The idea that sex between consenting adults is a private matter has lost much of its force when it comes to lawyer-client sexual relations.

Most states’ disciplinary rules expressly forbid sexual relationships between an attorney and a current client unless the intimate relationship began before the professional one did.

Even in jurisdictions that lack a specific rule on point, lawyers have been disciplined under other standards for having a sexual relationship with a client. Moreover, lawyers may subject themselves to tort claims for having an affair with a client.

In this Special Report, legal editor Joan Rogers explains the specifics of ABA Model Rule 1.8(j) and state equivalents, reviews what sort of activities they prohibit, and cites other rules lawyers may violate by making the professional relationship too personal.

Client Sex: Usually Unethical, Never a Good Idea

Model Rule 1.8(j), adopted by the ABA in 2002 on the recommendation of its Ethics 2000 Commission, flatly prohibits lawyers from having sex with a current client, unless the sexual relationship began before the representation. It 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.”

Why?

Comments to Model Rule 1.8 explain the rationale of the rule and its application:

- A sexual relationship may involve unfair exploitation of the client’s trust in the lawyer, and can endanger the lawyer’s ability to exercise independent judgment on the client’s behalf. The prohibition applies “regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.” Comment [17].

- Even when a sexual relationship began before the client hired the lawyer, the lawyer must evaluate whether the relationship will materially limit the ability to provide effective representation. Comment [18].

- An organization’s lawyer—whether in-house or outside counsel—may not have a sexual relationship with a constituent who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters. Comment [19].

Most States Expressly Ban It


Other states have modified the ABA model, putting their own gloss on it, or have adopted their own unique rule:

Alabama forbids sexual conduct with a client or client representative that exploits or adversely affects the client’s interests or the lawyer-client relationship. Sexual relations between a lawyer and client are presumed to be exploitative unless a spousal or sexual relationship existed when the lawyer-client relationship began.

Alaska prohibits sexual relations between a lawyer and client unless a consensual sexual relationship existed when the client-lawyer relationship began. Alaska adds, however, that the sexual relationship must not create a conflict under Rule 1.7, and it defines “client” in the case of an organization as a constituent who supervises, directs or regularly consults with the lawyer concerning the organization’s representation.

California Rule of Professional Conduct 3-120 forbids lawyers to demand sexual favors from clients or to coerce clients into having sexual relations. These restrictions do not apply to sexual relations between a lawyer and spouse or to consensual sexual relationships predating the attorney-client relationship. Moreover, a lawyer who has sexual relations with a client of the lawyer’s firm but does not personally represent that client is not subject to discipline solely because of the relationship. A state statute, Cal. Bus. & Prof. Code § 6106.9, codifies similar restrictions.

Florida Rule of Professional Conduct 8.4(i) forbids lawyers to “engage in sexual conduct with a client or a representative of a client if the conduct exploits or adversely affects the interests of the client or the lawyer-client relationship.” If the sexual conduct commenced after the lawyer-client relationship was formed, this harm is rebuttably presumed. The prohibition and presumption do not apply to lawyers in the same firm if the
lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the client's file.

Iowa prohibits a lawyer from engaging in sexual relations with a client, or a representative of the client, unless the sexual relationship predates the attorney-client relationship or the lawyer and client are married. Even in those situations, the lawyer must withdraw from the representation if there is any reasonable possibility it may be impaired or the client will be harmed.

Minnesota Rule of Professional Conduct 1.8(j) forbids a lawyer involved in representing a client to have sexual relations with the client unless the sexual relationship began before the representation. The rule defines sexual relations and specifies that for organizational clients any individual who oversees the representation and gives instructions to the lawyer is deemed to be the client. It also provides that government lawyers and in-house corporate lawyers are governed by Rule 1.7(b) regarding their sexual relations with other employees of the represented entity. The rule does not prohibit a lawyer from having sexual relations with a client of the lawyer's firm if the lawyer is uninvolved in the client's legal matter. The rule restricts prosecution of disciplinary charges when the client does not want to take part.

Nevada prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. The rule does not apply when the client is an organization.

New York flatly prohibits lawyers from having sexual relations with a client during representation in a domestic relations matter. In other legal matters, the rule prohibits lawyers from demanding sexual relations as a condition of representation or coercing clients into sexual relations. Sexual relations between a lawyer and spouse and consensual sexual relationships that predate the lawyer-client relationship are not prohibited. Furthermore, a lawyer is not subject to discipline solely for having sexual relations with a client of the firm if the lawyer does not personally take part in the representation. The term "sexual relations" is defined in the terminology rule.

North Carolina Rule of Professional Conduct 1.19 prohibits sexual relations with a current client unless the sexual relationship existed before the commencement of the attorney-client relationship. The rule specifies that this prohibition covers only those lawyers who assist in the client's representation. It also defines sexual relations and forbids coerced sexual relations with a client as a condition of professional representation.

Ohio forbids lawyers to "solicit or engage in sexual activity with a client" unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

Oklahoma prohibits lawyer-client sexual relations unless (1) a consensual sexual relationship existed between them when the client-lawyer relationship commenced and (2) the relationship does not result in a material-limitation conflict under Rule 1.7(a)(2).

Oregon forbids a lawyer to have sexual relations with a current client unless the relationship predates the lawyer-client relationship. Furthermore, it prohibits a lawyer from having sexual relations with a current client's representative if the sexual relations would likely damage the client in the representation. The rule defines sexual relations and applies only to a lawyer who assists in a client's representation, not other members of the lawyer's firm.

South Carolina Rule of Professional Conduct 1.8(m) states that lawyers must not have sexual relations with a client when the client is vulnerable or otherwise subject to undue influence by the lawyer, or when sexual relations may have a harmful effect on the client's interests or adversely affect the lawyer's representation of the client.

Utah forbids lawyer-client sexual relations that exploit the professional relationship. The rule defines "sexual relations" and specifies that lawyer-client sexual relations are rebuttably presumed to involve exploitation unless the lawyer and client are married or the sexual relationship began before the lawyer-client relationship.

Washington Rule of Professional Conduct 1.8(k) bans lawyers from engaging in sexual relations with their clients unless the intimacy preceded the represen-
tation. The rule extends the ban to sexual relations with a client's representatives if the sexual relations would be likely to harm the client in the representation. The rule does not apply to a firm's lawyers who are not involved in the client's representation.

**West Virginia** provides that a lawyer may not have sexual relations with a client whom the lawyer personally represents unless a consensual sexual relationship existed between them before the lawyer-client relationship. The rule defines sexual relations.

**Wisconsin** Rule of Professional Conduct 20:1.8(k) prohibits sexual relations with a client unless the relationship existed before the lawyer-client relationship. The rule defines sexual relations and specifies that, for organizational clients, "client" means any individual who oversees the representation and gives instructions to the lawyer. Furthermore, it provides that government lawyers and in-house corporate lawyers are governed by Rule 1.7(b) regarding their sexual relations with other employees of the represented entity.

**Some States Forgo Specific Rule**

A minority of states have no specific rule on sexual relations with clients. For example, **Vermont** omitted the ABA rule banning lawyer-client sexual relations on grounds that an absolute prohibition is an invasion of privacy and duplicates other rules requiring loyal and competent representation, according to the reporter's note to Vermont Rule of Professional Conduct 1.8.

Most of the jurisdictions that have no black-letter rule on sex with clients instead address the subject in commentary to Rule 1.7 or Rule 1.8, often drawing on comments to Model Rule 1.8 that explain the ABA prohibition against sex with clients. For example:

Three comments to District of Columbia Rule of Professional Conduct 1.7 address personal relationships between lawyers and clients. Comments [37] and [38] discuss the dangers of any intimate personal relationship between lawyer and client, and warn that a sexual lawyer-client relationship may create a conflict of interest, impair the lawyer's professional judgment and endanger client confidences. The client's emotional involvement prevents informed consent to these risks. Comment [39] addresses the concerns involved in sexual relationships with the representative of an organizational client.

Comment [12] to **Maine** Rule of Professional Conduct 1.7 says the lack of a categorical prohibition should not be construed as implicit approval of such relationships and does not prevent professional discipline. It adds that in some situations, particularly family or juvenile matters, the lawyer's ability to represent a client may be materially limited by a sexual relationship with the client.

Comment [12] to **Maryland** Rule of Professional Conduct 1.7 states that a sexual relationship with a client will create an impermissible conflict between the interests of the client and those of the lawyer if the representation of the client would be materially limited and it is unreasonable for the lawyer to believe the lawyer can provide competent and diligent representation. Under those circumstances, the client's informed consent is ineffective. The comment also cross-references a prohibition in Rule 8.4 against sexual harassment.

Comment [12] to Massachusetts Rule of Professional Conduct 1.7 cautions that a lawyer-client sexual relationship raises acute concerns about conflict of interest, impaired judgment and loss of the attorney-client privilege.

A comment to **Michigan** Rule of Professional Conduct 1.8 says that the state supreme court decided in 1998 not to adopt a black-letter rule on lawyer-client sexual relationships after finding that the subject is adequately covered by conflicts rules, criminal statutes and lawyers' fiduciary duties to clients. The comment warns that lawyers risk severe sanctions under existing rules if they have a conflict of interest, take advantage of a client's vulnerability, harm the client's representation or engage in immoral behavior.

Comment [12] to **New Mexico** Rule of Professional Conduct 1.7 says that a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and presents a significant risk of impairing the lawyer's independent professional judgment.

Comment [12a] to **Tennessee** Rule of Professional Conduct 1.7 warns that a lawyer-client sexual relationship may create a conflict of interest, lead to impaired professional judgment and endanger the attorney-client privilege. It states that the client's own emotional involvement may make it impossible for the client to give informed consent to the sex. Comment [12b] discusses the concerns involved in sexual relationships with the representative of an organizational client.

Comment [17] to **Vermont** Rule of Professional Conduct 1.8 cautions lawyers that sexual relations with a current client may lead to charges of incompetence under Rule 1.1, lack of diligence under Rule 1.3, a conflict with the lawyer's personal interests under Rule 1.7(a)(2), using client information to the client's disadvantage under Rule 1.8(b), conduct involving dishonesty under Rule 8.4(e) or conduct prejudicial to justice under Rule 8.4(d).

Other states lacking a specific rule on lawyer-client sexual relations include **Georgia**, **Louisiana**, **Mississippi**, **New Jersey**, **Rhode Island**, **Texas** and **Virginia**.

**Lack of Rule Is Not a Safe Haven!**

Because of the fiduciary duties attorneys owe their clients, lawyer-client sexual relationships have historically been viewed as improper in many situations. See Restatement (Third) of the Law Governing Lawyers § 16 cmt. e (2000) (lawyer may not enter into sexual relationship with client when it would undermine client's case, abuse client's dependence on lawyer or jeopardize lawyer's independent judgment).

A dozen years before the ABA adopted Model Rule 1.8(j), the organization's ethics committee made clear that sexual relationships between lawyers and clients create a significant risk of unprofessional conduct.

In ABA Formal Ethics Op. 92-364 (1992), the committee made clear that an attorney should not represent a client when the representation may be limited by the lawyer's own interest, and that lawyers' fiduciary obligations to clients prohibit them from taking advantage of their dominant position over the client or exploiting the client's dependent position.

Similarly, the Virginia State Bar's ethics committee warned that although no ethics rule in that jurisdiction specifically prohibits sexual relations with clients, this conduct may jeopardize competent representation, wrongfully exploit the lawyer's fiduciary relationship.

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Does the Prohibition Extend to Sexual Relations With a Client’s Spouse, Relative or Friend?


In fact, some courts hold that a lawyer’s sexual relationship with a client’s spouse creates a per se conflict of interest because of the high risk that this conduct will damage the attorney-client relationship. Disciplinary Counsel v. Owen, 2014 BL 296928, 30 N.E.3d 910, 30 Law. Man. Prof. Conduct 714 (Ohio 2014) (citing cases); In re Anonymous, 2010 BL 212494, 699 S.E.2d 693, 26 Law. Man. Prof. Conduct 582 (S.C. 2010).


But see In re Inglino, 740 N.W.2d 125, 23 Law. Man. Prof. Conduct 556 (Wis. 2007) (although lawyer’s misconduct including videotaped sexual encounter with divorce client’s girlfriend violated other rules, it did not contravene Rule 1.8(b)(2), which prohibits sex “with a current client”).

with the client, interfere with the lawyer’s professional judgment, create a conflict of interest between the lawyer and the client, jeopardize the duty of confidentiality to the client or potentially prejudice the client’s matter. The committee also said a lawyer who intentionally uses the professional relationship to coerce sexual favors from a client or solicits sexual favors in lieu of legal fees may violate the prohibition in Rule 8.4 against a deliberately wrongful act that reflects adversely on the lawyer’s fitness to practice law. Virginia Ethics Op. 1853, 26 Law. Man. Prof. Conduct 73 (2009).


Furthermore, lawyers subject themselves to the possibility of tort claims by having an affair with a client. E.g., Mangan v. Runo, 209 F.R.D. 29 (D. Me. 2002) (former client may proceed with malpractice claim seeking punitive damages against lawyer who allegedly used confidential information to initiate sexual relationship with her and manipulated her to continue sexual relationship against her wishes); Walter v. Stewart, 67 P.3d 1042, 19 Law. Man. Prof. Conduct 235 (Utah Ct. App. 2003) (plaintiff may proceed with tort claims against former divorce lawyer who allegedly lured her into sexual relationship in which he misrepresented his marital status).

In every jurisdiction, then, the advice to an attorney attracted to a client is the same: Think before you act! Even in a state with no specific ethics prohibition, a lawyer may be accused, once the personal relationship ends, of indulging sexual desires to the client’s detriment. If a relationship with a client becomes intimate, the safest course even without an express rule on the subject is to end the attorney-client relationship as quickly as is ethically feasible.

Disciplinary cases in this area tend to address lawyer’s sexual relationships with individual clients rather than corporate attorneys who become involved with constituents of their organizational client. As discussed below, however, a comment to Model Rule 1.8 and ethics rules in some states indicate it is improper for lawyers to engage in sexual relations with a corporate client’s representative who directs or instructs them in the representation.

Other Rules Come Into Play


In many cases lawyers were found to have violated the rule on personal conflicts of interest by seeking or starting a sexual relationship with a client, because the court said the lawyer’s advice and actions could be skewed by the lawyer’s personal interests in the sexual relationship. E.g., Fla. Bar v. Roberto, 2011 BL 56041, 59 So. 3d 1101 (Fla. 2011); Disciplinary Counsel v. Detweiler, 989 N.E.2d 41, 29 Law. Man. Prof. Conduct 307 (Ohio 2013);

In some circumstances a lawyer’s sexual relationship with a client has been found prejudicial to the administration of justice or indicative of the lawyer’s unfitness to practice law.

E.g., In re Ashy, 721 So. 2d 850 (La. 1998) (two-year suspension for lawyer who promised he would use special effort on client’s behalf if she would enter into sexual relationship with him); Attorney Grievance Comm’n of Md. v. Culver, 849 A.2d 423, 20 Law. Man. Prof. Conduct 280 (Md. 2004) (lawyer disbarred for pressuring divorce client to have sex and for other misconduct); Cleveland Bar Ass’n v. Fenelli, 712 N.E.2d 119, 15 Law. Man. Prof. Conduct 369 (Ohio 1999) (lawyer who had sex with client and suggested that fee could be reduced through additional sexual acts suspended for 18 months, with six months stayed).

Similarly, unintended sexual advances not leading to an actual intimate relationship have been found prejudicial to justice or evidence of the lawyer’s lack of fitness to practice.

E.g., Ky. Bar Ass’n v. Belker, 997 S.W.2d 470, 15 Law. Man. Prof. Conduct 448 (Ky. 1999) (lawyer disbarred for fondling clients after advising them that physical examinations were necessary component of representation); Attorney Grievance Comm’n of Md. v. Goldsborough, 624 A.2d 503 (Md. 1993) (suspension of at least two years for lawyer who repeatedly spanked client and secretary); Lake Only. Bar Ass’n v. Mismas, 11 N.E.3d 1180, 30 Law. Man. Prof. Conduct 448 (Ohio 2014) (lawyer reprimanded for sending sexually explicit texts to law student that he hired as clerk and requesting sexual favors as condition of continued employment); In re Hoffmeyer, 2008 BL 12973, 656 S.E.2d 376, 24 Law. Man. Prof. Conduct 61 (S.C. 2008) (nine-month suspension for lawyer’s repeated sexual advances toward vulnerable client and improper gifts to her); In re Romano, 675 N.Y.S.2d 610 (App. Div. 1998) (disbarred lawyer who conducted “physical exams” of clients in his office); cf. Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Steffes, 588 N.W.2d 121 (Iowa 1999) (lawyer suspended at least two years for taking pictures of undressed client for pretextual reason, which violated disciplinary rule prohibiting sexual harassment).

Some forms of sexual contact are illegal and thus violate professional standards against engaging in criminal conduct.

E.g., In re Egbune, 58 P.3d 1168 ( Colo. 1999) (lawyer who fondled client disciplined for criminal offense of sexual assault); In re Wolf, 826 P.2d 628 (Or. 1992) (lawyer who had sexual intercourse with 16-year-old client in back seat of limousine violated disciplinary rules prohibiting both criminal conduct and representing clients with interests adverse to lawyer’s; court imposed 18-month suspension from practice).

What’s Forbidden?

Some states’ rules include a definition of “sexual relations,” making clear that the term extends beyond sexual intercourse to other types of intentional sexual touching. For example:

- New York Rule 1.0(u) — “sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.”
- Minnesota Rule 1.8(g) — “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.”
- North Carolina Rule 1.19 — “(1) Sexual intercourse; or (2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”
- Oregon Rule 1.8(g) — “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”
- Utah Rule 1.8(g)(1) — “sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.”
- West Virginia Rule 1.8(g) — “sexual intercourse or any touching of the sexual or other intimate parts of a client or causing such client to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or as a means of abuse.”
- Wisconsin Rule 20:1.8(j)(1) — “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.”

Ohio’s Rule 1.8(j) prohibits a broader range of conduct, forbidding lawyers to solicit or engage in “sexual activity” with a client: See, e.g., Disciplinary Counsel v. Deitweiler, 989 N.E.2d 41, 29 Law. Man. Prof. Conduct 307 (Ohio 2013) (sexting and other sexual advances toward vulnerable client); Cincinnati Bar Ass’n v. Schmalz, 914 N.E.2d 1024, 25 Law. Man. Prof. Conduct 498 (Ohio 2009) (series of steamy telephone conversations with jailed client); see also Cleveland Ethics Op. 2011-1, 27 Law. Man. Prof. Conduct 407 (bawdy or flirtatious language could be unethical solicitation of sex if client reasonably interprets it that way).

Depending on the circumstances, sexual conduct toward a client may give rise to a personal conflict of interest even if there is no actual touching. See, e.g., In re Hammond, 2011 BL 20213, 56 So. 3d 189, 27 Law. Man. Prof. Conduct 80 (La. 2011) (lawyer violated Rule 1.7 and other rules by engaging in graphically sexual phone conversation with jailed client and filming his assistant performing oral sex on jailed client); Disciplinary Counsel v. Freeman, 835 N.E.2d 26, 21 Law. Man. Prof. Conduct 528 (Ohio 2005) (lawyer violated predecessor to Rule 1.7 and other rules by taking photos of his 18-year-old client in various states of undress).

A romance with a client can sometimes give rise to a personal conflict under Rule 1.7 even if the lawyer and client don’t actually have sex. Chief Disciplinary Counsel v. Zelotes, 102 A.3d 1116, 30 Law. Man. Prof. Conduct 569 (Conn. App. Ct. 2014) (lawyer who “dated” friend while advising her and then took over her divorce case violated rules governing conflicts of interest and conduct prejudicial to justice even though there was no evidence of any sexual relationship between them).

On the other hand, a lawyer’s secret crush on a client doesn’t create a personal conflict of interest under Rule 1.7, unless the lawyer’s feelings interfere with the pro-

**Client Consent Doesn’t Matter**

Comment [17] to Model Rule 1.8 makes plain that the rule against lawyer-client sexual relationships applies even if the intimate relationship is consensual and no harm actually results. The rationale is that the significant danger of harm to the client’s interests and the client’s own emotional involvement make it unlikely the client can give adequate informed consent.

Accordingly, court are reluctant to find that the client’s consent to an intimate relationship obviates the lawyer’s conflict of interest, especially when the representation involves a highly personal matter such as divorce. E.g., In re Tsoutsouris, 748 N.E.2d 856, 17 Law. Man. Prof. Conduct 402 (Ind. 2001) (consensual sexual relationship with divorce client warranted 30-day suspension even if representation was not impaired).

**Organizational Affairs**

According to Comment [19] to Model Rule 1.8, an organization’s lawyer—whether in-house or outside counsel—is prohibited from having a sexual relationship with a constituent who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.

This prohibition is made explicit by rule in some states, including Alaska, Florida, Iowa, Minnesota and Wisconsin. By rule in Oregon and Washington state, a sexual relationship with a corporate client’s representative is unethical if it is likely to harm the client in the representation. At the other end of the spectrum, Nevada’s rule specifies that the ban on lawyer-client sexual relations does not apply when the client is an organization.


A disciplinary case on point is Cleveland Bar Ass’n v. Kodish, 852 N.E.2d 160, 22 Law. Man. Prof. Conduct 462 (Ohio 2006), which held that a lawyer who had a sexual liaison with her corporate clients’ representative/principal while handling the companies’ bankruptcy matters had a conflict of interest that adversely reflected on her fitness to practice law even though there was no proof the corporate clients were injured by the intimate relationship.

*By Joan C. Rogers*