnon ignores women who find the experience of dominance and


\(^{217}\) CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 117 (1989) (“Feminism has been widely thought to contain tendencies of liberal feminism, radical feminism, and socialist feminism. But just as socialist feminism has often amounted to traditional marxism ... liberal feminism has been liberalism applied to women. Radical feminism is feminism.”) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE]; MACKINNON, FEMINISM UNMODIFIED, supra note 212, at 15-16.

\(^{218}\) MACKINNON, FEMINISM UNMODIFIED, supra note 212, at 8. See also Eichner, supra note 216, at 10 (“Women’s differences from men, in this reading, are the result of male power: women are different from men because men desire them to be different and subordinate them to produce this effect.”)

\(^{219}\) MACKINNON, FEMINISM UNMODIFIED, supra note 212, at 33.

\(^{220}\) Id. at 34.

\(^{221}\) West, Difference in Hedonic Lives, supra note 82, at 84.

\(^{222}\) Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 SIGNS 515, 515 (1982).

submission "sexually desirable, exciting and pleasurable—in fantasy for many; in reality for some."

B. Privacy

Critics of rules barring attorney-client sexual relationships often argue that notions of privacy insulate these relationships from state intervention. Mischler argues that the constitutional "zone of privacy" protects personal decisions about sex from government intrusion. Though she concedes that the right is not unlimited, in light of Bowers v. Hardwick, which allows a state to criminalize homosexual sex, she nonetheless argues that "Bowers itself does not significantly dilute the fundamental right of two mature adults to initiate and maintain an intimate, heterosexual relationship." Thus, she concludes that "adult attorneys and clients enjoy this fundamental right to engage in consensual sexual activity."

Mischler recognizes that a ban on attorney-client sex does not severely limit privacy rights—individuals, after all, can pursue their intimate relationships by simply terminating the professional representation. She argues, however, that even this limited burden on intimate relationships cannot withstand constitutional scrutiny. In her view, outright bans on attorney-client sex are not narrowly tailored to further a compelling state interest in protecting


225. Mischler, supra note 19, at 231-235.

226. Id. at 232.


228. Mischler, supra note 19, at 234 (quoting Jeffrey A. Barker, Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?, 40 UCLA L. REV. 1275, 1335 (1993)). Mischler's argument is strengthened by the Supreme Court's recent decision in Lawrence v. Texas, 123 S. Ct. 2472 (2003). The Court overruled Bowers v. Hardwick and held that a Texas statute criminalizing homosexual sodomy was unconstitutional. The Court reasoned that "[t]he case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." Lawrence, 123 S. Ct. at 2484. The Court suggested, however, that a different case would be presented if it involved "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." Id. The Court also noted that the case did not involve abuse of an institution the law protects. Id. at 2478 ("This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."). One might argue that the attorney-client relationship is an institution traditionally protected and regulated by governments, thus regulation of sex in that relationship is not prohibited.

229. Mischler, supra note 19, at 234.

230. Id.
vulnerable clients.\textsuperscript{231} Thus, she argues, these relationships should remain private, unimpeded by rules of professional responsibility.

"Historically, the dichotomy of ‘public’ and ‘private’ has been viewed as an important construct for understanding gender.\textsuperscript{232} Early struggles for women’s rights, exemplified by the suffrage movement, protested women’s exclusion from the public sphere.\textsuperscript{233} Denying women the vote and barring them from numerous occupations all but forced women to remain in their “separate sphere”—the home.\textsuperscript{234} The private sphere, the home, was seen as a place of refuge, a haven in a heartless public world of politics and business.\textsuperscript{235} Even the U.S. Constitution was interpreted to recognize a “private realm of family life which the state cannot enter.”\textsuperscript{236}

Feminists have long realized that the absence of the state, of law, from the private sphere has itself contributed to male dominance and female subordination.\textsuperscript{237} “The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation.”\textsuperscript{238}

Although much good has inured to the cause of women through the doctrine of privacy,\textsuperscript{239} privacy doctrine has also encouraged, reinforced, and supported violence against and abuse of women:

Privacy says that violence against women is immune from sanction, that it is permitted, acceptable and part of the basic fabric of American family life. Privacy says that what goes on in the violent relationship should not be the subject of state or community intervention. Privacy says that it is an individual, and not a systemic problem. Privacy operates as a mask for inequality, protecting male violence against women.\textsuperscript{240}

\textsuperscript{231} Id. at 234-35.
\textsuperscript{234} Olsen, \textit{Statutory Rape}, supra note 233, at 392.
\textsuperscript{235} Dailey, supra note 232, at 966-67 (citing CHRISTOPHER LASCH, \textIT{HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED} (1979)).
\textsuperscript{236} Prince v. Massachusetts, 321 U.S. 158, 166 (1944) cited in Dailey, supra note 232, at 984.
\textsuperscript{237} Taub & Schneider, supra note 233, at 154.
\textsuperscript{238} Schneider, supra note 232, at 978.
\textsuperscript{240} Schneider, supra note 232, at 984-85.
Arguments that attorney-client sex belongs in the private sphere, which should be free from government regulation, rely on the private-public dichotomy long-challenged by feminist scholars. As Deborah Rhode notes, “the state’s refusal to intervene in private matters has not necessarily expanded individual autonomy; it has often simply substituted private for public power.”

Those who criticize rules against sex in the attorney-client relationship focus on the sex rather than the attorney-client relationship, and in doing so invoke notions of privacy associated with intimate activities. In fact, the attorney-client relationship falls squarely within the “public” sphere in that it has long been regulated by government entities.

The government regulates whether an attorney-client relationship exists, defining the relationship for purposes of rules of evidence regarding the attorney-client privilege as well as rules of professional responsibility. The

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241. Rhode, supra note 81, at 631.
242. “Generally, each state’s highest court has inherent power to regulate the practice of law within the state. This power is typically delegated to state bar organizations, which often provide interpretive, investigative, and prosecutorial functions in regulating the practice of law.” Cynthia Fountaine, When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment, 71 U. Cin. L. Rev. 147, 150.


government restricts whom attorneys can and cannot represent. The government further regulates the rights and duties of attorneys and clients, and regulates how the relationship may be terminated. Regulating attorney-client sex is well within the sphere of government action given this framework.

existence of an attorney-client relationship was a prerequisite to a one-year suspension of the attorney for violating rules of professional responsibility).

245. See, e.g., MODEL RULES PROF'L RESPONSIBILITY R. 1.7(a) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."); R. 1.8-1.13 (setting forth certain conflicts of interest), R. 1.16(a) ("[A] lawyer shall not represent a client . . . if (1) the representation will result in violation of the rules of professional conduct or other law."). See also ALASKA RULES OF PROF'L CONDUCT R. 1.7-1.13 (2001) (conflicts of interest), R. 1.16 (declining representation); CAL. RULES OF PROF'L CONDUCT R. 3-310, 3-600, 3-700 (1997) (conflicts of interest); IOWA CODE OF PROF'L RESPONSIBILITY R. 3-110 (1997); ME. CODE OF PROF'L RESPONSIBILITY R. 3.4 (conflicts of interest), 3.5 (withdrawal from representation) (2001); NEB. CODE OF PROF'L RESPONSIBILITY R. 2-104, 2-109, 2-110, 5-101, 5-102, 5-105, 5-108 (2000) (rules governing personal contact with prospective clients, acceptance of employment, withdrawal from employment, and conflicts of interest); N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 2-104, 2-109 (requiring lawyer to decline employment on behalf of a person who seeks to bring legal action only to harass another), 5-101, 5-102, 5-105, 5-108 (2002) (same); OHIO CODE OF PROF'L RESPONSIBILITY DR 2-104, 2-109, 2-110, 5-101, 5-102, 5-105, 5-106, 5-109 (2002) (same).


247. This is particularly true with regard to contingent fee agreements. See, e.g., MODEL RULES PROF'L RESPONSIBILITY R. 1.5 (2002) (regulation of fee agreements). See also Charles Kocoras, Contingent Fees—A Judge's Perch, 47 DEPAUL L. REV. 421, 422-23 (1998) ("Even when the validity of the fee contract itself has not been challenged by the parties, it is within the court's inherent power of supervision over the bar to examine the attorney's fee for conformance with the reasonable standard of the Code of Ethics."); Mitzel v. Westinghouse Elec. Corp. 72 F.3d 414 (3d Cir. 1995); Kirby v. Liska, 334 N.W.2d 179 (Neb. 1983). In addition to fee agreements, rules of professional responsibility may also require certain agreements in writing, such as a waiver of conflict of interest. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 3-310 (1997). The rules in Maine even provide a form titled "Limited Representation Agreement" to be used when a lawyer undertakes limited representation of a client. See ME. CODE OF PROF'L RESPONSIBILITY R. 3.4(j)(2001). Courts have also read certain terms into attorney-client contracts. See, e.g., Mourad v. Auto. Club Ins. Ass'n, 465 N.W.2d 395, 400 (Mich. Ct. App. 1991) (attorney-client employment contracts have an implied term that the attorney is bound by the code of professional conduct); Campagnola v. Mulholland, Minion & Roe, 555 N.E.2d 611 (N.Y. 1990) (notwithstanding the express terms of an attorney-client contract, the client has an absolute right to terminate the employment contract without cause); Delmonte v. State Farm Fire & Cas. Co., 975 P.2d 1159 (Haw. 1999) (contractual provision regarding duty of defense that conflicts with attorney's representation of insured in accord with the Rules of Professional Conduct must yield to the requirements of professional ethics).

248. See, e.g., MODEL RULES PROF'L RESPONSIBILITY R. 1.16 (2002); ALASKA RULES OF PROF'L CONDUCT R. 1.16 (2001); CAL. RULES OF PROF'L CONDUCT R. 3-700 (1997); IOWA CODE OF PROF'L
Furthermore, the view that the state must bow out when it comes to attorney-client sex is untenable in light of what the prohibitions of attorney-client sexual relationships actually say and do. These regulations do not tell attorneys with whom they can and cannot have sex. Instead, they tell attorneys whom they can and cannot represent. Countless regulations of attorneys' professional lives have passed constitutional muster.\(^\text{249}\) Regulation of attorney-client sex is just another variety of this regulation.

Attempts to leave attorney-client sexual relationships behind the veil of privacy leave clients to be exploited by attorneys. The failure to regulate in this area, when there are countless regulations governing conduct in the attorney-client relationship, sends a powerful ideological message: “The message of women's inferiority is compounded by the totality of the law's absence from the private realm. In our society, law is for business and other important things. The fact that the law in general has so little bearing on women's day-to-day concerns reflects and underscores their insignificance.”\(^\text{250}\)

C. Autonomy and the Meaning of Consent

Cases involving attorneys who rape their clients, or who make unwanted advances, present few problems—in terms of detection and punishment—for bar authorities. The difficult cases are those where the client initiates the sexual

\(^{249}\) Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding Florida regulation prohibiting attorneys from soliciting wrongful death victims within thirty days of the accident); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (upholding disciplinary rule requiring certain disclosures in attorney advertising); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding state regulation prohibiting attorneys from soliciting clients in person); Paciulan v. George, 229 F.3d 1226 (9th Cir. 2000) (upholding constitutionality of California's pro hac vice admission to nonresidents licensed in other states); In re Morrissey, 168 F.3d 134 (4th Cir. 1999) (upholding gag rule restricting lawyer speech in criminal litigation); Schwarz v. Kogan, 132 F.3d 1387 (11th Cir. 1998) (upholding professional responsibility rule requiring pro bono services against due process challenge); Tolchin v. Supreme Court of New Jersey,111 F.3d 1099 (3rd Cir. 1997) (upholding constitutionality of New Jersey residency requirements); Kirkpatrick v. Shaw, 70 F.3d 100 (11th Cir. 1995) (upholding constitutionality of Florida Bar rules and regulations requiring all applicants submit to fitness review); Goldfarb v. Supreme Court of Virginia, 766 F.2d 859 (4th Cir. 1985) (upholding constitutionality of Virginia rule admitting only those out-of-state attorneys to bar without examination who intend to practice full time in Virginia); Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974) (upholding constitutionality of South Carolina regulation exempting those attorneys admitted to practice in a state granting reciprocity to South Carolina attorneys).

\(^{250}\) Taub & Schneider, supra note 233, at 156.
encounter, or where there is arguably consent. Critics of rules prohibiting attorney-client sexual relations often argue that there should be no regulation of sexual relations between consenting adults.

But are these relationships truly consensual? The answer depends on the meaning of consent. Rutter found that women experienced "psychic numbing" at the moment of sexual touching between the professional man and his female client.

Psychic numbing, experienced by survivors of catastrophes and a prominent symptom of post-traumatic stress disorder, results in paralysis "of action, judgment, feeling and voice." He explains further: "Sharon Grant describes the helplessness leading to psychic numbing that she felt at the moment her attorney told her he would abandon a lawsuit to keep her house unless she agreed to have sex: "There was no way to control anything. When this happens, there is no boundary to the self. There is no self. Anybody can do anything he wants to you. You have no power, no control, no choice. You can't say yes or no."

Such occurrences of psychic numbing raise questions about the line between consent and helplessness.

Robin West suggests that liberal feminists are mistaken to focus on consent and choice. Liberal feminism assumes that human beings will choose what will make them happy, and thus expanding women's choices will expand their happiness. Professor West does not find "women" in the liberal's definition of "human being." She contends that the liberal feminist claim that women consent to transactions in order to maximize happiness may be false. "It may be that women consent to changes so as to increase the pleasure or satisfy the desires of others."

The rather inescapable fact is that much of the misery women endure is fully "consensual." That is, much of women's suffering is a product of

251. One might argue that the cases discussed in this section are also easy cases -- but in the other direction. The cases deal with coercion, sex-for-services, etc. How can these be cases of consent? In fact, in criminal law terms, these are easily non-consensual situations. See Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of the Law 121-28, 163-64 (1998). See, e.g., State v. Thompson, 792 P.2d 1103 (Mont. 1990) (dismissing sexual assault charges where high school principal threatened student that he would prevent her from graduating unless she had sex with him); Common W. v. Mlinarich, 498 A.2d 395 (Pa. Super. 1985) (reversing rape conviction where guardian of girl threatened to send her back to juvenile detention facility if she refused to have sex with him). These quid-pro-quo cases and coerced consent cases would therefore still be considered cases of consent.


253. Id. (internal quotations omitted)

254. Id. at 133.

255. Id. at 88. See also Dailey, supra note 235, at 1004 ("the liberal conception of abstract individualism; under which individuals interact as independent, autonomous, rational equals; has no connection to family life, where individuals are, above all, dependent, related, and unequal.").

256. Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 4 ("Women, though, are not human beings.") [hereinafter West, Jurisprudence and Gender].

a state of being which was itself brought into being through a transaction to which women unquestionably tendered consent. A woman’s experience of marital sexuality, for example, may range from boring to irritating to invasive to intensely painful. . . . But the fact is that . . . the wife . . . was [not] brought to the altar in shackles . . . . Put affirmatively, the conditions which create our misery—unwanted pregnancies, violent and abusive marriages, sexual harassment on the job—are often traceable to acts of consent. Women—somewhat uniquely—consent to their misery.\(^{258}\)

Relational feminism instructs us that women are different from men, in acting for the benefit of others rather than themselves, because their lives are different from men. Professor West believes that several factors explain this difference: biological pregnability and social training as primary caretakers are two. She focuses on another explanation for the difference which she thinks “has great explanatory force”—pervasive violence in the lives of women.\(^{259}\) Violence, particularly sexual violence, causes women “to define themselves as ‘giving selves’ so as to obviate the threat, the danger, the pain, and the fear of being self-regarding selves from whom their sexuality is taken.”\(^{260}\) Relational feminism lends credence to this argument—women judge themselves in contrast to the male sphere and thus see themselves as possessing an “ethic of care.” But radical feminism informs us that this view of one’s female self as giving is still oppressive because it sets maleness as a standard to which females are compared.

The feminist debate about prostitution—its focus on autonomy and exploitation—has relevance to the issue of attorney-client sexual relationships. Consider again the case of *Florida Bar v. Bryant*,\(^{261}\) where a lawyer represented a woman who had been arrested for a misdemeanor violation of a municipal ordinance regulating exotic dancers. Because she had little or no money, the client suggested that Bryant represent her in exchange for sex. Bryant agreed, and the client performed oral sex several times during Bryant’s representation of her.\(^{262}\) The referee who initially heard the grievance against Bryant found there to be no violation of disciplinary rules, because this was simply a situation where the client, being a prostitute, bartered her sexual services for Bryant’s legal services.\(^{263}\)

Liberal feminist legal thought would agree with the referee, seeing sexual barter as simply a choice some women might make.\(^{264}\) The client’s choice here
is seen as a rational one: the attorney can provide her services she needs, but she is unable to pay for them. She can, however, provide a service the attorney may want. In this view, exchanging legal work for sex work is merely a business arrangement, an exchange of services, a bartering of commodities.265

Another strand of feminist legal thought would decry the referee’s finding as ignoring issues of exploitation, as relying on stereotypical notions of prostitution that are linked to the “prostitutes can’t be raped” myth,266 and as ignoring the commodification of female sexuality.267 This feminist argument focuses attention on the conditions that make women “choose” prostitution. The English Collective of Prostitutes argues that poverty forces women into the sex industry, thus women are not free to choose prostitution as a work option. “Sex is supposed to be personal, always a free choice, different from work. But it’s not a free choice when we are dependent on men for money.”268 Other feminists go further, asserting that prostitution is a system of exploitation and violence that differentially harms women. The mere exchange of money, in this view, cannot change acts of violence against women into work.269

The resolution of the feminist debate about prostitution is difficult. As Margaret Jane Radin puts it,

If the social regime permits buying and selling of sexual and reproductive activities, . . . there is a threat to the personhood of women, who are the ‘owners’ of these ‘commodities.’ . . . But if the social regime prohibits this kind of commodification, it denies women the choice to market their sexual or reproductive services, and given the current feminization of poverty and lack of avenues for free choice for women, this also poses a threat to the personhood of women.

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Thus the double bind: both commodification and noncommodification may be harmful. Harmful, that is, under our current social

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265. See Belinda Cooper, Prostitution: A Feminist Analysis, 11 WOMEN’S RTS. L. REP. 99, 109 (1989); Jody Freeman, The Feminist Debate Over Prostitution Reform: Prostitutes’ Rights Groups, Radical Feminists, and the (Im)possibility of Consent, 5 BERKELEY WOMEN’S L.J. 75, 88 (1989-90). Prostitution clearly can include exchange of sex for commodities other than money. For example, California defines prostitution as sex in exchange for money or other consideration. See CA. PENAL CODE § 647(b) (2003). Many are familiar with the “sex-for-drugs” trade, where a prostitute turns tricks in exchange for crack or other drugs. See Tracey L. Meares, Social Organization & Drug Law Enforcement, 35 AM. CRIM. L. REV. 191, 202 (1998); Bernstein, supra note 264, at 115.

266. Sanchez, supra note 157, at 550.


269. Id. at 48-49.
conditions. . . . In other words, the fact of oppression is what gives rise to the double bind.

Thus, it appears that the solution to the double bind is not to solve but to dissolve it: remove the oppressive circumstances. But in the meantime, if we are practically limited to those two choices, which are we to choose? I think that the answer must be pragmatic. We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or not as bad), and we must keep re-deciding as time goes on.  

Even if autonomy arguments are valid in the prostitution context, where the only imbalance of power is the one all women face because of men's dominance, they are less valid in the context of attorney-client relationships. A common characteristic of the attorney-client relationship is an imbalance of power.  

In that relationship, in addition to the usual dynamic of male dominance/female subordination, there is the imbalance caused by the dependence of the client on the lawyer's expertise. The opportunities to exploit such trusting relationships are great, so great that prohibition of attorney-client sex, although it may impair the autonomy of some women, seems the best option.

Even liberal feminists who highly value autonomy and choice are wary of "desperate exchange" - that is, an exchange that the individual would never partake in given any reasonable alternative. Although "desperate exchange" is often used in analyzing prostitution (especially prostitution driven by extreme poverty or drug addiction), surrogacy, and organ donation, it is also relevant in the context of attorney-client sex.

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271. Silver, supra note 60 at 260-61.
272. See discussion, supra notes 19-20.
273. Awad, supra note 18, at 132-33 (arguing that consent is not possible in such relationships).
274. Bernstein, supra note 264, at 100. As one author put it, "even though we value autonomy, we are repulsed by what Michael Walzer calls 'desperate exchanges' or 'trades of last resort' made when one party to the exchange is operating within a context of brutal necessity." Matthew H. Baughman, In Search of Common Ground: One Pragmatist Perspective on the Debate Over Contract Surrogacy, 10 COLUM. J. GENDER & L. 263, 271 (2001) citing MICHAEL WALZER, SPHERES OF JUSTICES 102 (1983).
275. Bernstein, supra note 264.
276. See id. at 114-15, discussing the different varieties of "career prostitution," and identifying crack and heroin prostitutes as "an extreme example that may help to clarify when prostitution is or is not a 'desperate exchange.'"
Attorneys serve as gatekeepers to legal services. Without a lawyer, a layperson cannot enter the courthouse door realistically expecting redress of injuries or the protections of the law. In fact, American lawyers have a legally-created monopoly on the provision of legal services. Thus, sex-for-services agreements like in *Bryant* are highly suggestive of a "desperate exchange."

Even without a direct suggestion of sex in exchange for legal services, there often appears an element of desperation in women who agree to have sexual relations with their attorneys. Recall Sharon Grant, discussed in Rutter's book, who engaged in a year-long affair with her attorney while he represented her in a divorce. When she agreed to sex with her lawyer, she felt that "my economic future and actual survival were completely dependent on how my lawyer handled my case." She goes on to talk about the moment when her attorney told her he would abandon a lawsuit to keep her house unless she agreed to have sex: "You have no power, no control, no choice. You can't say yes or no."

D. Ensuring Sexual Availability of Women

Catharine MacKinnon identifies one of the "perks" of male domination of women as the sexual availability of women to men. "One of the advantages of male supremacy, along with money and speech and education and respectability, is sexual access to women.... Women being the universal object under male supremacy, sexual access to women makes you human. It makes you real, like money.... Men as a gender have had access to women." Recall the quote from a minister who had sex with a parishioner: "Could I once again get sexually involved with a member of my congregation? Absolutely, if I'm honest about it. I don't want to stop being sexually attracted to what's forbidden. To deny that would be to deny part of my manhood."
He seems to agree with MacKinnon—the sexual availability of women in his congregation was integral to making him “real,” in making him a man.

Some feminists have argued that many laws and social policies are designed to ensure men “broadened sexual access to the women they know.”\textsuperscript{285} The failure of states to regulate attorney-client sexual relations appears to be part of the same phenomenon—ensuring the sexual availability of women.

Rutter explains the silence of professional men in the face of sexual exploitation as caused by “a nearly universal fascination with the fantasy of sex in the forbidden zone.”\textsuperscript{286} A key element, he says, in the perpetuation of sexual abuse by professionals is the public silence of their colleagues:

Men who never engage in forbidden-zone sex participate in it vicariously through the exploits of men who do. In a tribal sense, it is as if men who violate the forbidden zone are the designated surrogates who live out the fantasies for the rest of the men in the tribe. Because these men are the surrogates for the rest of us, we secretly do not wish to prevent them from having sexual relationships with the women under their care.\textsuperscript{287}

Rutter further postulates that “even ethical professional men wish to leave open the possibility that one day they will have a sexual encounter with a woman under their care.”\textsuperscript{288} For these reasons, Rutter is skeptical about the ability of the professions to regulate themselves in this area:

Asking men in power to prevent their colleagues’ sexual exploitation in some way requires them to undermine their own fantasy lives. . . . The medical, psychotherapeutic, pastoral, and legal professions have long insisted on policing themselves about ethical matters. At this stage, however, men in these professions need the help that widespread public scrutiny and growing public understanding can bring to this problem.\textsuperscript{289}

Rutter’s skepticism seems warranted in light of the fact that only ten jurisdictions currently have rules of professional responsibility that regulate attorney-client sexual relationships. While another fifteen states have legal authority regulating attorney-client sexual relationships, they stop short of absolute bans on such

\textsuperscript{285} SUSAN ESTRICH, REAL RAPE 32, 36-37, 40 (1987) (discussing rape law). See also Carter & Giobbe, supra note 267, at 37 (“The function of the institution of prostitution is to allow males unconditional sexual access to females, limited solely by their ability to pay for this privilege”).

\textsuperscript{286} RUTTER, supra note 15, at 61.

\textsuperscript{287} Id. at 62.

\textsuperscript{288} Id. at 63.

\textsuperscript{289} Id.
relationships. Thus, the current state of the law ensures that women clients remain sexually available to their male attorneys.

V. THE SOLUTION—A PROPOSED RULE

Despite Rutter’s skepticism that the professions can police themselves with regard to sexual relationships with clients,\footnote{RUTTER, supra note 15, at 63.} I believe that an important first step is for every state to adopt an explicit prohibition against attorneys representing clients with whom they have a sexual relationship.\footnote{It is very difficult to gauge empirically the success of such rules. Attorney grievance is confidential in most jurisdictions. Thus, it is hard to determine whether the adoption of any rule, or a particular rule, is effective in protecting the public by decreasing the incidence of attorney-client sex. Nonetheless, I argue that passage of such rules is appropriate.} The passage of such a rule sends an important message about valuing women’s voices, about listening when women talk of oppression. Adopting such rules makes explicit what attorneys know—or should know—that sex with clients is unethical, exploitative, and harmful.

The ABA’s model rule, which simply states, “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced,”\footnote{MODEL RULES OF PROF’L CONDUCT R. 1.8 (2002).} serves as a starting point for the rule I propose. The rule, however, does not go far enough.

Like most of the state rules, the Model Rule excludes from coverage relationships that predate the legal representation. These exemptions for pre-existing relationships seem to assume that the only real harm in attorney-client sex is an attorney abusing his or her position to initiate a sexual relationship with a client. The exemptions do not address potential conflicts of interest or impairment of judgment that might arise in pre-existing relationships. Only Iowa recognizes that pre-existing relationships can be problematic, adjuring:

Even in these provisionally exempt relationships [relationships that predate the attorney-client relationship], the attorney should strictly scrutinize his or her behavior for any conflicts of interest to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the attorney should immediately withdraw from the legal representation.\footnote{IOWA CODE OF PROF’L RESPONSIBILITY DR 5-101(B).}
This potential for impaired judgment and lack of objectivity is why doctors do not treat family members.\textsuperscript{294}

A rule addressing attorney-client sexual relationships should also address pre-existing relationships. One might argue that existing rules about conflict of interest and professional judgment would apply, and are sufficient to deal with attorneys representing sexual intimates; but where the rule clearly exempts such relationships, it does not indicate to an attorney that he is entering a danger zone. Of course, the danger zone exists when attorneys represent their parents, children, friends, and other family members, and no rule explicitly addresses these relationships. But the existence of the exclusion in the attorney-client sex rule stands as tacit approval for representing sexual intimates. In order to counteract that tacit approval, a rule ought to address problem areas in representing sexual intimates even when the relationship predates the attorney-client relationship.

The ABA Model Rule addresses the matter in a brief comment to the rule:

Sexual relationships that predate the client-lawyer relationship are not prohibited. 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 proceeding 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.\textsuperscript{295}

This comment is not sufficient to highlight to attorneys or their clients that pre-existing relationships have the potential for impairing representation. The matter should be addressed in the rule itself.

The ABA rule also buries in the comments the definition of client when the client is an organization:

As to an organization client, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter.\textsuperscript{296}

Some question whether the power imbalances usually attendant to the attorney-client relationship apply when the client is a corporation.

\textsuperscript{295} \textsc{Model Rules of Prof’l Conduct} R. 1.8, cmt. 18.
\textsuperscript{296} \textsc{Id.} cmt. 19.
Again, this view suggests that the only evil to be eradicated by an attorney-client sex prohibition is the exploitation of a vulnerable client. While that may be the primary reason for such a ban, it is also important to focus on the impairment of the attorney's objective professional judgment, the potential for conflict of interest, and the potential for the inadvertent waiver of attorney-client privilege. All of these problems pertain to corporate clients to the same extent they apply to non-corporate clients. Thus, the rule should make clear on its face that it applies to relationships with corporation representatives who supervise, direct or regularly consult with the corporation's attorney.

In addition, the rule ought, for the sake of clarity and completeness, to include a definition of sexual relationship. It is not helpful in the grievance process if a lawyer can argue that nothing short of vaginal intercourse constitutes a sexual relationship.297

In light of the foregoing, I propose the following rule:

(a) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(b) Where a consensual sexual relationship existed between the attorney and client when the client-lawyer relationship commenced, a lawyer shall not represent the client if there is a significant risk that (1) the representation will be materially limited by the personal interest of the lawyer; (2) the protection of the attorney-client privilege may be impaired, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship; or (3) the lawyer's objective professional judgment may be impaired.

(c) Where the client is an organization, the lawyer shall not have sexual relations with the representative of the organization who supervises, directs or regularly consults the lawyer.

(d) For the purpose of this rule, "sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

This proposed rule goes further than the ABA Model Rule in order to ensure that everyone—including attorneys and their clients—are on notice about the proper parameters of the attorney-client relationship.

297. Few can forget President Bill Clinton's arguments about whether sexual contact short of intercourse with Monica Lewinsky constituted a sexual relationship. For discussions of the issue, see Anita L. Allen, Lying to Protect Privacy, 44 VILL. L. REV. 161 (1999); John Gibeaut, Presidential Lessons: The Strategies Bill Clinton's Lawyers Used to Fend Off Paula Jones and Ken Starr Are Classic Do's and Don'ts Even Beyond the Beltway, 4 A.B.A. J. 52 (1998); Charles J. Ogletree, Jr., Personal and Professional Integrity in the Legal Profession: Lessons From President Clinton and Kenneth Starr, 56 WASH. & LEE L. REV. 851, 856-57 (1999).
The rule sends an explicit message that an attorney cannot represent a client with whom he or she has commenced a sexual relationship. It also seeks to strike a balance where the relationship predates the representation, by putting the attorney and client on notice that dangers other than exploitation exist when an attorney has a personal relationship with a client.

The rule also makes clear who the "client" is when an organizational entity is the actual client. The greatest danger—in terms of exploitation, impairment of judgment, conflict of interest, and possible waiver of the attorney-client privilege—occurs when the sexual relationship is with the representative of the organization who supervises, directs or regularly consults the lawyer. This is the person with whom the lawyer has the most prolonged and potentially intimate contact. Sexual involvement with the organization's representative—rather than with some other person who happens to work for the organization but is unrelated to the legal services being rendered by the lawyer—is not as likely to have an adverse effect on the rendition of legal services.

Finally, the proposed rule defines sexual relations to encompass more than sexual intercourse by including sexual contact of any kind.

VI. CONCLUSION

The problem of attorney-client sex allows an exploration of issues of power, relationships, privacy, consent and sex from feminist perspectives. Some liberal feminists might argue that autonomy and choice precludes regulation of sex between attorneys and clients. Other liberal feminists might see a "desperate exchange" in the attorney-client sexual relationship, and advocate regulation. Relational feminists might identify the corrosive effect of attorney-client sex on the professional relationship, as well as the emptiness of the liberal feminist's focus on choice. Relational feminists might also contend that in ignoring the problems of attorney-client sex, the legal profession simply continues its tradition of ignoring the reality of women's lives. Radical feminists might argue that the absence of prohibitions on attorney-client sex ensures the sexual availability of women to men, and allows the powerful to exploit the powerless through sex.

As I have argued in this Article, and as the compelling narratives in Peter Rutter's book illustrate, attorney-client sex— even when it might appear consensual— is exploitative and dangerous. Linda Fitts Mischler argues that attorney-client sexual relationships should be unregulated as private conduct. But shrouding these sexual relationships behind a veil of privacy ignores the pervasive regulation of the attorney-client relationship and exemplifies a tendency of government to categorize as "private" the harms suffered by women. Mischler also argues that per se bans of attorney-client sex perpetuate stereotypes of female weakness and dependence. She ignores, however, that all clients— male and female— are dependent on their attorneys' expertise. It is just that in the male-
female attorney-client relationship the exploitation of that dependence becomes
the expropriation of sexuality. Although the rules address other forms of
exploitation of that dependence, equally applicable to male and female clients, the
rules fail to address this particular form of exploitation which disproportionately
affects the female clients of male attorneys. The failure to regulate – and the
apparent depth of the resistance to such regulation as exemplified by the difficulty
of the ABA to promulgate such a rule – confirms Peter Rutter’s conclusion that
“even ethical professional men wish to leave open the possibility that one day
they will have a sexual encounter with a woman under their care.”

A reason sometimes expressed for why states should not adopt an explicit
rule barring attorneys from representing clients with whom they have sexual
relationships is that doing so 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.

Many lawyers decry the fact that the public seems to have lost faith in
attorneys. One state bar recently launched an initiative to increase the public’s
trust and confidence in the legal profession. A public survey revealed that
the majority of state residents rated teachers (85%), doctors (77%), and judges
(71%) as honest and ethical. Significantly fewer residents 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.

298. Rutter, supra note 15 at 63.
300. Id.
301. Id.