

10-1-1993

## A Conflict is a Conflict is a Conflict: Fiduciary Duty and Lawyer - Client Sexual Relations

Matthew Certosimo  
*Dalhousie University*

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Matthew Certosimo, "A Conflict is a Conflict is a Conflict: Fiduciary Duty and Lawyer - Client Sexual Relations" (1993) 16:2 Dal LJ 448.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

### *Introduction*

Does a lawyer breach his<sup>1</sup> fiduciary duty by engaging in sexual activity with a client?<sup>2</sup> The Nova Scotia Barristers' Society is attempting to answer this very question with a proposed Rule in the *Legal Ethics and Professional Responsibility Handbook*<sup>3</sup>: Chapter 24<sup>4</sup> on Sexual Relation-

---

\* LL.B. 1993 (Dalhousie). The author wishes to acknowledge and express gratitude for the patience and guidance of Professor Innis Christie, whose careful and constructive criticism was instrumental in the writing of this paper. The author also wishes to thank Darrel Pink and Alan Stern, Q.C., of the Nova Scotia Bar Society and Professor Hugh Kindred for his editorial guidance.

\*\* With apologies to Gertrude Stein's *Sacred Emily* ("Rose is a rose is a rose is a rose.").

1. Although gender neutral language is preferred, in this context the problem being addressed is not, unfortunately, gender neutral. One recent survey of State Bars in the United States on complaints of lawyer sexual misconduct concluded that 96% of the lawyers were male and 95% of the complainants were female. (L.M. Jorgenson and P.K. Sutherland, "Lawyer/Client Sexual Contact: State Bars Polled" (June 15, 1992), *National Law Journal* 26.) Therefore, for the purposes of this paper, the masculine gender will be used to refer generally to lawyers and the feminine gender will be used when referring generally to complainants. Cf., where the same approach was adopted, Y. Levy, "Attorneys, Clients and Sex: Conflicting Interests in the California Rule" (1992), 5 *Geo.J.L.Ethics* 649, 650, at note 8.

2. L. Dubin, "Sex and the Divorce Lawyer: Is the Client Off Limits?" (1988), 1 *Geo.J.L.Ethics* 585, at 586.

3. Nova Scotia Barristers' Society, *Handbook on Legal Ethics and Professional Responsibility* (Halifax: Nova Scotia Barristers' Society, 1990). [Hereinafter, the *Handbook*].

4. Chapter 24: Sexual Relationships with a Client

Rule: A lawyer has a duty not to:

(a) initiate, request, suggest or engage in a sexual relationship with a client who is emotionally vulnerable; or  
(b) represent a client with whom the lawyer is having or has had a sexual relationship if the lawyer's independent professional judgment is likely to be impaired because of such a relationship.

Guiding Principles:

1. For purposes of the Rule, "sexual relationship" includes sexual intercourse between a lawyer and client and any other conduct with a client which may reasonably be interpreted as sexual.

2. For purposes of the Rule, if the client is an organization of body corporate, any individual overseeing the representation and giving instructions to the lawyer shall be deemed to be the client.

ships with a Client.<sup>5</sup> The purpose of this paper is to review the proposed Rule in the context of a lawyer's fiduciary duty to his client.

Throughout North America, the profession has been challenged to reconsider the boundaries of fiduciary duty by complaints of sexual misconduct against lawyers.<sup>6</sup> In *Re MacDonald*,<sup>7</sup> a lawyer, who was aware of his client's emotional vulnerability and nevertheless pursued her sexually, was reprimanded by the Nova Scotia Barristers' Society for

---

3. Rule (a) does not apply to a sexual relationship between a lawyer and the lawyer's spouse nor to a consensual sexual relationship which predates the initiation of the lawyer client relationship.

4. The Rule does not prohibit a lawyer from engaging in a sexual relationship with a client of that lawyer's firm provided that the lawyer has no involvement in the performance of legal work for the client.

Commentary:

24.1 the reasons for the Rule are:

(a) to prohibit sexual exploitation in the course of a professional representation; and

(b) to ensure objective representation unimpaired by personal relationships.

24.2 Based upon the nature of the representation, a client may be emotionally vulnerable and dependent upon the advice and guidance of the lawyer. In that regard, the lawyer has the duty of utmost goodwill to the client.

24.3 The relationship between a lawyer and client is a fiduciary relationship of the very highest character and all dealings between a lawyer and client that are beneficial to the lawyer will be strictly scrutinized. Where a lawyer exercises undue influence over a client or takes unfair advantage of a client, discipline is appropriate.

24.4 The Rule recognizes that emotional detachment from a client is necessary to the lawyer's ability to provide competent legal services.

5. Although not yet adopted, henceforth the proposed rule will be referred to simply as "Chapter 24". The Nova Scotia Barristers' Society is the only law society in Canada considering an explicit rule on this matter. Chapter 24 was recommended by the province's Legal Ethics Committee for consideration by the Executive, and requires final approval by the Bar Society's Council to be formally adopted. (Interviews with Darryl Pink, Executive Director Nova Scotia Bar Society and Alan J. Stern, Q.C., former Chair of the Legal Ethics Committee, November, 1992 and November 1993 with Mr. Pink once again.)

6. Cf. L. Dubin, *supra*, note 2; Y. Levy., *supra*, note 1; Jorgenson and Sutherland., *supra*, note 1.

7. *Re MacDonald* (June 19, 1991), Nova Scotia Barristers' Society.

conduct unbecoming a member.<sup>8</sup> In its ruling, the Subcommittee held that, since Mr. MacDonald knew that his client was "emotionally vulnerable," he had an obligation to refrain from sexual relations with her. The Subcommittee's assessment placed an emphasis on the client's peculiar vulnerability, not the lawyer's professional responsibility.

The decision leaves many questions unanswered. Had the client not been uniquely fragile, would the lawyer's sexual pursuit of that client been any less a breach of his duty? If, by the very nature of a fiduciary relationship a lawyer accepts the confidence of his client, with the ethical obligation not to misuse that trust, should not the assessment of an alleged breach focus on the actions of the lawyer? In the more traditional context of fiduciary duty that is the nature of the investigation. The rules surrounding business related conflicts reflect, as the primary concern of the profession, the protection of the client.<sup>9</sup> How is a breach of a more personal nature different?

---

8. Mr. MacDonald was retained by the complainant in June, 1988, regarding an employment matter, after she was referred to him by her psychiatrist. Since 1982, the complainant had been treated for severe reactive depression by the psychiatrist, mainly precipitated by a stressful, long-term relationship with a colleague at work. Her treatment included a prescription for Nardil, an anti-depressant, which improved her mental state "markedly". The psychiatrist advised Mr. MacDonald of the complainant's condition in 1988. The complainant provided Mr. MacDonald with a written history of her problems with her employer in February of 1989, which included a description of difficulties, such as her 1982 nervous breakdown, her feelings of betrayal by men and her low self-esteem.

At Mr. MacDonald's request, the complainant met him at 7:30 pm at O'Carroll's Restaurant in Halifax, on March 1, 1989, where both legal and non-legal matters were discussed. At Mr. MacDonald's initiation in following-up on her file, he and the complainant had several lengthy telephone conversations, during which the discussion became "quite personal in nature." The complainant was concerned about the fees for Mr. MacDonald's lengthy phone calls, and was told by Mr. MacDonald, "Don't worry about it....[There are some things] you have to do."

On April 2, 1989, Mr. MacDonald called the complainant in the evening to invite her out for pizza with him and his son, which she declined. After spending the evening becoming intoxicated, Mr. MacDonald fell asleep, awaking at about 1:00 am, at which point he called the complainant. Mr. MacDonald states that he was invited by her to come to her home, and upon arriving he could smell alcohol on her breath and noted she had a "bit of a buzz on." The parties engaged in intimate sexual conduct, although the complainant's only recollection of the affair is a brief vision during the act and her requesting that he discontinue. Allegations by the complainant that Mr. MacDonald had exerted force against her, that she was not a willing participant, were not accepted by the Subcommittee. In the morning, the complainant was surprised that Mr. MacDonald was in her bedroom, and he immediately left. At the intervention of concerned friends, who became aware of her despondency over the incident, and her resulting attempted suicide, the complainant was hospitalized on April 4.

On April 12, 1990, the complainant first filed a letter of complaint with the Bar Society.

9. For example, Regulation 48C regarding loans between lawyer and client, places the burden of proof on the lawyer to show that the client's interests were fully protected by independent legal advice. Notices, "Loans Between Solicitors and Clients" (February, 1992), 1 Discipline Digest 2 (Nova Scotia Barristers' Society).

Logically, no ethical distinction can be made between a lawyer's misuse of his client's financial trust on the one hand, and a lawyer's misuse of his client's personal trust on the other. When a lawyer has a sexual relationship with a client, he calls into question whether he is placing his own interests ahead of those of his client, and whether he is taking advantage of the unique vulnerability of a client, as a client.

Insofar as the Rule in Chapter 24 proposes to adopt the approach in *Re MacDonald*, by prohibiting a lawyer from having a sexual relationship with clients who are "emotionally vulnerable", it is inconsistent with the standards of fiduciary duty in other contexts. In its adherence to an illusory distinction, the proposed Rule would shift the assessment of a complaint of professional misconduct away from the lawyer and focus the inquiry on the degree of the client's vulnerability. In practical terms, this Rule would place the lawyer in the extraordinary position of having to assess, perhaps in the midst of an ethical dilemma, whether the client fits the ambiguous, and undefined, label of "emotionally vulnerable".

Amendments to Chapter 24 that will make the Rule more consistent with fiduciary duty, as enunciated in the other relevant sections of the *Handbook*, are in order. Prior to outlining an alternative Chapter 24, Section I of this paper explores the extent of the problem of lawyer - client sexual relations, and the manner in which other jurisdictions and comparable professions have dealt with the issue. Section II considers the nature of a lawyer's fiduciary obligations to his client, and it compares the duty in business and personal relations. Section III focuses on Chapter 24, providing a critique of it in the context of fiduciary theory. The conclusion outlines the logic behind an alternative Rule, which is then appended.

In adopting an explicit Rule on lawyer - client sexual relations, the Barristers' Society must avoid tacitly approving lawyer transgressions despite its desire to respect the privacy concerns of lawyers, and must establish a Rule which discourages complainants from coming forward by making their emotional state the threshold issue of an investigation. The Barristers' Society would better serve the public and its members with a clear Rule, consistent with the existing Rules governing the fiduciary duty of lawyers in other contexts.

### *I. Is there a Problem with Lawyer- Client Sexual Relations?*

It has become apparent that the profession needs a clear and practical Rule regarding a lawyer's personal relations with a client. Over the last three years in Nova Scotia, four separate complaints arising out of incidents of sexual relations between lawyers and their clients have been investigated by the Barristers' Society: two complaints led to the member being

cautioned at the investigative stage,<sup>10</sup> another is proceeding to a Formal Hearing,<sup>11</sup> and the other received a Formal Hearing.<sup>12</sup>

A survey of State Bars in the United States concluded that at least 90 complaints of sexual misconduct by lawyers had been filed in the two years preceding the spring 1992 study.<sup>13</sup> However, not one jurisdiction in North America has explicitly adopted an ethical Rule of professional conduct prohibiting or restricting lawyer - client sexual relations. Apparently, about half of the U.S. State Bar Associations believe such a Rule is unnecessary, and the other half remain undecided, or favour such a Rule.<sup>14</sup> A number of jurisdictions in North America have recently considered the adoption of an explicit Rule,<sup>15</sup> and California became the first to do so in 1992.<sup>16</sup>

In California, after high profile divorce lawyer Marvin Mitchelson was accused by two former clients of sexual assault, State Assemblywoman Roybal-Allard sponsored a bill which would require the State Bar to regulate, as a matter of professional conduct, lawyer - client sexual relations.<sup>17</sup> In the process, a debate ensued within and without the profession about the "L.A. Law" like behaviour of some of its membership.<sup>18</sup>

---

10. Investigative Committee Dispositions, "No. 2: Sexual Relationship with Client" (February, 1992), 1 Discipline Digest 5. A member was cautioned by Discipline Subcommittee "B" for continuing to represent a client in divorce proceedings after having had a brief sexual relationship with her. The complaint was made by the client's ex-husband. Investigative Committee Dispositions, "No. 12: Cautioned Member" (1993), 6 Discipline Digest 4.

11. Interview with Darryl Pink, Executive Director, Nova Scotia Barristers' Society (November, 1993).

12. *In Re MacDonald*, *supra*, note 7.

13. Only thirty-two of the fifty State Bar Associations responded to that question; Jorgenson and Sutherland, *supra*, note 1 at 32.

14. "Regulation of Lawyer - Client Sexual Contact: How Far Should the Profession Go?", National Organization of Bar Counsel (USA), *Annual Meeting Report* (August, 1992). [Hereinafter, the "NOBC - USA"]

15. They are California, Michigan, Illinois, Oregon and Nova Scotia; *ibid*.

16. Joanne Pitulla, "Unfair Advantage," (November 1992) ABA Journal 76. In *Formal Opinion* 92-364, the ABA Standing Committee on Ethics and Professional Responsibility declared that a sexual relationship between a lawyer and client may violate the *ABA Moral Rules of Professional Conduct*, *ibid.*, at 79.

17. Levy, *supra*, note 1 at 651; Memorandum and Supporting Documents in Explanation of Proposed Rule 3-120 of the *Rules of Professional Misconduct*, California State Bar to the California Supreme Court (May, 1991).

18. "Lawyer - Client Sex May be Banned by State Bar" (January 21, 1991), *L.A. Times*; Memorandum from the State Bar of California to the Supreme Court of California (January 9, 1992): "Subject Matter Summary of Written Public Comment on Republished California Rule of Professional Conduct 3-120 (*Sexual Relations With Client*).\" Cf. Cornelia H. Tuite, "Re Arnie Becker" (March, 1991), A.B.A.J. 88.

Three other jurisdictions in the United States have considered similar Rules:<sup>19</sup> Michigan and Illinois have a draft Rule; Oregon's State Bar rejected a proposed Rule in October 1991.<sup>20</sup> Alaska and Maryland have opted for providing "advisory opinions" from their Bar Associations' Ethics Committees, and both States' Legal Ethics Committees advise against sexual relations with clients in light of the adverse effect such a relationship might have on the lawyer's ability to protect the client's interests.<sup>21</sup>

In Canada, less has apparently been done and little has been documented. The Law Society of Alberta "supplemented" their existing Rules of conduct with a decision to reprimand a lawyer for "act[ing] crudely" by inviting a client to spend an afternoon with him in a hotel room.<sup>22</sup> The Law Society of Upper Canada Benchers reprimanded a member for unbecoming conduct, after two former divorce clients complained of the lawyer's unsolicited sexual advances, and a third former client, for whom he acted on a matrimonial matter, complained to the lawyer's former partner of his sexual pursuit (and her regretful acquiescence).<sup>23</sup>

The Ontario Bar has acted to deal with the related problem of workplace sexual harassment,<sup>24</sup> and passed a Rule of professional conduct regarding sexual harassment by members. Rule 27 states:

Sexual harassment of a colleague, of staff, of clients, or of other persons, in a professional context, is professional misconduct.<sup>25</sup>

---

19. NOBC-USA, *supra*, note 14.

20. L.M. Jorgenson and P.K. Sutherland, "Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact" (1992), 45 Ark.L.R. 459, at 460-461.

21. *Ibid.*, at 461-462.

22. NOBC-USA, *supra*, note 14 at 7.

23. *In Re Zuker* (October 17, 1989), Law Society of Upper Canada, Discipline Committee. Since 1991, when the L.S.U.C. began to specifically compile the data, an estimated 30 investigations into "sexual misconduct" of lawyers have occurred. ("Sexual misconduct" includes complaints related to sexual assault by lawyers, at one extreme, to ostensibly consensual sexual relations, at the other.) Of these, 10 to 15 complaints were made by former clients and involved circumstances which may be described as ostensibly consensual relations between the client and her lawyer. (Interview with Scott Kerr, Complaints Department, L.S.U.C., November 18, 1993).

24. "A Recommended Personnel Policy Regarding Employment - Related Sexual Harassment" (January 24, 1992), Law Society of Upper Canada.

25. "New Sexual Harassment Rule" (September, 1992), 2 *The Advisor* 1:1 (The Practice Advisory Service, Law Society of Upper Canada).

In the Commentary, the Rule's reach to certain kinds of lawyer - client sexual relations is suggested:

1. Sexual harassment is defined as one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature
  - (i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group; or
  - (ii) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services;...

With Rule 27, the Law Society of Upper Canada has chosen not to deal directly with the question of fiduciary duty. Whether that duty is compromised, or even affected, by a lawyer's intimacy with a client, regardless of whether the client "consents" to that relationship, remains unanswered in Ontario. Rule 27 focuses on unwelcome sexual harassment, not lawyer - client sexual relations.

Other professions, particularly in the medical world, have confronted the problem and the Government of Ontario has recently proposed the *Regulated Health Professions Act* in an effort to prohibit all forms of doctor - patient sexual contact.<sup>26</sup> In the United States, high profile revelations of doctor - patient sexual relations in the field of psychotherapy has touched off a debate that invokes the teachings, and actions, of Freud and has led to civil actions by former patients against the offending therapists.<sup>27</sup>

There have been several academic attempts to draw analogies between the professions, raising ethical implications for lawyer - client sexual relations.<sup>28</sup> The effect of a divorce lawyer's role upon an emotionally

---

26. "Taking Action Against Sexual Abuse of Patients" (October, 1992), Ontario Government (Ministry of Health). The proposed Act (the "RHPA") would specifically define forms of sexual misconduct and attach penalties for the degree of the offence. "Sexual impropriety" includes behaviour or remarks that are sexually demeaning, and which may cause the profession to reprimand or suspend the offending doctor. "Sexual transgression" deals with touching and kissing, and may attract penalties ranging from a reprimand to a licence revocation plus a fine. "Sexual violation" (patient-physician sex) includes, but is not limited to, sexual intercourse and may be penalized by mandatory licence revocation for a minimum of five years plus a \$20,000 fine. The RHPA results from a report of an independent task force, set up by the College of Physicians and Surgeons of Ontario, in response to complaints from patients and patients' groups. *Members' Dialogue* (July, 1991: #7), College of Physicians and Surgeons of Ontario.

27. "Sex and Psychotherapy: Doctors Sleeping with Patients - A Growing Crisis of Ethical Abuse" (April 19, 1992), *Newsweek*, at 53.

28. Dubin, *supra*, note 2 at 605; Jorgenson and Sutherland, *supra*, note 20.



distraught client has been compared to that of the psychotherapist's effect on his patient, including the phenomenon of "transference" and the related power imbalance that occurs.<sup>29</sup> As well, and along with parent - child, doctor - patient, clergy - penitent, professor - student and employer - employee relationships, it has been argued that the lawyer - client sexual relationship must be assessed in the context of "power dependency." There is a presumption of exploitation by the person in the power position, thereby rendering the defence of consent in these circumstances legally ineffective.<sup>30</sup>

These concepts were not ignored by the Subcommittee in *Re MacDonald*, when it held:

Under the heading "The Concept of Transference" Professor Dubin writes:...

The urge to act [upon the sexual attraction the lawyer feels for the client] needs to be controlled in order for the lawyer to remain a competent professional, working toward the best interest of his client.

While Mr. MacDonald was not acting as a divorce lawyer for the complainant, the professional activity, as a consequence of the grievance of the complainant, and the continuing distress under which she suffered, dealt with matters of very considerable emotional and sexual intimacy between herself and other men.<sup>31</sup>

While some obvious distinctions may be drawn between professional relationships, particularly between those in the fields of medicine and law, the Subcommittee's observation served to underline the common fiduciary duty to not misuse the position of trust in which the lawyer, or other professional, has been placed.

---

29. In psychoanalysis, transference occurs when the patient "directs towards the physician a degree of affectionate feeling...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's which have become unconscious." Thomas Lyon, "Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?" (1987), 10 Harv. Women's L.J. 159, at 163, in part quoting from S. Freud, *Five Lectures on Psychoanalysis* (1909).

30. Phyllis Coleman, "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988), 53 Alb.L.R. 95, at 96.

31. *Re MacDonald*, *supra*, note 7 at 31.

## II. *The Lawyer as a Fiduciary*

The attorney stands in a fiduciary relationship with the client and should exercise professional judgement "solely for the benefit of the client and free of compromising influences and loyalties."...By making unsolicited sexual advances to a client, an attorney perverts the very essence of the lawyer-client relationship. Such egregious conduct most certainly warrants discipline."<sup>32</sup>

It is not universally accepted that the fiduciary duty of a lawyer to a client extends to personal relationships. Contrasting the views expressed in *Re Gibson*, an Illinois court concluded that further effects on the professional relationship must result from the personal relations before a breach occurs:

An attorney, just like the client, is at best and at worst, a human being fraught with all the frailties that the status entails. For this reason we do not believe that the higher standard of care required of a fiduciary should extend to an attorney's personal relationship with his clients, unless there is tangible evidence that the attorney actually made his professional services contingent upon the sexual involvement or that his legal representation of the client was, in fact, adversely affected.<sup>33</sup>

In the one Formal Hearing decision in Nova Scotia, *Re MacDonald*,<sup>34</sup> the Discipline Subcommittee seemed to walk the line between these two views. On the one hand, the Subcommittee quoted extensively from an article by Professor Dubin, which concludes that "a lawyer is not ethically free to pursue sexual relations with clients" because of the lawyer's status of fiduciary to the client.<sup>35</sup> On the other hand, the Subcommittee explicitly refused to "determine the vexing problem as to whether sexual relations *per se* between a solicitor and client constitute conduct unbecoming", focusing instead on "the circumstances of this case."<sup>36</sup> As noted, those circumstances included a client whose ill health, and related fragility, was such that the Subcommittee could find conduct unbecoming of a member, without directly ruling on the whether the lawyer's conduct itself, regardless of the client's peculiarities, was a breach of his fiduciary duty

32. *Re Gibson* (1985), 369 N.W.2d 466, 695, 699, 700, as quoted in NOBC-USA, *supra*, note 14.

33. *Suppressed v. Suppressed* (1990), 565 N.E.2d 101, 105 (Ill.Ct.App.) [Hereinafter *Suppressed*], as quoted in NOBC-USA, *supra*, note 14. These two quotes, from *Suppressed* and *Gibson*, were placed in contrast in NOBC-USA.

34. *Re MacDonald*, *supra*, note 7.

35. Dubin, *supra*, note 2 at 586 as quoted in *Re MacDonald*, *supra*, note 7 at 29-30.

36. *Re MacDonald*, *supra*, note 7 at 32 (emphasis added).

to that client. In *Re MacDonald*, in other words, the implicating circumstances that were required by the court in *Suppressed*, in order to find a breach, were present. The necessity of such special fragility on the part of the client is questioned by Professor Dubin:

The fiduciary obligation to a client, which increases the lawyer's responsibilities beyond mere contractual performance, can be justified on the ground that a client is vulnerable and not able to evaluate the quality of a lawyer's performance. However, even absent client vulnerability, a lawyer's fiduciary obligation should not be lessened.<sup>37</sup>

It is essential, therefore, to determine the nature of the lawyer's fiduciary duty, in order to assess how, or whether, it extends to a lawyer's personal relations with a client. The Preface to the Canadian Bar Association's *Code of Professional Conduct* states that a lawyer "must act at all times *uberrimae fidei*."<sup>38</sup> Is that good faith breached by a sexual relationship with a client?

It has been said that the House of Lords decision in *Nocton v. Lord Ashburton*<sup>39</sup> is the "leading decision with respect to the fiduciary duty of a solicitor."<sup>40</sup> Not so long ago, the B.C. Court of Appeal, in *Jacks v. Davis*,<sup>41</sup> applied *Nocton*, and "expanded the extent of a lawyer's liability for breach of fiduciary duty."<sup>42</sup>

Viscount Haldane indicated that in order to determine whether a fiduciary relationship existed which would give rise to the solicitor being under a special duty to make full disclosure depended upon the circumstances and relations of the parties. But it is clear from that decision that such a relationship arises when the solicitor-client relationship exists. The reason it arises is that the client is reposing confidence in the solicitor and the solicitor is obliged to make full disclosure to the client in order that the client may properly make decisions in respect of the matter upon which he is retaining the solicitor.<sup>43</sup>

Professor Wolfram has explained that the lawyer's fiduciary duty is not only founded on the client's confidence in her lawyer, but also arises out of the fact that the client is "relatively vulnerable because of inferior

37. Dubin, *supra*, note 2 at 592 (emphasis added).

38. *Code of Professional Conduct* (Toronto: Canadian Bar Association, August, 1987), Preface.

39. [1914] A.C. 932.

40. John Sopinka, "Professional Responsibility of Lawyers at Common Law", in *Meredith Memorial Lectures 1983-84* (Don Mills: DeBoo Publishers, 1985), 247-269.

41. [1980] 6 W.W.R. 11.

42. Sopinka, *supra*, note 40.

43. As quoted in Sopinka, *ibid*.

legal information and skills and because of the pressure of legal difficulties.”<sup>44</sup> As well, it has been pointed out that a lawyer with a particular self-interest has difficulty acting as an impartial fiduciary on that matter. Sopinka has noted that:

...[t]ypically, breach of fiduciary obligations occur where a lawyer has acted for both sides or has a personal interest in the transaction. The solicitor in both situations owes a duty of disclosure to his client and will be liable for any damage if he breaches this duty whether or not the fact of non-disclosure was the actual cause of the damage....A solicitor is in breach of his fiduciary duty if he acts in any case or matter in which his interest and duty conflict.<sup>45</sup>

Conflict of interest rules, therefore, arise out of the profession's concern that a lawyer may unintentionally, or otherwise, breach his fiduciary duty. Whether in regard to “client - client” conflict, where a lawyer acts for both sides of a matter, or “lawyer - client” conflict, where the lawyer has a self-interest in the file, the rules of professional conduct direct a lawyer to avoid a transgression. If a lawyer has a personal interest in the client, arising out of a sexual relationship with that client, a “lawyer - client” conflict may occur if the lawyer's interest and his duty conflict. On a divorce matter, for example, a lawyer's personal interest in the client may conflict with his statutory duty to advise the client on the means of marital reconciliation.<sup>46</sup>

The extent to which a lawyer must go to avoid even the possibility of such a conflict was recently underlined by the Supreme Court of Canada, in *Martin v. Gray*. Noting that a “lawyer cannot compartmentalize his or her mind,” Sopinka J. held that, where a previous, sufficiently related relationship between the lawyer and the opposing client is found, a rebuttable presumption of a conflict will arise.<sup>47</sup> The English courts' standard for finding a conflict, which requires showing there is a “probability of mischief” or the likelihood of detrimental disclosure by the lawyer of truly confidential information,<sup>48</sup> was rejected by Sopinka J. in favour of a stricter approach, which may be paraphrased as the “reasonable possibility of a conflict” standard.

44. C. Wolfram, *Modern Legal Ethics* (1986), at 147, note 20, as quoted in Dubin, *supra*, note 2 at 592.

45. Sopinka, *supra*, note 40.

46. *Divorce Act*, S.C. 1986, c.4, ss.9(1) and 9(2).

47. *MacDonald Estate v. Martin (sub. nom. Martin v. Gray)* (1990), 77 D.L.R. (4th) 249 (S.C.C.), at 268.

48. *Rakusen v. Ellis, Munday, and Clarke*, in *Martin v. Gray*, *ibid.*

Similarly, when a lawyer benefits at the expense of the client, “a presumption arises that the fiduciary exercised undue influence”.<sup>49</sup>

Such a benefit is presumptively void, and the burden shifts to the fiduciary to show that the benefit was not awarded as a result of an abuse of the relationship. To do this, the fiduciary must show that there was fair and full disclosure to the client of the benefit to the fiduciary and that the transaction did not disadvantage or harm the client.<sup>50</sup>

A rebuttable presumption of undue influence is imposed upon the fiduciary because, by the very nature of the relationship, transgressions by the fiduciary are difficult to detect.<sup>51</sup> Furthermore, as Sopinka J. noted, consideration for the effect on the profession from the perspective of the “reasonable member of the public” must also be factored into the development of measures to prevent conflicts.<sup>52</sup>

The fiduciary relationship between lawyer and client arises out of the trust and confidence the client reposes in the lawyer. In order to protect the client, who by the nature of that relationship is vulnerable, the lawyer accepts the duty to place the client’s interests ahead of his own and to act impartially on that client’s behalf. Where it is reasonably possible that the lawyer is or has been unable to fulfil his obligations in that regard, a rebuttable presumption that the lawyer exercised undue influence or has entered into a conflict arises.

The “reasonable measures” expected of the lawyer to rebut this presumption depend, to some extent, on the circumstances, but are consistent in their requirement that the lawyer show that the client’s interests were, in fact, protected to the best of the lawyer’s abilities. In a “client - client” conflict, reasonable measures may entail a “chinese wall or cone of silence” in the firm to prevent the breach of confidential client information.<sup>53</sup> Or, where a lawyer is entering into a business relationship with the client, it is required that the lawyer recommend to the client that she seek independent legal advice and ensure that she receives a full and understandable disclosure of the terms of the transaction.<sup>54</sup> By first obtaining, in this way, the client’s informed consent prior to the transac-

---

49. Jorgenson and Sutherland, *supra*, note 20 at 485.

50. *Ibid.*, at 486.

51. *Ibid.*, at 488.

52. *Martin v. Gray*, *supra*, note 47 at 267.

53. *Ibid.*, at 269.

54. Chapter 7, *Handbook on Legal Ethics and Professional Responsibility*, *supra*, note 3. [Hereinafter, “Chapter”]

tion, the lawyer is affirming that the client's interests are protected, and that her susceptibility to exploitation is being avoided.

The Nova Scotia *Handbook* provides a number of other Rules of guidance which are directed to protecting the client's trust and confidence in the profession. A lawyer has a duty not to acquire property by way of gift or testamentary disposition unless the client has independent legal advice.<sup>55</sup> A lawyer has a duty not to prepare an instrument giving the lawyer a substantial gift from the client, including a testamentary gift (although, rather inconsistently, that lawyer's partner or associate can prepare such an instrument).<sup>56</sup> A lawyer cannot advise his co-venturers in respect of legal matters between them.<sup>57</sup>

In accordance with the decision in *Martin v. Gray*, the Nova Scotia *Handbook* states that a lawyer has a duty to uphold, in the strictest of confidence, all client business and personal information which arises out of the lawyer - client relationship:

The fiduciary relationship between lawyer and client forbids the lawyer to use any confidential information acquired by the lawyer as a result of the professional relationship for the benefit of the lawyer or a third person, or to the advantage of the client.<sup>58</sup>

The business side of the relationship between lawyer and fee paying client must also fit within the rubric of the fiduciary relationship:<sup>59</sup>

The fiduciary aspect of the relationship that exists between lawyer and client requires full disclosure of all financial matters between them and prohibits a lawyer from accepting any hidden fees.<sup>60</sup>

Similar cautions are provided regarding a lawyer's outside interests. The *Handbook* states that a lawyer's involvement in other interests cannot be allowed "to impair the exercise of the lawyer's independent professional judgement on behalf of a client."<sup>61</sup> A client's affairs are said to require impartiality and must be free from a lawyer's conflicting interests:

...the client's affairs may be seriously prejudiced unless the lawyer's judgement and freedom of action on the client's behalf are as free as possible from compromising influences....The Rule requires informed consent to enable the client to make an informed decision about whether to have the lawyer act despite the existence or possibility of a conflicting interest.<sup>62</sup>

---

55. Chapter 7(e).

56. Chapter 7(f).

57. Chapter 7(h).

58. Chapter 5.4.

59. Dubin, *supra*, note 2 at 591.

60. Chapter 12.6.

61. Chapter 8.1, 8.2.

62. Chapter 6.1, 6.2 (emphasis added).

As well, a lawyer has a duty not to borrow from or lend money to a client,<sup>63</sup> except where the client is in the business of lending and/or borrowing money or is fully protected by independent legal advice,<sup>64</sup> and where the lawyer is able to discharge the onus by proving that the client's interests were fully protected.<sup>65</sup>

In the decision of the Nova Scotia Barristers' Society Discipline Subcommittee in *Re Goldberg*,<sup>66</sup> this prescription against loans to clients was at issue, and the Subcommittee's findings on the matter are helpful to understanding the way in which the profession applies these fiduciary Rules. Mr. Goldberg, a partner in a Halifax firm, lent money to and became active in the operations of a client company. The Subcommittee held that Mr. Goldberg failed in his obligation to the client by not insisting that the company have independent legal advice, and thereby became fully informed of any "actual, perceived or potential conflicts of interest."<sup>67</sup> At issue was the behaviour of Mr. Goldberg, who jeopardized his independence and integrity by becoming both investor and lawyer to the company. The Subcommittee issued a reprimand to Mr. Goldberg and ordered him to pay costs.

In contrast, while the Discipline Committee in *Re MacDonald* did assess the behaviour of Mr. MacDonald in the context of fiduciary duties, it focused in the end on the peculiar fragility of the client in these circumstances and the attendant duty upon Mr. MacDonald to consider her related best interests. The decision to reprimand Mr. MacDonald was founded on the conclusion that, while the lawyer - client relationship continued and his representation of her was not apparently affected, his failure to consider the effect of his actions on the complainant in her emotional state constituted an oversight of his client's best interests.<sup>68</sup>

The Subcommittee held that the lengthy phone calls between MacDonald and the complainant "entered into the personal field," but that the incident of sexual intimacy between them was "not related to the solicitor - client relationship."<sup>69</sup> Yet, the Subcommittee also held that the "opportunity" to engage in "conversation and acts that were pleasing and satisfactory to him, but...profoundly upsetting, and potentially very harmful to her," arose as a consequence of the lawyer-client relationship.<sup>70</sup>

---

63. Chapter 7(g).

64. Regulation 48C(1).

65. Notices, 1 Discipline Digest 1,2, Nova Scotia Barristers' Society (February 1992).

66. (1991), Nova Scotia Barristers' Society.

67. *Supra*, note 65 at 4.

68. *Re MacDonald, supra*, note 7 at 35, 37-38.

69. *Ibid.*, at 35.

70. *Ibid.*, at 37.

Indeed, the Subcommittee held that Mr. MacDonald's actions "constituted a fundamental breach of his obligation to her [the complainant, his client]." <sup>71</sup> How, on the one hand, the Subcommittee could find the sexual relationship was not related to, but on the other hand arose out of, the lawyer - client relationship is difficult to reconcile. <sup>72</sup>

In finding as they did, however, the Committee chose not to hold Mr. MacDonald to the same standard as Mr. Goldberg: by becoming both lawyer and sexual pursuer, had not Mr. MacDonald jeopardized his independence and integrity?; had not Mr. MacDonald failed his client by not ensuring that she provided informed consent, fully aware of the actual, perceived or potential conflict of interest which might occur as a result of Mr. MacDonald's personal interest, and the effective compromising of his ability to fulfil his professional duty?

A real concern arises out of the Subcommittee's focus on the complainant's emotional state. While in this instance the fragility of the complainant created in the lawyer a special duty of care, her emotional state appears to have also placed into doubt her testimony before the Subcommittee. The Subcommittee concluded:

The Committee concludes that the evidence of Mr. MacDonald with respect to [the events of February to April, 1989] is more reliable and, for the most part, his evidence should be accepted. In part, this was due to the complainant's taking an excessive amount of medication, being emotionally upset, mixing her medication with a small amount of wine, and suffering from a medical condition which may have caused amnesia with respect to conduct of certain kinds. <sup>73</sup>

Thus, the very state of the client's vulnerability that created the special duty of care in Mr. MacDonald, and which was necessarily argued by the Barristers' Society counsel to succeed in establishing that a breach occurred, was also cause for mitigating the degree of the transgression.

---

71. *Supra*, note 70 (emphasis added).

72. By way of contrast, in *Drucker's Case* (1990), 577 A.2d 1198 (N.H.S.C.), a lawyer's two-year suspension was upheld, despite the fact that there was no finding that his independent professional judgement had been effected. The court found that Drucker failed to maintain an ethical lawyer-client relationship, when he initiated a sexual relationship with a divorce client after she had told him that she was seeing a psychiatrist and was emotionally fragile. It was concluded that the client became unable to separate her personal feelings from her confidence in him as her lawyer. It was held that the lawyer knew or should have known that his client would suffer emotionally as a consequence of his actions. (See discussion in Jorgenson and Sutherland, *supra*, note 20 at 479).

73. *Re MacDonald*, *supra*, note 7 at 26.



The question, therefore, remains: if the client company's decision not to get independent legal advice was not at issue in *Re Goldberg*,<sup>74</sup> but rather, it was the fact that Mr. Goldberg had not insisted that it do so which breached his fiduciary duty, why was it necessary to question the female complainant's state of mind and emotional vulnerability before assessing the lawyer's (fiduciary's) behaviour in *Re MacDonald*?

### III. Chapter 24 of the Nova Scotia Handbook

It is unfortunate that the Legal Ethics Committee of the Nova Scotia Barristers' Society chose to limit the proposed regulation of lawyer - client sexual relations to incidents between lawyers and "emotionally vulnerable" clients. Measured against the fiduciary duty a lawyer has to his client, this and other aspects of the proposed Rule fall short of the necessary standards of conduct expected of a professional with a client's trust to protect. The proposed Rule in Chapter 24 states:

Rule: A lawyer has a duty not to: (a) initiate, request, suggest or engage in a sexual relationship with client who is emotionally vulnerable; or (b) represent a client with whom the lawyer is having or has had a sexual relationship if the lawyer's independent professional judgement is likely to be impaired because of such a relationship.<sup>75</sup>

Chapter 24 is inconsistent with the implementation of a lawyer's fiduciary duty in the rest of the Nova Scotia *Handbook*. It tacitly approves of sexual relations between lawyers and clients where a client is not extraordinarily vulnerable. It may discourage complainants from coming forward, and it is impractical in its disregard for detection problems associated with fiduciary relationships.

As noted previously, the Rule places complainants in the uncomfortable and contradictory position of having to convince the Discipline Subcommittee that, while they were quite emotionally unstable at the time of the relationship, they are nevertheless credible complainants with respect to their recollection of the facts at issue now before the Subcommittee. The practical effect of this approach may be to discourage complainants from coming forward. It may also make detection more difficult, since the category of client that is explicitly protected is a vague, undefined one and no doubt particularly difficult for the lawyer to assess in the "heat of the moment." It will certainly focus attention away from the lawyer's behaviour and on to the complainant's credibility.

---

74. Discipline Digest, *supra*, note 66.

75. Chapter 24, *Handbook*, *supra*, note 3 (emphasis added).

In the context of the Rules applied in *Re MacDonald*, the Subcommittee held that counsel for the Society was not under an obligation to call expert evidence to establish that the objective standard applied to such questions of conduct.<sup>76</sup> One wonders whether, within the rubric of the proposed Rule, it will be necessary to establish that the client was, in fact, "emotionally vulnerable" at the time of the intimacy, and if so, whether expert evidence will be required from both parties to the complaint.

The Commentary of the proposed Rule does not help to answer these concerns, but only serves to confuse further. It is stated in Commentary 24.1 that the Rule is intended to prohibit sexual exploitation and ensure objective representation, unimpaired by personal relationships. How a lawyer can have a sexual relationship with a "regularly" (as opposed to an "emotionally") vulnerable client, and remain objective in his representation is not explained, and, with due respect, somewhat difficult to accept. As Sopinka J. pointed out in *Martin v. Gray*, a lawyer cannot "compartmentalize his mind."<sup>77</sup> Whether or not the client has a peculiar vulnerability does not affect the fact that the lawyer has a personal interest in the client. An interest of a personal nature is, by definition, subjective.

Commentary 24.2 notes that, "based on the nature of the representation, a client may be emotionally vulnerable." In addition, Commentary 24.3 notes that the nature of the relationship between lawyer and client is a fiduciary one, thus beneficial dealings with the client will be strictly scrutinized for evidence of undue influence. Once again, the Rule and the Commentary appear to be inconsistent. If, by the nature of the representation, all clients may be "emotionally vulnerable", and the lawyer - client relationship is a fiduciary one, then would not the Rule prohibiting sexual relations between a lawyer and an "emotionally vulnerable" client, in effect, be a Rule prohibiting sexual relations with all clients?

On the other hand, while the Commentary suggests that the purpose of the Rule is to honour the fiduciary duty a lawyer has to his client, the Rule formally limits itself to the protection of a narrower band of clientele, namely those who are "emotionally vulnerable". It is, therefore, difficult to tell if the Rule tacitly approves of sexual relations between lawyers and clients who are not "emotionally vulnerable", or if it effectively prohibits sexual relations with all clients, since all clients, in the context of a fiduciary relationship, are "emotionally vulnerable". Without a definition of what is meant by "emotionally vulnerable", and how such a client is identifiably different from other clients, it is possible in this way to

76. *Re MacDonald*, *supra*, note 7 at 34.

77. *Supra*, note 47.

interpret an absolute prohibition of lawyer - client sexual relations in Chapter 24, although that is not the stated objective of the Legal Ethics Committee.

The test of any Rule is its application. It is uncertain how Chapter 24 would apply to real circumstances facing lawyers in practice. As noted above, the *Divorce Act* establishes that lawyers have a duty to “draw to the attention of” and “inform” the client of the object and means of achieving reconciliation with their spouse, rather than divorce.<sup>78</sup> Where a lawyer becomes intimately involved with a client in a divorce matter, the extent to which he fulfils this duty may become suspect. Indeed, applying Sopinka J.’s test<sup>79</sup>, sexual relations between a lawyer and divorce client would always be a breach of the lawyer’s fiduciary duty, since the lawyer’s personal interest would possibly conflict with his professional duty, as defined by the *Divorce Act*.

Under Chapter 24, if the lawyer’s “independent professional judgment” is “impaired”, the Rule would be breached. The nature of the fiduciary duty, as emphasised in the Commentary section, requires lawyers to avoid even the possibility of a conflict of interest. While lawyers may believe that they are fulfilling their professional obligations, their intimacies with clients may have impaired their judgment without their being aware of that impairment. In the context of a business conflict, the Rules avoid this kind of self-analysis by simply requiring the lawyer to insist upon the client’s obtaining independent legal advice.

Chapter 24 can be further tested in a corporate law context. A client who approaches a lawyer for a simple incorporation may, at first, appear not to be the kind of client that is “off limits” by the proposed Rule. The legal matter is not emotionally charged, and the client would likely appear to be a business professional, as strong and independent as the lawyer, and outwardly not emotionally vulnerable. But, it is unclear whether the proposed Rule would prohibit the lawyer and this client from becoming intimate. While the client may not appear to be emotionally vulnerable, the Commentary notes that the very nature of the representation may make the client emotionally vulnerable. As Wolfram notes, a client’s reliance on a lawyer in the intimidating environment of the legal system, to which she is not accustomed, creates a natural anxiety in the client.<sup>80</sup>

In addition, the Commentary reminds the lawyer that the relationship is a fiduciary one, and under those circumstances the mere possibility of

---

78. *Supra*, note 46 at ss. 9(1), (2) and (3).

79. Sopinka, *supra*, note 40.

80. Wolfram, *supra*, note 44.

a conflict is enough to require the lawyer to obtain the client's informed consent. Thus, Chapter 24 is not clear in that the Commentary appears to explain that the rule prohibits sexual relations with this corporate client, *per se*, while it also seems that the rule would only prohibit such relations with this client if she was "emotionally vulnerable". Once again, what is meant by emotionally vulnerable is not clear, remains undefined, and seems to be an impractical attempt to distinguish particularly vulnerable clients from not-so-particularly vulnerable clients. How the lawyer is qualified or capable of recognizing that distinction is not explained, and difficult to accept.

By way of contrast, California's Rule 3-120 attempts to take into account these kinds of concerns.<sup>81</sup> Rule 3-120 prohibits sexual relations between a lawyer and client which is "incident to or as a condition of professional representation", and it explicitly restricts lawyers from using "undue influence" to entice a client into sexual relations. Paragraph B prohibits relations between a lawyer and client where "such sexual relations cause the member to perform legal services incompetently."

At the final draft stage, the Rule included an evidentiary, rebuttable presumption to overcome the enforcement obstacles which arise because of the difficulty in detecting transgressions:

(E) A member who engages in sexual relations with his or her client will be presumed to violate rule 3-120, paragraph (B)(3). This presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules.<sup>82</sup>

Thus, this draft of the California Rule attempted to protect clients<sup>83</sup> by requiring the lawyer to prove that the client was fully cognisant of the implications of their sexual relations. Effectively, this burden of proof would have been overcome by evidence of the client's informed consent, as is the practice in Nova Scotia with respect to business related "lawyer - client" conflicts of interest. However, critics suggested that this provision would "substantially increase the probability that clients will bring

---

81. Interestingly enough, the California rule 3-120 includes a Discussion section, similar to Nova Scotia's Commentary. In this Discussion section, a rationale for the rule that is provided is similar to that provided in proposed Chapter 24 in Nova Scotia.

82. The California rule 3-120 has gone through six public Drafts; "F" added the rebuttable presumption. Cf. Y. Levy, *supra*, note 1, for a criticism of this approach.

83. Jorgenson and Sutherland, *supra*, note 20 at 502.

fraudulent and frivolous" claims.<sup>84</sup> In the end, the California Supreme Court struck out this rebuttable presumption paragraph.<sup>85</sup>

#### IV. Conclusion

The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purposes and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reason for being.<sup>86</sup>

In his defence, Mr. MacDonald's counsel argued that a Rule against sexual relations between a lawyer and his client did not exist. Furthermore, if the Barristers' Society wished to discipline members for such activity, then it must provide fair warning against the offending behaviour in the form of an explicit Rule:

Counsel made the point that if a member of the Society is going to be held accountable for certain conduct, then the *Code* should particularize that kind of conduct as constituting conduct unbecoming so that members are given reasonable notice. The law, he argues, must be certain, not vague.<sup>87</sup>

Mr. MacDonald, in his own testimony, stated that "his training, practice and observations from others in the profession" had led him to believe that only where a client's "legal rights" are affected would sexual relations between a lawyer and client become a problem.<sup>88</sup>

It is commendable that the Legal Ethics Committee of the Nova Scotia Barristers' Society has proposed a Rule on this matter, particularly in light of the fact that their effort is the first of its kind in Canada. To guide members properly, however, the Rule that is put in place must be consistent with the existing fiduciary obligations that lawyers have to their clients. It must also be practical to apply in regard to detection,

---

84. Levy, *supra*, note 1 at 651. But note that Levy does not explain how that probability can be supported in light of the fact that, where the same rebuttable presumption is in place in business fiduciary relations, no such increase of frivolous claims has occurred. Levy supports protection, in an explicit rule for "emotional vulnerable" clients, without a rebuttable presumption, leaving other clients to rely on protection from the existing rules of professional conduct.

85. *Supra*, note 16 at 76. The California State Legislature sent Governor Pete Wilson a tougher statute, which was signed in September 1992. *Ibid.*, at 79.

86. Cheatham, "Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar" (1965), 12 U.C.L.A. L.Rev. 438 at 440, as quoted in the *CBA Code of Professional Conduct* (1987), *supra*, note 38 at Preface, note 4.

87. *Re MacDonald*, *supra*, note 7 at 28.

88. *Ibid.*, at 9 (emphasis added).

policing and voluntary compliance. Furthermore, it must not send conflicting messages to the lawyers and to members of the public which it professes to be trying to protect. Proposed Rule 24 does not satisfy these basic requirements in its present form.

This article's central thesis is that a conflict is a conflict. To differentiate personal from business relations between lawyers and clients in the Rules of professional conduct relies on an illusory distinction, and tacitly approves of one kind of breach of the fiduciary duty, while formally prohibiting another. A Rule regarding this kind of relationship should draw upon the existing Rules in the *Handbook* regarding fiduciary duties.<sup>89</sup>

In areas of business relations, Nova Scotia has adopted a rebuttable presumption model. Like California, personal relations should also be governed with the same protection against misuse of a lawyer's influence over the client. Only with a rebuttable presumption, discharged by a lawyer who obtains the client's informed consent, will clients be fully protected where detection of a transgression is otherwise difficult. And, only a rebuttable presumption places the burden of proof appropriately on the lawyer, rather than the complainant.

It may appear absurd to require a lawyer to obtain the informed consent of a client, preferably in writing as is required in business relations, prior to engaging in sexual relations. That absurdity, however, arises only from the assumption that a lawyer - client sexual relationship is a normal, consensual association. In fact, however, it is not. By the very nature of the lawyer - client fiduciary relationship, a power imbalance exists and the client is vulnerable. By introducing the formality of informed consent, that very fact is underlined. The conflict of interest is all too conspicuously illuminated if the lawyer is unable to place his client's best interests, protected in these circumstances by a full consideration of the serious implications of an intimate relationship between lawyer and client, before his own immediate desires.

---

89. See "Appendix A" for an alternative proposal for Chapter 24 as drafted by the author.

*Appendix A:*  
*Proposed Alternative Rule by Matthew Certosimo*  
*Sexual Relations with a Client*  
*Rule*

- (a) A lawyer has a duty not to initiate, request, suggest or engage in a sexual relationship with a client, unless the lawyer has the informed consent of the client.
- (b) For the purposes of this Rule, a lawyer has a client's informed consent to enter into a sexual relationship with that client where the client consents, preferably in writing, to the relationship after the lawyer, preferably in writing, has
  - (i) recommended to the client that the client seek independent legal advice respecting the implications of their relationship on the client's legal representation; and
  - (ii) fully disclosed the possible implications on that client's legal affairs of a sexual relationship between the lawyer and that client.<sup>90</sup>
- (c) A lawyer has a duty not to:
  - (i) require or demand sexual relations with a client incident to or as a condition of any professional representation; or
  - (ii) employ coercion, intimidation or undue influence in entering into sexual relations with a client;<sup>91</sup> or
  - (iii) represent a client with whom the lawyer is having or has had a sexual relationship if the lawyer's independent professional judgement is likely to be impaired because of such relationship.
- (d) In disciplinary proceedings arising from a breach of this Rule, the lawyer has the burden of showing his or her good faith, that adequate disclosure was made to the client of the implications of the relationship and that the client's informed consent was obtained.<sup>92</sup>

*Guiding Principles*

1. For the purposes of the Rule, "sexual relationship" includes sexual intercourse between a lawyer and client and any other conduct with a client which may reasonably be interpreted as sexual.

---

90. Based on Chapter 7, *Handbook*, *supra*, note 3.

91. Parts (i) and (ii) are based on California rule 3-120.

92. Based on Chapter 6.8.

2. For the purposes of the Rule, if the client is an organization or body corporate, any individual overseeing the representation and giving instructions to the lawyer shall be deemed to be the client.
3. This Rule does not apply to sexual relations between a lawyer and the lawyer's spouse nor to a consensual sexual relationship which predates the initiation of the lawyer - client relationship.

*Commentary*

24.1 The relationship between a lawyer and client is a fiduciary relationship of the very highest character and all dealings between a lawyer and client that are beneficial to the lawyer will be strictly scrutinized. Where a lawyer exercises undue influence over a client or takes unfair advantage of a client, discipline is appropriate.