SEX WITH CLIENTS AND THE ETHICAL LAWYER

Lynda Crowley-Cyr *

Carol Caple

INTRODUCTION

We've all heard it before. A divorce client's marriage is collapsing. The sympathetic but persuasive lawyer comes on like *L A Law's* Arnie Becker.[1] A torrid liaison develops during the course of representation. Once the legal matter is concluded, and the sexual relationship ends, a complaint is raised with the lawyer's professional disciplinary body.

The basis of the complaint is that the lawyer has exploited an emotionally charged situation. Accusations fly. The client claims the lawyer took advantage of her vulnerability. The lawyer relies on the notion that the relationship involved consenting adults. Many in the profession would agree there's nothing unethical about lawyers having consensual sexual relations with their clients. In Australia, no specific rule expressly prohibits such relationships.

Paradoxically, there is a dearth of empirical research on what one judge has described as the legal profession's 'dirty little secret'.[2] Fundamentally, the problem is that the roles of lover and lawyer potentially conflict. Arguably, the implied emotional involvement fostered by sexual relationships jeopardises the objectivity and detachment demanded for adequate representation.[3]

Most of the scholarly literature in this area focuses on relationships comprising sexual intercourse. For the purposes of this discussion the term 'sexual relations'

---

* LLB, LLM, Grad Cert Ed, Senior Lecturer in Law, James Cook University.
** LLB (Hons) QUT.

[1] The Arnie Becker Syndrome is referred to in M. Livingston, *'When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relationships'* (October 1993) 62 *Fordham Law Review* 5 at 6.

[2] *In the Marriage of Kantar* (1991) 581 N.E. 2d 6 at 12 per Greiman J.

[3] American Bar Association Committee on Ethics and Professional Responsibility – Formal Opinions, 'Sexual Relations with Clients' (opinion w/2 1992) 364 available at http://www.abanet.org.

accordingly adopts a similar starting point. However, it is unproductive to attempt to precisely define the limits of what conduct may constitute 'sexual relationships' in the post-Clinton era. For this reason, the term used in the present discussion is not intended to provide a comprehensive definition of the type of conduct that ought be regulated. The conduct envisaged falls short of sexual harassment and or discrimination because lawyers are of course subject to the same laws as every citizen with regard such unwelcome and unlawful behaviour.[4]

A brief review of the status quo is examined in Part A of this discussion. This will include an overview of the arguments against the introduction of a rule to regulate lawyer-client sexual relationships. Part B considers arguments in support of the introduction of legal intervention to the issue. Parallels with other professions are drawn in Part C as well as a comparison with the position taken in other jurisdictions. Part D explores a possible framework for the regulation of lawyer-client sexual relationships.

Part A: The Current Position and Arguments Against Change

The Current Position

Lawyer-client sexual intimacy is not specifically forbidden by the rules of professional conduct in any Australian jurisdiction. Rather, the issue is addressed broadly under the more general rules against conflicts of interest that state, for example, that 'a practitioner shall give undivided fidelity to his client's interest unaffected by any interest of the practitioner or of any other person or by the partitioner's perception of the public interest'.[5]

Many legal practitioners would argue that regulation of such personal relationships would infringe the lawyer's right to sexual privacy. Their position is that 'there's nothing unethical' about lawyers having consensual relations with their clients.[6] This view is largely consistent with the attitude taken by the High Court in 1972 in *Bar Association of Queensland v Lamb.*[7]

The decision in Lamb's case stands as the only Australian authority on sexual relations between lawyers and their clients. The case involved an application by the Bar Association for special leave to appeal from the Full Court of the Queensland Supreme Court's decision to allow the respondent, to be admitted to the Bar. Three issues arose for determination. One such issue was that while Lamb

---

[4] See *Sex Discrimination Act* 1984 (Cth) ss14, 28A and State counterparts.

[5] WA: *Professional Conduct Rules*, r. 7.1; see also ABA, *Advocacy Rules* (1995), r. 16; ABA, *Code of Conduct* (1993), r. 3.1(a); LCA, Model Rules of Professional Conduct and Practice, r. 17.1 (implemented in ACT); *Professional Conduct and Practice Rules* 1995 (NSW), r. A16; ACT: *Guide to Professional Conduct and Etiquette*, para 6.1; NT: *Professional Conduct Rules*, r. 9A1; Qld: *Solicitors Handbook*, paras 5.01(7), 9.00; Tas: *Bar Association Professional Conduct Guidelines*, para 26; Vic: *Barristers Practice Rules*, r. 11.

[6] See comments by J. Marsden, former President of NSW Law Society in K. McClymont, 'There's nothing wrong with having sex with a client says Marsden' *Sydney Morning Herald* 17 June, 2000, p. 3.

[7] [1972] ALR 285.

had been acting as Mrs Stevens' solicitor in the matter of her contested divorce action, the two had engaged in extramarital intercourse. This aspect of their relationship occurred after Mrs Steven's decree absolute was granted but before custody and maintenance matters had been determined.

In short, by a 3:1 majority (Menzies, Windeyer and Owen JJ, with McTiernan J in dissent) the High Court upheld the lower court's finding that sexualised solicitor-client relationships are improper and unprofessional. However, the High Court held such relationships did not of themselves constitute misconduct capable of sustaining a motion to strike off a solicitor or disqualify him from admission to the Bar. Interestingly, Menzies J characterised the conduct as 'her misconduct with him' but nonetheless pronounced Lamb 'fit' to be admitted to the Bar.[8] However, it is noteworthy that contemporary disciplinary precedents make it clear that a client's conduct is an otherwise relatively minor consideration because the ethical standard is intended to protect clients from themselves.[9]

Windeyer J found the conduct complained of 'reprehensible' but not such as to disqualify Lamb from membership to the legal profession.[10] Owen J likewise dismissed the application for leave to appeal. McTiernan J, in dissent, held that the Bar Association should be granted leave to appeal. He said the questions raised by the application '...admit of serious argument and are clearly of public importance'.[11]

In reaching its decision, the test applied by the High Court was whether Mrs Stevens had been adversely affected by the relationship. In fact, because the extramarital affair had not caused the marital breakdown (the breakdown having preceded the affair) the court concluded the conduct was insufficient to warrant disciplinary action. In doing so, it does not appear that the High Court gave sufficient weight to or evinced an understanding of the nature of sexual exploitation and the client's vulnerable state of mind. The extramarital relationship with Lamb occurred during a complex and sensitive family law matter. Although it began after the marriage had legally ended, the dissolution of marriage was based on the husband's cruelty in circumstances of domestic violence.[12] This fact alone is strongly suggestive of Mrs Stevens' emotionally affected state of mind - a fact the lawyer must have been aware of.

In addition, the custody of Mrs Stevens' children, the outcome of maintenance and property settlement matters remained pending. This suggests a more profound level of susceptibility to influence on the part of this client. These are circumstances that demanded a heightened level of propriety of conduct. The

---

[8] *Id* at 286.
[9] *Medical Board of Queensland v Martin* [1998] 2 Qd R 129 at 136-139 per Fryberg J.
[10] *Ibid.*
[11] *Id* at 285.
[12] *Stevens v Lamb* (Unreported Queensland Supreme Court, 1971) per Wanstall ACJ.

remaining legal proceedings were potentially jeopardized by the association with Lamb.[13]

Relational power dynamics and the nature of sexual exploitation are far better understood today than they were perhaps in the late 60's and early 70's. For this reason, Akenson speculates a similar case before the High Court would today generate a different outcome.[14] In any event, it is a question of fact as to what constitutes proper and improper standards of professional conduct at any given time.[15]

Arguments Against Introduction of a Rule

According to one legal ethics expert, the argument for a rule prohibiting sexualised lawyer client relationships can be reduced to two assumptions. The first concerns client vulnerability. For Mischler, the overwhelming number of lawyer-client relationships involve male lawyers with female clients.[16] Accordingly, when a woman client becomes a consenting participant to a sexual encounter, she can be assumed to have become 'so incapacitated she cannot make a decision about her sex life'.[17] In Mischler's view, this position is untenable. Lawyer-client relationships are not characterised by a similar degree of control as other fiduciary relationships. The second assumption is that the emotional intimacy assumed to be associated with a sexual relationship impairs a lawyer's decision-making capacity.[18]

Other arguments against the introduction of a specific rule include the lack of research that has been carried out to determine whether sexual relations between lawyers and their clients ought be regulated.[19] Although the prevalence of lawyer-client sexual relationships in Australia is unclear, anecdotal evidence suggests the practice is not uncommon. For instance, Marsden, former Law Society President of NSW, admitted that 'a lot of my sexual partners have been clients of mine'.[20] In America, studies have indicated that between 6% -18% of lawyers admit to having had sex with one or more clients.[21]

---

[13] *Ibid.* In April 1971 consent orders stipulated the children not come into contact with Lamb.

[14] L Akenson, 'Solicitor/client relations- an abuse of power', *Law Institute Journal,* May 1995, 450 at 452.

[15] *Medical Board of Queensland v Martin* (1998) 2 Qd R 129 at 136 per Fryberg J.

[16] L Mischler cited in M Robbins 'Propose No Sex with Clients Rule Gets a Cold Shower of Criticism' (April 25, 2002) available at htpp://www.law.com/.

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] *Supra* n.6 at 3.

[21] L Akenson, 'Solicitor/client relations- an abuse of power' *Law Institute Journal* May 1995, 450.

Part B: Arguments in Support of Introduction of a Rule

The Power Imbalance Theory

Proponents for the creation of a specific rule to prohibit lawyer-client sexual relations rely on a power imbalance argument. This power imbalance exists because of two factors. The first factor consists of the lawyer's position,[22] specialized authority and knowledge.[23] The second factor is the client's vulnerability that arises from the need for legal advice and protection.[24]

Once a client reposes trust and confidence in a lawyer, the lawyer assumes a dominant role in the relationship. The resulting power imbalance locates the lawyer in a superior position to exert unique legal, financial and/or emotional influence over a dependent client.[25]

A client's vulnerability has two dimensions. These include emotional vulnerability and financial vulnerability. Emotional vulnerability is amplified through the existence of a lawyer-client sexual relationship that jeopardises the client's emotional well-being. The nature of family law and criminal law matters exacerbates the risk of harm. These types of proceedings always involve serious personal consequences for the client. This emphasises the necessity for securing a true professional relationship. Clients 'need a lawyer not a friend'.[26]

Extreme cases of emotional vulnerability have led to 'transference'.[27] Transference is described as a psychological phenomenon whereby the vulnerable party experiences a powerful attraction and tendency to bestow affection on their professional adviser.[28] It is likely to arise in any professional relationship where the person with relative authority is in a position of trust and confidence in relation to the vulnerable party.[29] It is the risk of the potential manipulation and exploitation of the client that constitutes the danger of transference.

Whenever substantial sums have been invested to retain a lawyer, the risk of economic vulnerability arises when a client is unable to forfeit such investment and generate further funds to retain new representation. In these circumstances, clients are left particularly susceptible to coercion in divorce, probate, personal injuries and criminal law matters as well as those involved in sexual harassment or

---

[22] *Ibid.*

[23] described as the 'knowledge gap' in J. O'Connell, 'Keeping Sex Out Of The Attorney-Client Relationship: A Proposed Rule',(1992) 92 *Columbia Law Review*, 887 at 890-1.

[24] G.E. Dal Pont *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd ed. Sydney, Law Book Company, 2001, 175.

[25] *Supra* n.23; Supra n.21.

[26] T. Mulligan J. 'Developing the Criminal Lawyer' (May 1995) SA *Law Society Bulletin*, 11 at 12.

[27] L. Jorgenson & P Sutherland '*Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact*' (1992) 45 *Arkansas Law Review* 459 at 472-484.

[28] *Ibid.*

[29] *Id* at 478-479.

discrimination disputes.[30] By declining sexual favours, a client may fear that their lawyer will not provide as vigorous a representation or withdraw from the case.[31]

The Question of Consent

In the absence of equal bargaining power, a client who is reliant on a lawyer for legal representation may not be in a position to freely consent to a sexual encounter. Consent in these circumstances is rendered inherently suspect.[32] Acquiescence in a climate of fear may not be truly voluntary.[33] A further consequence is that sexual involvement clouds the professional's ability to objectively evaluate the client's ability to consent.[34]

Lawyers as Fiduciaries

As officers of the court, lawyers owe a duty to the court to ensure their conduct is beyond reproach.[35] Even more than average citizens,[36] lawyers as fiduciaries, owe their clients onerous obligations that exact a demanding level of propriety of conduct.[37] Accordingly, courts have strictly enforced lawyers' fiduciary duties to protect their clients' financial and legal interests.[38] Fiduciary breaches of this nature are considered so serious that they 'frequently constitute the very indicia of professional misconduct'.[39] It follows that conduct disclosing moral turpitude ought to cast doubt on a lawyer's fitness to practice.

It is proposed that fiduciary duties owed by lawyers to their clients ought be expanded to include sexual relations. Just as strict rules protect clients from lawyers' financial overreaching, it seems inconsistent to impose 'less stringent' rules of conduct over clients' personal and emotional interests.

Duty of Independence

The lawyer's faithful exercise of an independent and unbiased judgment is critical to public confidence in the legal profession.[40] Both objectivity and independence are jeopardised by the pursuit of business relationships with clients *a fortiori*

---

[30] *Supra* n 21at 451. See also M. Eckhause, 'A Chastity Belt for Lawyers – Proposed MRPC 1.8 (K) and the Regulation of the Attorney Client Sexual Relationships' (1997) 75 *University of Detroit Mercy Law Review* 115 at 120-121.
[31] *In the Marriage of Kantar supra* n.2.
[32] *Supra* n.21.
[33] *Supra* n.23 at 891.
[34] *Supra* n.23 at 922.
[35] *Re Maraj (a legal Practitioner)* (1995) 15 WAR 12 at 24-25 per Malcolm CJ.
[36] *Meinhard v Salmon* (1928) 164 N.E. 545 at 456 per Cardozo CJ refers to the conduct of lawyers as 'at a level higher than that trodden by the crowd'.
[37] See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41at 97 per Mason J.
[38] *Tyrell v Bank of London* (1862)10 HLC 26 at 44; 11 ER 934 at 941 per Lord Westbury 'there is no relation known to society, of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honourable observance than the relation between solicitor and client'.
[39] *Supra* n.24 at 149.
[40] *Supra* n.24 at 446.

relationships of a sexual nature.[41] In *Stewart v Secretary, Department of Health,* Kirby J opined that it was unacceptable to deprive clients of the benefit of independent, dispassionate advice because a relationship has become charged with emotion that prevents objective professional judgment and skill.[42]

Several prominent theories demonstrate that a degree of objectivity 'is indispensable to the ethical lawyer's role'.[43] Once sexually involved with a client the risk is that the blurring of objectivity may lead to unsound professional decisions and directly impact on the quality of the legal representation. For example, it may render it impossible to predict to what degree legal professional privilege will protect client confidences. Client confidences are only protected when they are imparted in the context of the legal professional relationship. In addition, it may encourage other ethical breaches such as conduct inconsistent with a lawyer's duty of candour to the court and third parties.[44] For example, Lamb's case (discussed above) also involved allegations of interference and improper communication with one of the opposing party's witnesses.[45] There have even been cases where lawyers sexually involved with their clients have acted over aggressively to impress the client or have otherwise taken liberties with the client's case (such as making legal decisions without consulting the client in the mistaken belief that the personal relationship with the client bestowed the right to do so). [46]

Part C: Comparison With Other Professions and Jurisdictions

Other Professions

Doctors, psychologists, teachers, ministers of religion and other professionals recognize that sexual relationships interfere with therapeutic objectivity and are injurious to the client.[47] These professions have specific rules forbidding dominant parties from engaging in sexual relations with their clients during the currency of treatment or provision of advice.[48] In Texas, even dieticians are prohibited from having sexual relations whereas lawyers are not.[49] While the relationship of

---

[41] *R v White* (1997) 114 CCC (3d) 225 at 263-264 (Ont CA).

[42] (Unreported, New South Wales Court of Appeal 66 of 1986, 6 August) referred to in *Medical Board of Queensland v Martin* [1998] 2 Qd R 129 at 137-8 per Fryberg J.

[43] *Supra* n.23 at 893.

[44] *NSW Bar Association v Livesey* [1982] 2 NSWLR 231 at 233 per Moffat P; also *Supra* n.24.

[45] *Supra* n.7 at 286 per Menzies J.

[46] See for example *Bourdon's Case* (1989) 565 A. 2d at 1056 where the lawyer made a 'decision to request a contested divorce hearing without first notifying, consulting with, or obtaining the permission of his client'.

[47] See for instance, *Supra* n.1; *Supra* n.16;and D. Tan, 'Sexual Misconduct by Doctors and the Intervention of Equity' (1997) 4 *Journal of Law and Medicine* 243.

[48] See for instance, the relevant Medical Acts in various jurisdictions; also *Medical Board of Queensland v Martin* [1998] 2 Qd R 129.

[49] Brock cited in M. Robbins 'Proposed No Sex with Clients Rule Gets a Cold Shower of Criticism' available at http://www.law.com.

lawyer client bears similarity to that of other professional relationships, it appears inconsistent and anomalous with lawyers' ethical rules that this conduct is not regulated in Australia.[50] Brock claims the legal profession is on 'the verge of becoming a laughing stock'.[51]

Other jurisdictions

Support for the implementation of a specific rule prohibiting sexual relations between lawyers and their clients may be found in other common law jurisdictions. The High Court in *Mabo v Queensland* (No 2) made it clear that international trends should be referred to in developing new areas of law in order to keep Australia in line with international norms and conventions.[52]

At least two other jurisdictions now recognise the dangers inherent in such relationships. For instance, on 15 August 2001, the American Bar Association amended its Model Rules to prohibit 'the lawyer from having sexual relations with a client regardless of whether the relation is consensual and regardless of the absence of prejudice to the client'.[53] This amendment occurred following a long history of debate on the issue. The plethora of US cases involving lawyer-client sexual encounters illustrate potentially disastrous outcomes for the professionals involved [54] and their clients.[55] Similarly, in New Zealand the Rules of Professional Conduct for Barristers and Solicitors prescribe that 'the relationship of confidence and trust may be breached where a practitioner and a client enter into a sexual relationship'.[56]

Part D: Zero Tolerance: a Framework for Regulation of Lawyer Client Sexual Relationships

The Object of Disciplinary Proceedings

The object of disciplinary proceedings is not retribution but protection of the public and the reputation of the profession. Malcolm CJ explained that in order to achieve these objectives, the consequences for the practitioner may need to be more severe than they would if the only object of the proceedings was one of

---

[50] S. Ross, 'Sex, lawyers and ethics' 1998 *Law Institute Journal* (October), 38.

[51] *Ibid.*

[52] (1992) 175 CLR 1; (1992) 107 ALR 1.

[53] American Bar Association, House of Delegates, Amendments to Model Rules of Professional Conduct, Annual Meeting, 15 August 2002 r. 1.8 entitled 'Conflict of Interest: Specific Rules' available at http://www.aba.net.org/leadership/.

[54] See for instance, the lawyers were suspended from practice in *Re Grimm* (1996) 674 N.W. 2d 551; *Re Bilbro* (1966) 478 S.E. 2d 253; and *Re Mulcaney* (1997) 577 N.W. 2d 210. The lawyer was disbarred in *Re Berg* (1998) 955 P 2d 1240.

[55] See for instance, *In the Matter of James v Tsoutsouris* (2001) 748 N.E. 2d 856 (client suffered depression and psychological disorder); *In the Marriage of Kantar, supra* n.2 (client suffered financial disadvantage – her lawyer billed her for the time they spent in bed together).

[56] Law Society of New Zealand's Rules of Professional Conduct for Barristers and Solicitors, r 1.01(commentary (3)) available at http://www.nz-lawsoc.org.nz/about/profcon1.

punishment.[57] However, commentators have indicated general conflict of interest rules are 'too difficult to enforce'.[58] If complainants delay acting until the sexual relationship results in an actual conflict of interest, the damage done to the competency and objectivity of the representation could be irreparable.[59]

The harm to clients from sexual relationships can most effectively be prevented by totally banning the commencement of such relationships during the course of the legal representation.[60]

Why a Zero Tolerance[61] Rule?

The doctrine of zero tolerance will raise concerns of a perilous denial of 'due process', a presumption of guilt rather than innocence, or that lawyers will be struck off by way of censure. While zero tolerance implies broad changes to the current position, it simply means that sexual relations between lawyers and their clients are unacceptable and ought not be tolerated. It highlights the reality of risk of serious harm caused by such relationships. Not only are the client's personal[62] and legal interests at risk, the interests of other parties such as dependants and spouses are also jeopardised. Even isolated events that constitute breaches of trust and confidences may engender public mistrust of the profession.

Zero tolerance is the only appropriate philosophy regarding sexual relations between lawyers and their clients for several reasons:

Lawyer-client sexual relationships are unacceptable because they inflict harm that is potentially serious;

violation of the client's trust makes it difficult, if not impossible, for the client to place her or his trust in lawyers;

it is an unacceptable abuse of the power held by lawyers as officers of the court, and make it similarly difficult, if not impossible, for lawyers to maintain their objectivity and professionalism in the course of their client's legal proceedings;

sexualised relationships tarnish public trust in the legal profession per se. The implementation of zero tolerance will lead to increased trust and heightened feelings of confidence by the public;

it is the only philosophy consistent with protection of the public. This is considered to be the primary task of self-regulating bodies such as professional conduct authorities;

it provides a transparent standard for measuring the effectiveness of policies, procedures, practices and education programmes intended to effect transition. This

---

[57] *Re Maraj (a Legal Practitioner)* (1995) 15 WAR 12 at 24.

[58] *Supra* n.50.

[59] *Ibid.*

[60] *Supra* n.21 at 453.

[61] This structure has been adapted from M. McPhedran et al, *The Final Report of the Independent Task Force on Sexual Abuse of Patients* (College of Physicians and Surgeons of Ontario, November 1991).

[62] Examples of the type of personal harm suffered by clients as a result of sexual relations with their lawyers include, feelings of embarrassment, shame and humiliation; depression, impaired ability to consult lawyers in the future and loss of faith in the profession. See *Id.* at 451.

will prevent these types of relationships occurring out of ignorance on the part of either party;
it also sets an unambiguous standard of acceptable conduct. It clarifies where the boundaries of propriety of conduct lie in lawyer-client relationships. Zero tolerance will foster increased awareness of the presence of sexually demeaning attitudes and behaviours. The transparency and predictability of the consequences that will follow provide the most balanced way to communicate to members of the profession the limits of appropriate conduct.

It is proposed that the only other acceptable regulatory scheme is a prima facie rule with a rebuttable presumption.[63] Assuming not all lawyer-client sexual relationships necessarily involve coercion or exploitation, would permit the lawyer an opportunity to justify and refute allegations that his or her conduct did not compromise the legal relationship. For instance, where a lawyer strikes up a sexual relationship with a constituent (other than a constituent who can effect control over an organisation's interests or activities) of a business or corporate entity client.

CONCLUSION

'A profession's most valuable asset is its collective reputation and the confidence, which it inspires' [64]

Sexualised lawyer-client relationships can seriously harm clients' interests. Accordingly, both lawyers and clients would be ill advised to pursue personal relationships with each other because of the possibility of harm to clients and the risk of damage to the quality of the representation. The ethical lawyer will have infringed the fiduciary duty owed to the client if a sexual relationship develops and an impaired representation is provided.

The medical profession and others have long recognised the ethical quandary that professional-client sexualised relationships represent and have implemented 'bright line bans' of these relationships.[65] The client's ability to validly consent is inherently suspect due to the nature of relational dynamics embedded in the professional relationship and the client's emotional vulnerability.

For these reasons, it is proposed that the most effective philosophy is a zero tolerance rule of professional conduct. Pursuant to such a rule the lawyer may be called upon to rebut that consent was not validly given. In doing so it will be necessary to prove that the client's consent was validly given after the full disclosure of the risks involved and that the quality of the representation was unaffected by any conflict of interest or loss of objectivity of judgment on the part of the lawyer.

---

[63] *Supra* n.21 at 453.
[64] *Boulton v Law Society* [1994] 2 All ER 486 at 492 per Sir Thomas Bingham.
[65] *Supra* n.30 at 140-141

Alternatively, lawyers ought to be encouraged to end the professional relationship by arranging competent substitute counsel. In this sense the parties would then be free to pursue their personal relationship.