MODELS FOR PROFESSIONAL DISCIPLINE OF LAWYER-CLIENT SEXUAL RELATIONSHIPS

By

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A Thesis Submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements For the Degree of

Master of Laws

Faculty of Law
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Winnipeg, Manitoba

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Of

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ABSTRACT

Until very recently Canadian law societies devoted little attention to lawyer-client sexual relationships and have mainly concentrated their effort on sexual harassment. The need today is to assess the situation, to recognize that the lawyer-client relationship is fiduciary in nature, to identify the harm and to place the issue of sexual relationships in the context of a major subject of legal and ethical debate in the country. The time has now come for lawyers to take a harder look at professional conduct.

The purpose of this thesis is to advance discussion about important and controversial ideas in law and ethics and review the literature. As such it is addressed to any informed reader who is interested in understanding current debates concerning lawyer-client sexual relationships. It is particularly addressed to the professionals in law who will be asked to comment on issue respecting sexual misconduct.*

Part One gives an overview of the rules and recommendations made by the Law Society of Upper Canada and suggested frameworks dealing with professional-client relationships. Part Two covers the case law dealing specifically with the issue of sexual relationships between lawyers and clients, introducing five Canadian narratives which depict the spectrum of seriousness of sexual and professional misconduct and the compelling factors for all Canadian law societies to introduce a rule. Part Three addresses the "zero tolerance" concept with respect to physician-client sexual relationships and raises analogous arguments applicable to the lawyer-client relationship in Canada. Part Four covers the stand taken by several American states to protect the public interest by introducing specific rules directly on point.

The use of narratives and comparisons is a good way to learn about relationships between a professional and a client. This thesis uses comparisons extensively, primarily between two professions, physicians and lawyers, and two countries, Canada and the

United States. Where possible and desirable, all issues presented here are illustrated with case law. The comparison framework helps to better assess the seriousness and the harm brought about by lawyer-client sexual relationships in the client's life. One thing the reader learns is that the existing disciplinary rules governing professional misconduct or "conduct unbecoming" are in the process of being revised to better respond to the public interest.

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Chapter I. Introduction

Canadian rules of professional conduct provide that lawyers should assist and guide in maintaining lawyers' integrity. Rules must change as social conditions change, to adapt themselves to new social and legal environments. Rules must also advance social and political values in responding to current needs of clients.[1]

> As a profession, we are striving to adapt to social change and, as a consequence, we are becoming more responsive to the public demand for accountability. Thus, with some exception, we are justified in utilizing our own heightened sensibilities to safeguard the integrity of the legal profession and the law. [2]

Clients have demanded that lawyers be more accountable, especially in reconsidering boundary violations of the fiduciary obligation grounded in complaints of sexual misconduct against their lawyers. Actions against Canadian lawyers are on the rise. Increasingly fiduciary obligations are playing a significant role in the liability of lawyers.[3] Lawyers engaging in personal relationships with clients have been found guilty of professional misconduct even in the absence of a rule that explicitly forbids such conduct. Rather, it is considered to fall under the guidelines set out in the model introduced in the Canadian Bar Association's Code of Professional Conduct.[4]

As Certosimo once said, "when a lawyer has a sexual relationship with a client, he calls into question whether he is placing his own personal interests ahead of those of his client, and whether he is taking advantage of the vulnerability of a client, as a client."[5] Essentially, this means that lawyers must be continually on guard about themselves, their fiduciary obligation, the issue of confidentiality and more particularly their clients' situation. Furthermore, the lawyer-client sexual relationship to some degree always

constitutes a potential prejudice to the client's interests. If the sexual relationship is not emotionally serious, the lawyer exploits or abuses the client's vulnerability. If the sexual relationship is emotionally serious, the lawyer still exploits or abuses the client's vulnerability and cannot be dispassionate about the client's legal problems. For Certosimo, the use of the term "emotionally vulnerable" is inconsistent with the standards of fiduciary duty in other contexts of law.[6] This reflects an illusory distinction and consequently shifts the assessment of the complaint of professional misconduct away from the lawyer's fiduciary duties. Further, it focuses mainly on the degree of the client's emotional vulnerability. Such assessment places the lawyer in the extraordinary position of having to assess the issue of sexual abuse, perhaps in the midst of an ethical dilemma, whether or not the client fits the ambiguous and undefined condition of "emotionally vulnerable". And yet the Supreme Court of Canada is clearly of the view that the issue of vulnerability is on the other side of the differential power equation, as fundamental to any fiduciary relationship. It is also said that it is only where there is a material discrepancy between the power of the fiduciary and the vulnerability of the client that the fiduciary relationship is recognised by the law. [7]

In accepting the retainer, the lawyer has pledged himself to act in his client's best interests, and to not allow any conflict between his fiduciary duty and his client's best interests. The lawyer's ethical and fiduciary obligation, not to exploit the professional relationship for his own interests, applies during the retainer and when the lawyer considers it terminated, freeing him to pursue a personal relationship with a client. We will come back to this point. If the fiduciary relationship is shown to exist between lawyer and client, then the proper legal analysis is one based on the full and fair consequences of a breach of that relationship. In essence, the lawyer-client relationship makes lawyers accountable to the profession[8] and must forbid taking personal advantage of the "unique vulnerability of a client, as a client."

The following jurisdictions have raised the issue of professional-client sexual relationship. First, the Nova Scotia Barristers' Society has enacted a rule in the context of a lawyer's fiduciary duty to his clients. Thus, Rule 7 (a) of the Nova Scotia Ethics Handbook reads as follows:

> (a) A lawyer has a duty to not act for a client when the interests of the client and the personal interests of the lawyer, or, to his knowledge, the interests of an associate of the lawyer, as defined by the Guiding Principles are in conflict. [9]

Such a rule is meant to deal specifically with the client's vulnerability in the lawyer-client relationship. The following commentary addresses the duties of fiduciary relationship and good faith:

> Rule 7(a) is intended to prohibit, *inter alia*, sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits vulnerability. The solicitor-client relationship frequently creates an imbalance of the lawyer where a client exhibits dependence upon the lawyer. A lawyer owes the utmost duty of good faith to the client. The relationship between a lawyer and a client is a fiduciary relationship of the very highest character and all dealings between a lawyer and a client that are beneficial to the lawyer will be closely scrutinized with the utmost strictness. Where lawyers exercise influence over clients to take unfair advantage of clients, discipline is appropriate. In all matters, a member is advised to keep clients' interests paramount in the course of the members' representation.[10]

The Nova Scotia Ethics Handbook is unique in Canada with respect to the lawyers' conduct; its drafting responds to the public needs in raising the boundary violation. As Rule 7(b) of the Nova Scotia Ethics Handbook, Rule 2.04 of the Law Society of the Upper Canada[11] does describe the relationship between lawyer and client as fiduciary in nature. That being said, certain duties do arise from the special lawyer-client relationship of trust and confidence. Among these are the duty of the lawyer to act with utmost good faith and loyalty, to hold confidential information from and about a client in

confidence, and mostly to avoid any conflict of interests. Once the lawyer is found to stand in the position of a fiduciary, the court will impose fiduciary obligations and duties upon that person in order to control and constrain the fiduciary's ability to act in a self-interested manner.[12] In recognising the lawyer-client relationship as fiduciary in nature, the Nova Scotia express rule states implicitly that the client, as a beneficiary, becomes then at the mercy of the unilateral power or discretion of the lawyer, so as to affect the client's legal or practical interests.

Second, the Law Society of British Columbia has also introduced a rule dealing with dishonourable conduct and discouraging an intimate relationship between a lawyer and a client. Rule 1 reads as follows:

> A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the intregrity of the legal profession or the administration of justice.

Such a rule raises the issue of conduct affecting the integrity and the competence of the lawyer. It ignores the issues respecting fiduciary duty, trust and confidence. However, the following commentary attempts to define the relationship between lawyer and client in restricting its use:

> A lawyer must not exploit the relationship between solicitor and client to the lawyer's own advantage. An intimate relationship between a lawyer and a client, such as a sexual one, may constitute exploitation.
>
> An intimate relationship with a client is also likely to affect the lawyer's professional judgement, which could cast doubt on a lawyer's ability to represent the client competently. A lawyer owes each client a duty to provide objective legal advice and perform services in a professional manner. The lawyer must not permit any personal interest to interfere with that objectivity.

Third, the Law Society of Upper Canada has recently introduced a rule attempting to address the significance of a sexual relationship to the lawyer and client relationship and the significance of a lawyer and client relationship to a sexual relationship. In September 1999, the Standing Committee struck a working group to review the professional conduct that arises in the context of a sexual relationship between a lawyer and a client. This working group prepared a discussion paper for the Standing Committee's review, which began in the fall of 2003. This working group recognised that there was a wide range of possible approaches to the issue, ranging from not expressly addressing the issue at all in a code of conduct, at one end of the spectrum, to promulgating an absolute prohibition, at the other. One intermediate option was to prohibit such relationships only where the client is vulnerable.

The Professional Regulation Committee's policy report was finally provided on 22 January 2004 Convocation for information. At such time, the Professional Regulation Committee has approved the policy basis and the text of new rules of professional conduct and commentary within the rules on conflicts of interest on the subject of lawyer's sexual relationship with clients. The recommendation was that there be an absolute prohibition on sexual relationships between lawyers and clients, with a limited exception for relationships that pre-date the lawyer and client relationship.

The proposed wording of the new rules and commentary, which are located under rule 2.04 on conflicts of interest, was followed by the policy report. Amendments are shown as follows.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definitions

2.04(1) In this Rule

a "conflict of interest" or a "conflicting interest" includes

(a) an interest that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client,
(b) an interest that a lawyer might be prompted to prefer to the interests of a client or prospective client, or
(c) a sexual relationship between a client between a lawyer handling the client's work.

"sexual relationship" means a relationship between a lawyer and a client or prospective client where

(a) there is sexual intercourse,
(b) a lawyer touches the client's or prospective client's sexual or other intimate parts for the purpose of arousing or satisfying the sexual desire of the lawyer, client, or prospective client, or
(c) a client or prospective client touches the lawyer's sexual or other intimate parts for the purpose of arousing or satisfying the sexual desire of the lawyer, client or prospective client.

Avoidance of Conflicts of Interests

(2) A lawyer shall not advise or represent more than one side of a dispute.

(3) A lawyer shall not act or continue to act in a matter where there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Sexual Relationship between Lawyer and Client

(3.1) Where there is a sexual relationship between a client and a lawyer handling the client's work, the lawyer shall not act or continue to act in a matter unless,

(a) the sexual relationship came before any lawyer and client relationship, and
(b) after disclosure adequate to make an informed decision, the client or prospective client consents.

(3.2) A lawyer shall not have a sexual relationship with a client or prospective client unless the sexual relationship came before any lawyer and client relationship.

Commentary

A sexual relationship combined with a lawyer and client relationship is always problematic, even when the sexual relationship is consensual, loving, and caring. The lawyer's devotion and emotional involvement with the client may interfere with the lawyer's fiduciary duties, independent professional judgment, ability to provide competent legal services, and responsibilities to the courts, the public, and other lawyers. The sexual relationship creates an interest that conflicts with and potentially undermines, a lawyer's duty to provide objective, disinterested

> advice. (It should be noted, however, that there is no conflict of interest if another lawyer of the firm who does have a sexual relationship with the client is the lawyer handling the client's work.) The existence of a sexual relationship may interfere with the lawyer's obligation to hold in strict confidence all information concerning the client's business and affairs, since the sexual relartionship obscures whether the information was acquired in the course of the professional relationship, which is a factor in determining whether the information is confidential and protected by lawyer and client privilege. Conversely, the existence of a lawyer and client relationship frequently creates circumstances where the lawyer may have considerable power over a client, who may be vulnerable and dependent, and these circumstances may be abused by the lawyer taking advantage of the client for the purposes of initiating or agreeing to a sexual relationship. In some circumstances, the power imbalance may undermine the client's ability to truly consent to a sexual relationship.
>
> The definition of conflict of interest in rule 2.04 (1) and rules 2.04 (3.1) and (3.2) recognize that a sexual relationship is a type of conflict of interest. These rules regulate this conflict of interest by differentiating two situations. The first situation is where the sexual relationship is in existence before the lawyer and client relationship begins. An example of the first situation would be a retainer where a lawyer is retained by his or her spouse with whom there is a consensual sexual relationship. The lawyer may act in this situation provided that the client provides an informed consent to the lawyer acting nothwithstanding the lawyer's conflict of interest.
>
> The second situation is where there is no pre-existing sexual relationship between the lawyer and his or her client. In the second situation, rule 2.04 (3.2) prohibits a lawyer from initiating or agreeing to a new sexual relationship with a client or prospective client. However, should a sexual relationship develop, then, pursuant to rule 2.04 (3.1), the lawyer handling the client's work cannot act or continue to act. It may be noted that where there is no pre-existing sexual relationship, a client cannot consent to a lawyer acting or continuing to act if a sexual relationship develops.
>
> Where the client is an organization, which includes corporations, partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships, the rules about sexual relationships between a client or prospective client apply as between the lawyer handling the client's work and any representative of the organization who instructs or could instruct the lawyer on behalf of the organization.[13]

The Canadian Law societies, such as the Law Society of Manitoba Code of Professional Conduct,[14] are the governance authorities. Their main focus is, indeed, on maintaining the integrity of the legal profession and acknowledging new issues when they arise. In 2000, the Canadian Bar Association's Ethics and Professional Issues Committee

undertook a review of its Code of Professional Conduct to respond further to new issues.[15] In promoting modernisation of the Canadian Bar Association's Code of Professional Conduct, the Standing Committee has recommended that the Canadian Bar Association's Code of Professional Conduct be revised to address the issue of "in what circumstances it is improper for a lawyer to have a sexual relationship with a client". At present the Code is silent on the subject; and furthermore it does not characterise the lawyer-client relationship as fiduciary. The lawyer-client sexual relationship is not adequately addressed by such existing guidelines[16] and, therefore, requires some regulatory response.[17]

In essence, the information reviewed by the writer in preparing this thesis includes Canadian and American case law, numerous codes of conduct, relevant legistation and literature, all of which will be summarised or referred to in the thesis. This background material allows the writer to have no objection to supporting Rule 2.04 introduced by the Law Society of Upper Canada because: it raises the most important issues, such as conflict of interest, sexual relationships, confidentiality, and fiduciary obligation, which will be studied in this thesis. Furthermore, this writer thinks that the above rule's curative measure will be effective in restraining professional conduct and, as a result, the public's confidence and trust in the profession may be heightened. This writer suggests limiting the statement of ideals of the legal profession to that which is necessary to further the client's interests.

The scope of this thesis is as follows. Discussion of the legal and ethical issues, concerning the use of a rule that prohibits the lawyer-client sexual relationship, requires a thorough understanding of the relevant case law in Canada and the United States with respect to appropriate conduct. Once such an analytical exercise has been completed, one should then ask the following questions: Should a rule prohibiting the lawyer-client sexual relationship be implemented? If a rule should be adopted, should it prohibit

sexual relations in all lawyer-client relationships? The use of a rule is necessary to protect the public in disciplining lawyers. As we will see, it appears that the lawyer-client sexual relationship is a serious breach of the fiduciary obligation. In 1989, the Supreme Court of Canada stated that the scope of fiduciary obligations in the lawyer-client relationship was not a settled issue and must be dealt with. The presumption that a lawyer will owe his client fiduciary obligations is rebuttable.[18] However, the Canadian Law Societies should reflect the seriousness of clients' complaints against lawyers with respect to sexual misconduct. Henceforth, regulatory bodies, tribunals and courts should be able to use an explicit rule addressing the issues of vulnerability and power imbalance in the context of a fiduciary duty, where the lawyer is found to have wrongly exercised or abused discretion or power over the client in order to take unfair advantage. This reflects the inequality inherent in the professional relationship in which the lawyer has considerable power over the client.[19]

This thesis will be limited to the legal and ethical issues raised by the use of a rule prohibiting any lawyer-client sexual relationship. I will draw a legal comparison for the current professional governing practices between lawyers and physicians in Canada and the United States. To appreciate the impact of such a rule, it is interesting to examine the basic understanding of the professional relationship and define the regulatory bodies' expectations concerning conduct. The theoretical discussion on this issue begins with clarification of the public debate over the use of such a rule. There are here three interrelated frameworks defining the fiduciary relationship between professionals and clients to be considered.

(a) Framework 1: This considers the basic understanding of the lawyer-client fiduciary relationship in reviewing the Canadian Bar Association Code of Professional Conduct. Although there is currently no rule explicitly prohibiting

sexual relationships between lawyer and client in most of the Canadian Law Societies, such as the Law Society of Manitoba Code of Professional Conduct, regulatory bodies, tribunals and courts have a wide discretion to discipline lawyers with respect to professional misconduct and conduct unbecoming. Regulatory bodies impose penalties on lawyers who engage in sexual misconduct toward their clients, ranging from a public reprimand to suspension or disbarment. These bodies utilise existing rules dealing particularly with integrity, sexual harassment, conflict of interests, breach of trust and confidentiality. Suffice it to say, these rules are not always adequate to deal with sexual relationships. The sexual harassment rule of the Law Society of Manitoba Code of Professional Conduct, for instance, differs from the Nova Scotia sexual exploitation rule. Even though incomplete in not having a "withdrawal for sex provision", the Nova Scotia rule is an express rule which furthers the current needs of clients' complaints against lawyers who engage in personal relationships with clients and abuse their fiduciary duty.

(b) Framework 2: This considers the basic understanding of the physician-patient fiduciary relationship in Canada, with respect to boundary violations and the ethical application of an express rule prohibiting any sexual relationship between physician and patient. Disciplinary bodies utilise a zero tolerance policy in stating that any sexual contact between physician and patient constitutes sexual violation. For the Manitoba College of Physicians and Surgeons, it is, for instance, not acceptable to terminate a physician-patient relationship with the intent of engaging in a personal relationship. As such, penalties on physicians are considered by the Disciplinary Committee on an individual case basis and will

range from a public reprimand to suspension from practice. This promotes an absolute blanket rule in all circumstances with no exceptions.

c) Framework 3: This considers the basic understanding of the lawyer-client fiduciary relationship in the United States with respect to enactment of a prohibitory rule in several states. Since the beginning of the 1990s, a scholarly debate on professional misconduct between lawyer and client dealing with sexual abuse has arisen in the United States. The American Bar Association and the American Law Societies Codes of Professional Conduct[20] in various jurisdictions have enacted an express rule; however, such a rule does not address the issues of harm and termination of the fiduciary relationship before concluding the matter with the intent of engaging in a personal relationship. This rule raises the issue that, in some cases, it would be abusive ever to have a sexual relationship with a former client, even after a waiting period. In these jurisdictions, disciplinary bodies impose more consistent penalties on lawyers who engage in sexual misconduct toward their clients, ranging from a public reprimand to suspensions or disbarment.

These three frameworks define the basic understanding of professional relationships with respect to sexual misconduct. They illuminate the ethical gap between physicians and lawyers, as well as the current law societies' situations in Canada and the United States. They are studied by scholars who focus on the impact of an express rule in an attempt to solve ethical concerns raised in the case law.

The trend in the law in both Canada and the United States is toward greater protection of the clients' interests against the lawyer's personal interests. Thus, the impact of this protection must be considered in the context of enacting a new rule that

responds to specific facts and complaints from clients who have been taken advantage of by lawyers, regardless of the client's consent.

Chapter II. The Lawyer-Client Sexual Relationship in Canada

(1) Introduction

Based on case law, the admission or proof of alleged professional misconduct is not the same as a plea or finding of guilt on a criminal charge in the provincial court, such as the Adams case.[21] Rather, where lawyers have been found guilty of professional misconduct, the sanction is based on administrative principles, after certain evidentiary rules have been applied. A professional misconduct hearing considers the effect of the lawyer's conduct on both the client and the profession[22] and all favourable and unfavourable factors. Both administrative boards and Canadian law courts impose sanctions on lawyers for conduct regarded as disgraceful, dishonourable or unbecoming, ranging from a reprimand to suspension or disbarment. The following narrative stories will set the stage in understanding better the nature of the relationship between lawyer and client and the boundary violations.

(2) Narratives: Professional Misconduct and Conduct Unbecoming

The following five stories are, on the spectrum of seriousness of sexual and professional misconduct, extreme cases of professional misconduct or conduct unbecoming. Moreover, they illustrate, first, the use of the breach of confidence, dependence and trust that exists in the lawyer-client relationship and which requires a lawyer to be above reproach at all times. Secondly, they demonstrate the limited use of the existing ethical rules when dealing with sexual relations between lawyer and client. Thirdly, they are used to exemplify the need to insert a rule proscribing behabiour between lawyer and client when engaging in sexual relations.

(a) The *Davis* Case[23]

A Russian woman filed a declaration with the Immigration and Refugee Board of Canada seeking "convention refugee" status for herself and her three children. In March 1999, she moved with her three children from her homeland of Russia to Winnipeg. In July 1999 she attended at the Davis office to provide translation services for a Russian client.

Shortly after, the Russian woman contacted Davis and asked whether he was capable of representing her with respect to her refugee claim. Davis suggested meeting this new client over lunch at the Fort Garry Hotel in Winnipeg. At the restaurant, the Russian woman disclosed that she was not able to return to Russia in light of the many problems that she had experienced there. She then brought to his attention most of her intimate problems in stating that she had suffered sexual abuse by her former employer in Russia and that her daughter had been kidnapped for a period of time. During the same conversation, she confirmed that she was experiencing nightmares and feeling physically sick about the prospect of deportation to Russia. Davis decided to represent her with respect to the Immigration and Refugee Board matter. She then consulted him for a period of approximately six months commencing in July 1999. On 21 February 2001, a citation was issued against Davis alleging that he was guilty of conduct unbecoming a barrister or solicitor, and of professional misconduct. The said matter was then heard on 23 May 2001 before the Law Society's Disciplinary Committee.

The facts supporting the citation were as follows. Between July 1999 and December 2000 Davis sexually harassed the Russian woman, while she was his client, by making comments and overtures of a sexual nature to her. Notwithstanding his female client's resistance to his overtures, the lawyer forced himself on her by kissing her, or attempting to do so, on several occasions. Davis also attended at her private

home and presented her with a gift in front of her family which she refused to accept. Later on, Davis admitted that he had sexually harassed his client.

In rendering its decision, the Law Society's Disciplinary Committee determined that Davis sexually harassed his female client in circumstances where he could reasonably expect that his conduct would cause her discomfort, given that she explicitly and consistently resisted his advances. The Disciplinary Committee stated that sexual harassment was a serious type of professional misconduct pursuant to Chapter 20 of the Manitoba Code, in that it involved a breach of trust that fundamentally undermined the lawyer-client relationship. It also stated that such a breach could be as serious, or more serious, as one resulting from the misappropriation of trust funds. Further, the Disciplinary Committee stated that the seriousness of Davis' conduct was buttressed by the vulnerability of the client. During the hearing, it was clear that Davis was aware that her claim for refugee status was based, in part, on the client's allegations of sexual harassment and sexual assault suffered at the hands of the employer in Russia, prior to fleeing to Canada.

With respect to assessing the penalty, the Disciplinary Committee cited relevant case law, which in all but one instance had led to suspension or disbarment. The one exception was *Law Society of Upper Canada* v. *Ramsey*[24] where a lawyer was found guilty of professional misconduct. Ramsey was publicly reprimanded for offering to waive his fees for preparing a codicil to a client's will if she would return to his office without wearing a brassiere and give him a complete viewing of her breasts. The Convocation referred to the sexual harassment rule to state that the profession must be aware that inappropriate sexual comments in a professional context would be treated seriously by the Society. The Convocation also stated that discipline in the *Ramsey* case was for a single incident involving a sexually provocative remark by the lawyer to his client of many years. That case could not compare to the seriousness of the lawyer's

course of conduct in Davis' case, involving several incidents spanning the course of six months.

In conclusion, the Disciplinary Committee found Davis guilty of professional misconduct and found further that a suspension of forty-five days was appropriate. The said suspension was based on an agreed statement of facts in which Davis admitted to harassing the client by making comments and overtures of a sexual nature, kissing her and on one occasion offering a gift of lingerie. The Disciplinary Committee took other factors into consideration, such as Davis' genuine remorse, his history of service in the legal and volunteer communities, and his previous good character.

Contrary to the Davis case, the lawyer in *Law Society of Upper Canada* v. *Coccimiglio*[25] was found guilty of professional misconduct on the basis of sexual propositioning of the client, and not on the basis of a sexual assault. The Convocation rejected a recommendation that a lawyer be suspended for three months and imposed as a penalty a one-year suspension, where a lawyer in two separate matrimonial cases propositioned one client to have sexual relations with him and sexually assaulted another client while propositioning her. The Convocation stated the following:

> In our view it is an important message, to both the profession and the public that there is a bond of trust between a client and his or her Solicitor; that there is a necessity for solicitors, at all times, to be above reproach in their conduct with their clients; and for a solicitor to use his position of power and trust to satisfy himself or attempt to satisfy himself sexually with a client, even to the extent of asking and accepting a no response....
>
> [I]t is unacceptable because of the vulnerability of the client, especially a female client in these circumstances, to feeling that there may not be an option in terms of consenting or not, given the particular situation that a client finds herself in with the solicitor client relationship and the need to rely on the solicitor's services to reach an end that the client cannot otherwise reach without the solicitor.[26]

The Convocation found that the lawyer was in a position to dominate the client; therefore, it could not be acceptable to allow a lawyer to breach the professional-client relationship in abusing his power, and the client's vulnerability and dependency.

Even though this particular case falls into the sexual harassment category, it is to be noted that it had a major impact on disciplinary law, mostly, with physicians engaging in sexual relations with patients. The existing rule regarding sexual harassment, as defined in the Law Society of Manitoba Code of Professional Conduct, applies to conduct where it is contended that the conduct is not consensual. However, the validity of a client's consent to sexual relations in the lawyer-client relationship is an issue which will be addressed in this thesis.

(b) The *Adams* Case[27]

A sixteen year old young female, detained in youth detention, and her boyfriend who was also in prison, retained a male lawyer, Adams. The lawyer made a successful bail application for her, so he knew her age. He was then aware that she was a prostitute. Adams also represented her boyfriend, whose release she strongly desired. He was attracted to her, although more than twice her age and married but experiencing problems in that relationship. Adams suggested a date on 10 September 1996 and she agreed to meet with him. Whether there was to be payment or not was said to be unclear on the evidence introduced in the subsequent court hearing. Meanwhile, the sixteen year old female approached the police to inform them about the date and, therefore, the police obtained an Authorization to Intercept Communications. To help the police in gathering evidence against Adams, she was then asked to wear a "wiretop body back" when he picked her up at her usual corner for the requested date.

On 10 September 1996, she prepared herself to be picked up by Adams. The wire-tap transcript opened with her ordering a chocolate milk at the convenience store before he picked her up. Then they proceeded to a hotel room, during which time transmission difficulties prevented all the conversation between them from being recorded. In the monitored conversation, Adams telephoned the courthouse advising that he was out of town and would be late for court. During this conversation, she asked Adams whether he had sex with a client before, to which he replied that he had not. He further admitted having sex with a prostitute in Europe some years earlier. While she was in the bathroom, the police entered the hotel room, during which time Adams was doing up his pants.

As a consequence, the crown elected to proceed with an indictable offence. Adams was, therefore, charged with sexual exploitation pursuant to s. 153(1)(b) of the *Criminal Code*[28] and pleaded guilty to this one count. He entered his plea and received a fifteen month conditional sentence on 5 September 1997 in Edmonton Provincial Court. The conviction of a lawyer for any indictable offence and the involvement of a sixteen year old female were seriously viewed during the professional hearing at the Law Society of Alberta. Its Disciplinary Committee determined that Adams had breached the trust between a lawyer and a client and furthermore viewed such breach as equal to a breach of trust involved in converting trust funds. In other words, the Disciplinary Committee stated that "perhaps that breach of trust involved in a proposed sexual relationship was even more serious than converting trust funds, for money can be restored but honour cannot." For the majority of the members on the Disciplinary Committee, the fact that the sixteen year old female was a prostitute was, however, irrelevant because she was still a client. The Disciplinary Committee was of the view that "a client is a client".

The decision discussed, at length, that youth prostitution was inherently illegal and that society had always denounced it and prohibited it. Adams was, however, remorseful of such conduct. The Disciplinary Committee took into consideration that while Adams was an articling student-at-law, he had pleaded guilty to a charge of communicating with a person for the purpose of obtaining sexual services of a prostitute, for which he had received an absolute discharge. Finally, the Disciplinary Committee assessed the penalty and made an order for disbarment. Thus, Adams appealed the decision of the Benchers of the Law Society of Alberta. The Court of Appeal confirmed the Order of the Benchers disbarring Adams.

(c) The *Gower* Case[29]

In 10 April 1984, a female lawyer, Gower, was called to the Ontario Bar. She then practiced as an employee of Angela Costigan in Toronto until August 1990, when she became a solo practitioner. In 1987, Gower, who was thirty years of age first met Krueger, a twenty-nine year old real estate agent, at a health club and began dating. Until she met Krueger in 1987, Gower had never had a serious and intimate relationship with a male. He was "street smart" and had been a professional boxer, a "hustler". Several months later, in December 1987, Krueger moved into Gower's apartment. Gower assumed responsibilities for his living and business expenses. In March 1988, Krueger moved out of the apartment, although he continued to socialise with Gower, who hoped to restore their former relationship. It continued even though Gower discovered, in August 1988, that he had returned to his former girlfriend, Michelle McDonough. Although their co-habitation was brief, they continued both an intimate and social relationship for the next three and one half years. While Krueger was having

a continuing relationship with Gower daily on a day time basis, he was living with Michelle McDonough at night.

Based on the foregoing, their relationship had serious consequences for Gower, which ultimately led to the professional misconduct in which she engaged during her law practice. Indeed, there were three incidents of professional misconduct, each concerning a real estate transaction, in which Krueger was directly involved. The fourth incident concerned a personal injury claim and did not involve Krueger directly. All of these transactions were structured so as to result in financial benefits to Krueger. In two of the transactions, Gower facilitated this by making false representations which permitted Krueger to obtain inflated mortgage financing. In the third transaction, Gower represented both the vendor, the elderly man of doubtful mental competence, and the purchaser, who was Krueger. The professional misconduct arising from these three real estate transactions occurred between September 1988 and June 1989. The fourth incident, with respect to a personal injury claim filed outside the limitation period, did not involve Krueger directly and occurred over an eighteen month period subsequent to the termination of their relationship.

During the disciplinary hearing, the professional misconduct was admitted by Gower and found to have been established. The hearing proceeded on the basis of an agreed statement of fact, psychiatric reports and the *viva voce* evidence of Gower. The sole purpose of the hearing was to determine the appropriate penalty for the professional misconduct. In its decision, the Disciplinary Committee concluded that Gower's judgment was so clouded during her practice, while having a lawyer-client relationship with Krueger, that she did virtually anything he asked her to do, in the misguided belief that he might return to her. This statement was supported by psychiatric reports. As of 30 September 1991, Gower completed the winding down of her practice. The Disciplinary Committee finally concluded that, at the time of their

meeting, Gower was inexperienced and naïve. It further noted that she had received no financial benefit from the real estate transactions. It was satisfied that her professional misconduct was a result of the influence of Krueger and as a result of her mental and emotional conditions. The Disciplinary Committee concluded that the end of justice was fully served by permitting Gower to resign and so recommended to Convocation.

In assessing the penalty, Convocation had regard to the seriousness of the conduct. This was measured against the purpose of the disciplinary process, which was not intended to exact retribution but principally to protect the public from further harm. Convocation stated the following:

> There can be little doubt that the professional misconduct in this case is serious. Although this is not a case of misappropriation, it is arguable that lawyers who engage in dishonest and deceptive conduct should prima facie be subject to the Law Society's most severe penalty, even where the risk of recurrence is remote. Such a penalty would send a clear message to the public and to the profession that such conduct is not to be tolerated in a profession which is obliged to maintain the highest ethical standards. If there should be a presumption of disbarment in cases of flagrant dishonesty and deception, there should be the opportunity to displace the presumption with appropriate evidence. Factors which have frequently been weighed in assessing the seriousness of a solicitor's misconduct include the extent of any injury, the solicitor's blameworthiness, and penalties which have been imposed previously for similar misconduct.[30]

Convocation concluded that the objects of the disciplinary process were met by a suspension and a continuing suspension thereafter. Therefore, Gower was suspended for one year from the practice of law.

(d) The *MacDonald* Case[31]

On or about June 1988, MacDonald was retained by the female complainant with respect to an employment matter, after she had been referred to him by her psychiatrist. Since 1982, the complainant was treated for severe reactive depression by the

psychiatrist, mainly precipitated by a stressful and long-term relationship with a colleague at her workplace. Her medical treatment included a prescription for Nardil, an anti-depressant, which had improved her mental state. In 1988, the psychiatrist advised MacDonald of the complainant's situation. In February of 1989, the complainant provided MacDonald with a written history of her problems with her employer which included a description of difficulties, such as her 1982 nervous breakdown, her feelings of betrayal by men and her low self-esteem.

On 1 March 1989, and at MacDonald's request, the complainant met MacDonald at 7:30 p.m. at a restaurant in Halifax, where both legal and non-legal matters were discussed. At 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 then concerned about the legal fees for MacDonald's lengthy telephone calls, and was told by MacDonald, "Don't worry about it ... [There are some things] you have to do." On 2 April 1989, 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, MacDonald fell asleep, awaking at 1:00 a.m., at which point he called the complainant. MacDonald stated 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 sexual contact was a brief vision during the act and her requesting that he discontinue. Allegations by the complainant that MacDonald exerted force against her, that she was not a willing participant, were not accepted by the Sub-Committee. In the morning, the complainant was surprised that 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 hospitalised on 4

April 1989. On 12 April 1990, the complainant filed a letter of complaint with the Nova Scotia Barristers' Society.

In its ruling, the Sub-Committee stated that MacDonald was aware of his client's emotional vulnerability and nevertheless pursued her sexually. He was therefore reprimanded by the Nova Scotia Barristers' Society for conduct unbecoming a member. The Subcommittee concluded that, since MacDonald knew that his client was emotionally vulnerable, he had an obligation to refrain from sexual relations with his client.

In short, the Sub-Committee's assessment placed an emphasis on the client's peculiar vulnerability, not the lawyer's professional responsibility. This disciplinary decision leaves many questions unanswered.[32] For instance, had the client not been uniquely fragile, would the lawyer's sexual pursuit of that client been any less an ethical breach of his duty? If by the 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 conduct of the lawyer? Is it not the traditional nature of any professional investigation? The rules surrounding business related conflicts reflect, as the primary concern of the legal profession, the protection of the client's interests. How is a breach of a more personal nature different from any other professional misconduct? All of these questions concerning the issue of vulnerability call for a clear rule, consistent with existing rules governing the fiduciary duty of lawyers in other contexts.

(e) The *Pavey* Case[33]

On or about November 1996, a young drug addicted woman ("the young woman") retained a male lawyer, Pavey, with respect to a child protection issue and a

custody issue relating to her children. During this time, she informed Pavey that she used crack cocaine. She also told him that she had two young children from two different fathers: Morgan was born on 14 February 1990 and Kaitlin on 20 December 1994. A few years later, Kaleb was born on 27 January 1998. Pavey represented the young woman in seven different proceedings on three separate legal aid certificates, over a twenty-nine month period, attending court hearings on her behalf on approximately thirty different occasions. Indeed, the Nova Scotia Department of Community Services ("NSDCS") was involved throughout a twenty-nine month period, in respect to child protection, custody and access issues because she still had serious drug addiction problems. It was not until 3 August 1999 that the young woman wrote the complaint to the Law Society against Pavey.

The facts were as follows. At the beginning of the representation, the young woman alleged that, in July 1997, Pavey asked his client if she would be interested in using drugs with him. She made further allegations. First, the night before they used the crack cocaine and had sexual relations in Pavey's office, they went in his mini-van to purchase the illicit drug. She alleged that he provided funds and assisted her in the purchase of a quantity of the crack cocaine and subsequently used crack cocaine with her. The day after, she claimed that they met early at his mediation office and used crack cocaine. During this time, the young woman also claimed that Pavey asked her to take off her clothes, which she did, and later, he took off his own clothes. She further alleged that Pavey asked her to perform oral sex on him, which she accepted on several occasions during the same day. She also claimed that they smoked the crack cocaine, talked and drank alcohol, and then had sexual intercourse. When they left the building at 10:30 p.m., the young woman alleged that Pavey drove her home in his vehicle. Throughout the twenty-nine months, she stated that she had many random urine tests conducted by the NSDCS, in respect of her drug and alcohol use, which could have an

adverse effect on her chances of obtaining custody of her children. On 24 June 1997, the young woman had a court appearance. On 9 July 1997 there was a court order granting custody of her oldest child Morgan to the natural father, which she consented to. Her last access visit with Morgan was arranged on 10 July 1997, for 12 July 1997. The young woman did not show up for the access visit on 12 July 1997. On 12 April 1999 Pavey attended at the court house for a scheduled hearing involving Kaitlin and Kaleb. He was then approached by the solicitor for the NSDCS and informed about these allegations against him, made by the young woman. He withdrew as counsel and ceased acting on 19 April 1999.

During the disciplinary hearing, Pavey stated that the young woman came forth with these allegations of using crack cocaine and having sexual relations, to delay the NSDCS proceeding with the apprehension of Kaitlin and Kaleb. Pavey testified, however, that he had a drug problem in relation to crack cocaine starting on or about September 1995. At that time he was seeking therapy from a counsellor. During the court hearing, it was suspected that Pavey was suffering from a dissociative disorder commonly called a multiple personality disorder. The counsellor made a referral to a psychiatrist on or about February 1996. Pavey agreed to meet with the psychiatrist and continued to see him until June 1998. He further testified that his last involvement with crack cocaine was in January or February 1998. Pavey also testified that when he first became involved with crack cocaine in 1995, he was going through very distinct dissociate states and would end up in places which were unusual for him to be in, such as crack houses. Furthermore, he testified that he suffered memory lapses which would change over time.

The Disciplinary Committee accepted the young woman's evidence with respect to the complaint and rejected Pavey's theory that she purposely misled the panel in making up her complaint against him. Indeed, the Disciplinary Committee was of the

opinion that sexual relations occurred between them in July 1997. As a result, the Disciplinary Committee found Pavey guilty of professional misconduct for engaging in sexual relations with the young woman, providing the funds and assisting her in the purchase of a quantity of crack cocaine, and using crack cocaine with her. Before turning to consideration of the appropriate penalty, the Disciplinary Committee reviewed provisions of its *Handbook on Legal Ethics and Professional Responsibilities*,[34] such as integrity and conflict of interest, and considered several aggravating and mitigating factors.

With respect to the aggravating factors, the Disciplinary Committee found, first, that the young woman was a vulnerable person and Pavey took advantage of that situation. She was suffering from an addiction to cocaine and needed Pavey's representation to obtain access and custody to her children. Furthermore, the Disciplinary Committee stated that Pavey took advantage of her by having her go with him to purchase the crack cocaine. It was stated that the young woman was Pavey's client, and yet he had her engage in the illegal conduct of purchasing a quantity of crack cocaine. Furthermore, Pavey continued to take advantage of his client by using the cocaine and having sex with her. It was also discussed that Pavey had substantial experience in the practice of family law and must have known that the young woman was undergoing random urine tests to determine whether she was clean from drugs, in order to have her children returned to her. The Disciplinary Committee stated that Pavey had to know, or ought to have known, the actual or potential injury that could be caused to the young woman and her chance of getting back her children by entering into such activity. According to the Disciplinary Committee, all of that was reprehensible conduct in a lawyer-client relationship. Another aggravating factor, introduced during the hearing, was that Pavey had a pattern of using crack cocaine, both before and after July 1997. Thus, the use of crack cocaine with the client was not the first or last time he used

crack cocaine. Pavey's conduct in purchasing and using crack cocaine with his client and subsequently having sex with her illustrated a lack of respect by him for the administration of justice. The Disciplinary Committee stated that he failed to uphold justice and discharge with integrity his duty owed to the young woman, the profession and the public.

With respect to mitigating factors, the Disciplinary Committee found that Pavey was forty-seven years of age and an experienced lawyer in family law. He also had a long history of involvement in community-based activities. Pavey did not have any prior disciplinary record with the La w Society. In terms of Pavey's character or reputation as a lawyer, twelve character reference letters were produced to the Disciplinary Committee. Prior to this complaint, the Discipinary Committee accepted that Pavey was a respected lawyer in the profession. The mitigating factor which had the most influential impact on the decision related to the fact that Pavey had the mental health disorder that he suffered at the time of the incident with his female client. He was treated initially by a counsellor and then by a psychiatrist, who became an expert witness in the disciplinary proceedings.

During the hearing, and with respect to his dissociative identity disorder, Pavey testified that he first became involved with crack cocaine in 1995, when he was going through distinct dissociate states. Initially Pavey was not aware of how he ended up in those crack houses, or why he was there. He suffered memory lapses. As a consequence, the Disciplinary Committee accepted that Pavey suffered from the mental health disorder during the 1997 incident which played a part in his conduct with his client. It stated that his mental health diagnosis did not excuse Pavey from the consequence of his reprehensible conduct. In assessing the penalty, the committee imposed an eighteen month suspension and reinstatement with conditions to protect the public against such conduct.

f) Conclusion

Under ethical rules, a lawyer is required to be a zealous advocate for his client. The first three narrative stories represent only a few cases decided in different jurisdictions where a rule prohibiting lawyer-client sexual relations is not enacted, *i.e.*, Manitoba, Alberta and Ontario, respectively.[35] Unlike Manitoba and Alberta, the Nova Scotia Barristers' Society takes a different ethical stand in terms of sexual relationships between lawyer and client. In that sense, the last two narrative stories illustrate that the lawyer's misconduct causes foreseeable harm, whether or not the client's consent is given in engaging in sexual relations, and that the lawyer abuses his position of trust in taking advantage of the vulnerability of the client.

Essentially, the foregoing case law reviews how different jurisdictions deal with the problem of lawyer-client relationships without guidance of an express rule. In that sense, the regulatory tribunals have been forced to apply existing rules to each individual case. These rules do not specifically address the prohibition on sexual relationships between lawyers and clients. Such general application in each case creates a disparity in disciplinary penalties for similar professional misconduct. In that sense, regulatory tribunals may lack consistency in sanctioning lawyers for engaging in sexual relationships with clients during the lawyer's representation. Indeed, we have seen that sanctions vary from reprimands to suspensions and disbarments. It does not seem to matter whether the lawyer pays for the sexual act or whether the sexual relations are consensual. Some tribunals may appear to consider consent as a factor to a lighter sanction. However, too often tribunals' reasons place an emphasis on the client's peculiar vulnerability, not the lawyer's professional responsibility. In doing so, they ignore the primary concern of the legal profession, protection of the client's interests. The same question remains unanswered: how is a breach of a personal

nature, such as sexual relationships between lawyers and clients, different from any other professional misconduct?

(3) Basic Understanding of the Lawyer-Client Relationship

In professional ethics, there is no federal jurisdiction. We are, therefore, left to contend with various provincial regimes or codes highlighting themes and directions dealing with rules intrinsic to the lawyer's role. They are regarded as binding upon his or her professional conduct during and after the retainer. Rules are backed by the courts to guide professional ethics.[36] The provincial codes, such as the statute, the rules and the practice directions, are important regulations of the respective law societies; they do urge lawyers to good (albeit minimum) standards of professional conduct. The law societies allude in the codes themselves to forms of conduct, described as "professional misconduct", "conduct unbecoming" and the like, which by legislation carry sanctions.

The Manitoba Code,[37] like any other province's, defines professional relationships between lawyers and clients in establishing standards. Rules are, indeed, binding on the legal profession if properly made under the authority of the Law Society's statute. Rules are considered important statements that express the collective view of the legal profession as to the appropriate standards to which lawyers should adhere in their practice to protect clients' interests. Tribunals discipline lawyers for acting in conflict of interest with their clients. Courts are sometimes asked to rule on conflict issues.

(a) Illustration of Existing Rules: The Manitoba Code

With few exceptions, the Manitoba Code largely mirrors the Canadian Bar Association Code of Professional Conduct[38] approach to the legal profession. The Canadian Bar Association, which is the only unifying presence, has passed codes of professional conduct in 1920, 1974 and 1987, and a new one is promised for 2004. In 1920, and over considerable opposition, the Canadian Bar Association first approved a set of canons of legal ethics, based in part on the American Bar Association Models.[39] As its 1969 meeting, the Canadian Bar Association created a special committee to review the 1920 Canons and recommend changes. As a result, the 1974 code was adopted. This code has been used as a basis for the rules of all law societies in Canada and, to a lesser extent, for the rules of the Barreau du Quebec.[40] All codes are instructive in nature, in dealing with the rules of lawyers' practice;[41] they do not have the force of law until they are formally adopted by a provincial or territorial law society. Several law societies have adopted either the 1974 code or the 1987 new version without any amendments; others have added to or amended the provisions of the 1974 code significantly. Yet other law societies have drafted their own rules.

Commentaries and notes appended to the codes are not only illustrative. This means that breach of the rules or standards will form the basis for disciplinary action against lawyers; as well, breach of one of the commentaries will support a finding of professional misconduct. Thus, in *Re Klein and Dvorak and Law Society of Upper Canada*,[42] Callaghan J. stated:

> It is also clear that the practising members of the bar feel bound, both by the Commentaries and the Rules. Both can form the basis for an exercise by the Law Society of its disciplinary power. In my view, there is no basis for differentiating between the Rules and the Commentaries for the purpose of these applications.

Even though rules in a Code of Ethics are not authoritative for courts, as stated by *MacDonald Estate* v. *Martin*,[43] they provide the hope that lawyers will observe them, so as to inspire confidence and trust in their client.[44] In that regard, in 1976 the Alberta Court of Appeal stated:

> A great deal of confidence has been reposed in the legal profession by the public and by the legislature; they are entrusted with large sums of money and with large matters where integrity is most necessary. It is imperative that the reputation of the profession be maintained ....[45]

Professional ethics impose on lawyers the obligations and duties to perform in an adequate manner to maintain the reputation of the profession, and to serve clients in a conscientious, diligent, efficient and trustworthy manner. Furthermore, the legal profession is an integral part of the administration of justice. Rules not only define the lawyers' obligations and duties, but also are used to discipline lawyers, if necessary. As demonstrated above, lawyers can be found to have acted in a manner deserving sanction even where their conduct does not relate to a specific breach of the written code. In 1989, the Nova Scotia trial court stated:

> Implicit in the concept of profession is the existence of standards which are the benchmarks for the practice of a profession. The standards may be written or unwritten. They may or may not be prescribed by the governing statute or regulations.[46]

Even though there is no explicit rule dealing with sexual relationships between lawyers and clients, the Law Society of Manitoba, for instance, makes use of rules related to disciplining lawyers when found guilty of professional misconduct. The lawyer's integrity falls under the general guidelines of Rule 1 of the Manitoba Code which states:

> The lawyer must discharge with integrity all duties owed to clients, the court, other members of the profession and the public.[47]

Overall, the great trust of the lawyer in the lawyer-client relationship is to be performed with integrity and within the bounds of the law. If personal integrity is lacking, the lawyer's usefulness to the client will be destroyed regardless of how competent the lawyer may be.[48] When a boundary violation occurs, the reverence for privilege, benefits and rights which connect the lawyer to the client is aborted. Once clients become aware of how they are wronged in the professional-client relationship, they have anger toward lawyers. The lawyer's conduct may then be subject to disciplinary action.[49]

Under such a heading, a lawyer may be disciplined for dishonourable or questionable conduct that impairs his ability to carry out properly his professional obligations and duties.[50] The terms and conditions of the trust will vary from client to client and from matter to matter. The essential element of trust within the lawyer-client relationship is not diminished, however, by these variations.[51] The authority to deal with professional misconduct is traditionally vested in the Law Society, to which all lawyers must belong. The purpose of the Law Society's disciplinary proceeding in an administrative hearing is thus not to punish offenders and exact retribution, as in a criminal hearing, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.[52] In that regard, there is clear expectation from the Law Society that lawyers understand that a conduct is wrong even where it is not expressly covered by written rules of conduct. Regarding disciplinary action, the Manitoba Code, in particular, states:

> Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the lawyer, the integrity of the legal profession and the administration of justice as a whole. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, a governing body may be justified in taking disciplinary action.[53]

Illustrations of professional conduct that may infringe Rule 1 and other provisions include, but are not limited to, taking improper advantage of the youth, inexperience, lack of education or sophistication or of unbusinesslike habits. Such a rule does not address the conduct where a lawyer takes improper advantage of the client, which is heightened where the latter is vulnerable in a way that affects the client's own ability to provide instructions to the lawyer or be clear about his own expectations.

Rule 2 in the Manitoba Code relates to the obligation under the general law of negligence:

> (a) The lawyer owes the client a duty to be competent to perform any legal services undertaken on the client's behalf.
> (b) The lawyer should serve the client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.[54]

Such a general rule implies an objective test of competence that any lawyer must meet to deal adequately with any legal matters undertaken on behalf of the client's interests. In stating "the lawyer should serve the client" in an ethical manner to provide a quality of service, the rule is then framed to exhort lawyers to strive for exemplary standards of practice. In the event that the lawyer engages in sexual relations with his client, it is arguable that the dual roles of "lover" and "lawyer" in a professional-client relationship are most likely to affect the performance of providing competent services to the client. In other words, the dual roles of "lover" and "lawyer" are inherently conflicting; the emotional involvement is fostered by a sexual relationship between a lawyer and client. The key point here is that this situation has the potential to undercut the objective detachment demanded for an adequate representation, by lawyers responding to the actual client's interests.

Rule 4 in the Manitoba Code deals with confidential information and provides:

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.
>
> The fiduciary relationship between lawyer and client forbids the lawyer to use any confidential information covered by the ethical rule for the benefit of the lawyer or a third person, or to the disadvantage of the client.[55]

Lawyers are expected to keep their clients' confidences. That is perhaps the most fundamental precept of lawyers' ethics as a standard of rules. There is also a personal dimension to confidentiality: clients trust their lawyers, and lawyers ought to deserve that trust. Any discussion of the duty of confidentiality that fails to acknowledge the core values of loyalty and trustworthiness is most rightly accused of lacking heart.

Rule 4 of the Manitoba Code further refers to *Szarfer* v. *Chodos*,[56] where Chodos was found to have breached the duty of confidentiality by using confidential information to the disadvantage of his client's interests. Associate Chief Justice Callaghan stated:

> In engaging in sexual intercourse with the plaintiff's wife, the defendant was acting in his own interest and to his personal benefit. I cannot help but conclude that his actions were also to the detriment of his client's interest. Upon discovery of the affair, the client's trust in the solicitor was destroyed. Such conduct which vitiates trust, the essential element of a solicitor-client relationship, and results in physical injury to the client is a breach of the conflict-of-interest rule.[57]

This judgment expanded the notion of one's personal interest as it may conflict with one's fiduciary[58] obligations. The concept of fiduciary relationships was first used by equity in relation to trustees, and later expanded to include the actions of any individual who occupies a position of trust or is entrusted by another for a particular purpose. The

fiduciary and the trust relationship entail similar duties, obligations and liabilities.[59] Furthermore, the fiduciary relationship involves the beneficiary's (*i.e.*, client) reposing trust and confidence in the fiduciary (*i.e.*, lawyer) to act in the former best interests, with the utmost good faith, integrity, candour and fidelity. The fiduciary is bound, meanwhile, to act selflessly for the benefit of the beneficiary and, mostly, must not take unfair advantage of the beneficiary so as to prejudice the latter's interests.[60]

Rule 4 of the Manitoba Code also demonstrates that lawyers are expected to be above reproach both in their professional and personal lives. In essence, professional discipline will be imposed for irresponsible and improper personal conduct.[61] To make it safe for clients, lawyers have to establish a demarcated and professional relationship that is predictable in accordance with the code. The lawyer's misuse of his client's confidential information may render him liable to account.[62] The lawyer owes a duty of secrecy to every client without exception. Such a duty will survive the predictable lawyer-client relationship. The more vulnerable the client, the heavier will be the fiduciary obligation of the lawyer to not use confidential information. The more vulnerable the lawyer, the heavier his fiduciary obligation will be to avoid misusing his client's confidential information. In the event that the lawyer allows a sexual relationship with his client, he may then put himself at risk to violate one of the most basic obligations, which is not to use intentionally the trust of the client against his own interests. This brings up Rule 6 of the Manitoba Code, which deals with the conflict of interest between lawyer and client:

> The lawyer shall not act for the client where the lawyer's duty to the client and the interests of the lawyer or an associate are in conflict.[63]

Rule 6 is here framed in prohibitive language. A lawyer "shall not" act for the client where there is a conflict of interests. The lawyer must avoid any conflict that puts the client at risk, harming the client or representing a boundary violation, which can potentially harm the client's interest. A conflict of interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to, a client. The lawyer's judgment and objectivity as counsel can be blunted by his personal relationship with the client.[64] In such a case, the lawyer may put his own personal interest before his client's interest. In other words, it is improper for a lawyer to represent a client when the lawyer's own interests are put first and therefore prejudice the client's interests. Such a rule fails to address the issue with respect to having sexual relations between lawyer and client, even though this may create risks to adequate representation and conflict of interest. One of the hallmarks of the profession is the lawyer's fiduciary obligation to exercise impartial and professional judgment solely on behalf of the client. Engaging in sexual relationships with the client may hinder the professional's ability to meet this obligation.

Rule 12 of the Manitoba Code refers to withdrawal and states:

> The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.[65]

In some circumstances relating to lawyer-client sexual relations, the lawyer will be under a duty to withdraw where it becomes clear that the lawyer's continued employment will lead to a breach of the rule relating to conflict of interest. Such a rule does not make reference to the situation where a lawyer terminates the lawyer-client relationship with the intent of engaging in a sexual relationship nor does it deal with the lawyer's obligation not to exploit the lawyer-client relationship for personal advantage.

Finally, Rule 20 of the Manitoba Code proscribes sexual harassment of clients in a professional context. This rule was referred to in the *Davis* case where the Disciplinary Committee was of the view that the seriousness of Davis' conduct was buttressed by the vulnerability of the client. Rule 20 states:

> The lawyer shall not, in a professional context, harass, either sexually or otherwise, other lawyers, employees, clients or other persons.
>
> 3. Sexual harassment means one or 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.[66]
>
> ...

Rule 20 is framed in prohibitive language, that the lawyer "shall not" harass either sexually or otherwise. It does not, however, make any reference to sexual conduct between lawyer and client, nor does it address the issues of harm and power imbalance. Such a rule is now used to discipline lawyers engaging in sexual relations with clients.[67] Rule 20 of the Manitoba Code also includes a non-exhaustive list:

> 4. Types of behaviour that constitute sexual harassment may include, but are not limited:
>
> (a) sexist jokes causing embarrassment or offense, told or carried out after the joker has been advised that they are embarrassing or offensive, or that are by their nature clearly embarrassing or offensive;
> (b) leering;
> (c) the display or sexually offensive material;
> (d) sexually degrading words used to describe a person;
> (e) derogatory or degrading remarks directed towards members of one sex or one sexual orientation;
> (f) sexually suggestive or obscene comments or gestures;

(g) unwelcome inquiries or comments about a person's sex life;
(h) unwelcome sexual flirtations, advances, propositions;
(i) persistent unwanted contact or attention after the end of a consensual relationship;
(j) requests for sexual favors;
(k) unwanted touching;
(l) verbal abuse or threats;
(m) sexual assault.[68]

Although Rule 20 provides that sexual harassment can occur in the form of conduct by men towards women, between men, between women or by women towards men, again it is not meant to deal with consensual sexual relationships between lawyers and clients.

In thousands of business affairs, commercial transactions or many other legal representations every year, money and confidence are entrusted to lawyers. In making use of these ethical rules, lawyers are, however, reminded that their professional conduct is not based on just a business relationship; rather, one is expected to perform ethically and professionally or act in accordance with the standard of rules. In theory, the Manitoba Code assists lawyers in choosing the appropriate course of action when they are faced with an ethical dilemma. It is further expected that lawyers will, in practice, turn to this statement of public policy when faced with an ethical issue related to sexual relations.[69]

The Manitoba Code does not address the ethical dimension of each aspect of legal practice. Yet, such a public document must be used as an influential statement of policy that openly expresses the collective views of the profession, as to the appropriate and minimum standards to which lawyers should adhere. A handful of rules is only implicitly introduced in the Manitoba Code as central to defining conduct, in whatever form it really takes. One theory is that all aspects of legal practice cannot be covered comprehensively by rules alone, because they embrace a broader framework of the universal value of life that lawyers bring with them. Such an argument does not bear scrutiny.

(b) Obligations and Disciplinary Actions

Lawyers must be devoted to protect the client's interests[70]; any professional misconduct which creates a boundary violation occurs in part because professionals minimise this dimension to push forward first their own interest at the expense of their clients' interests. And yet the professional's obligation to make the client's need primary is defined through the Manitoba Code.

For Max Weber, the power in the professional-client relationship[71] will impose special and onerous obligations on the professional who assumes power and responsibility over another individual. Such a power[72] involves domination between the lawyer and the client, where the lawyer has superiority and responsibility over the client by virtue of his position and knowledge. Within the field of law, lawyers vow to uphold the code of conduct and declare an allegiance to justice and the dignity of clients.[73] As guardians of the law and (*i.e.*, as repositories of the lawyer's knowledge),[74] lawyers are expected to discharge with integrity all duties owed to the court, the members of the profession, the public at large and, above all, their clients.[75] Once a binding professional-client relationship has been established and the obligations are fulfilled, the power is then perceived as the ability on the part of the lawyer to produce a positive change in the professional-client relationship. Only then, such a power will allow lawyers to have a relatively greater capacity in the professional relationship to do something which will directly affect or protect clients' interests.

For Donald A. Schon,[76] professionals such as lawyers are crucial in the very functioning of our society. Indeed, we conduct society's principal business through lawyers trained to carry out that business, whether it be making international laws against war, judging and punishing those who violate the law or settling disputes. Tribunals and courts are various public arenas for the exercise of the practice of law.

The public looks for and depends on lawyers to define and resolve problems; and it is through the lawyers' integrity, trust and confidence in them that the public strives for a legal representation.[77] The public at large honours the lawyers' claim to knowledge and expertise in matters of great importance. Furthermore, the public grants lawyers extraordinary rights, benefits and privileges. In return, lawyers promise to abide by the rules and keep their practice within the boundaries of the professional-client relationship. In the event that there is a violation, there is then a legal disposition for blame in alleging the professional's fault for their failure and for a loss of public trust in their conduct.

The purpose of the Law Society is to uphold and protect the public interest in the delivery of professional services with competence, integrity and independence.[78] It must establish standards of rules for the education, professional responsibility and continuing competence of lawyers [79] The Law Society must establish and enforce practice standards, issue practice directions, and adopt a code for lawyers that reflects boundary violations.[80] All legislative provisions with respect to legal practice directly impact on the lawyer-client relationship. The Law Society must ensure that the public can rely on lawyers to practise the high standards of conduct,[81] cleanse the profession and, most of all, prevent any future harm to the public.[82] For ease of reference, the term "harm" refers here to the existence of loss or detriment of any kind to a client resulting from any professional action, inaction or omission.[83]

The legal profession is a self-governing profession. The legislature delegates to it, and not to the courts, the responsibility for developing a standard of rules. In *Re Milstein and Ontario College of Pharmacy et al. (No.2)*[84], Justice Cory stated:

> One of the essential indicia of a self-governing profession is the power of self-discipline. That authority is embodied in the legislation pertaining to the profession. The power of self-discipline perpetuated in the enabling legislation must be based on the principle that members of the profession are uniquely and best qualified to establish standards of professional conduct. Members of the

> profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences.

According to the Supreme Court of Canada, any court's role is merely supervisory and its jurisdiction extends to this aspect of professional ethics only in connection with legal proceedings.[85] Professional bodies are those to whom the government has seen fit to grant monopoly status. In the *Adams* case, the Alberta Court of Appeal stated:

> With the monopolistic right come certain responsibilities and obligations. Chief amongst them is self-regulation. Self-regulation is based on the legitimate expectation of both the government and the public that those members of a profession who are found guilty of conduct deserving of sanction will be regulated – and disciplined – on an administrative law basis by the profession's statutorily prescribed regulatory bodies. [86]

The public dimension in disciplinary actions is of critical significance to the mandate of professional disciplinary bodies. The Supreme Court of Canada considers the discipline provisions of the *Law Society Act*, in *Pearlman* v. *Manitoba Law Society Judicial Committee*.[87] Delivering judgment for the Court, Iacobucci J. stated:

> In the case at bar, the Manitoba Legislature has spoken, and spoken clearly. The Law Society Act manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected.[88]

Thus, Chief Justice Monnin, in discussing this issue in *Re Law Society of Manitoba and Savino*[89], explained the following:

> No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.
>
> In *Mackay* v. *The Queen* (1980), 114 D.L.R. (3d) 393 at p.491, 54 C.C.C. (2d) 129, [1980] 5 W.W.R. 385 (sub nom. 626 082 762 *Private R.C. Mackay*,

Canadian Forces, Regular Force v. *The Queen*) at pp.414-5, in speaking of professional associations and their disciplinary powers, McIntyre J. said:

> It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine, accountancy, engineering, among others, are given this power, I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions. It must also be remembered that while this appeal concerned only the armed services serving in Canada, the position of forces serving abroad not being in issue, it must be recognized that in service abroad the officers must assume the judicial role by reason of the absence of any civil legal processes. The character of the officer for independence and impartiality will surely not vary because he is serving overseas. The practical necessities of the service require the performance of this function by officers of the service and I find no offence to the Canadian Bill of Rights in this respect ....

These judicial comments, applied to lawyers, are just as apt when applied to physicians. Legislatures entrust the governance of the law profession and decisions of its Disciplinary Committee to law societies; and courts must respect this decision. In their practices, lawyers, as officers of the court, have an obligation to respect ethical standards defined in the regulatory regime, *i.e.*, obey the self-governance of their Law Society.[90] This means that establishing and enforcing codes of professional conduct are two of the most important expressions of self-regulation. In that regard, lawyers found guilty of professional misconduct will be regulated and disciplined by the profession's statutorily prescribed disciplinary tribunals.[91] These tribunals with respect to sexual abuse have imposed penalties on lawyers ranging from a public reprimand, as a less serious punishment, to suspensions,[92] and from disbarment[93] to damages in civil courts.[94] The Benchers refer to a reprimand as a "go and sin no more" disposition and remark that a reprimand, standing alone, always connotes that the conduct is at the

lower end of the spectrum of seriousness of professional misconduct. In most of these cases, the lawyer's misconduct is not only found to be reprehensible but that it reflects upon and shatters their professional integrity to the point where protection of the public is compromised. Lawyers have a right to appeal the disciplinary decision to the Manitoba Court of Appeal for rulings ordering interim suspensions and for the imposition of fines, reprimands, conditions restricting areas of practice, or the issuance of a conditional practicing certificate pursuant to the Manitoba *Legal Profession Act*.[95]

Professional misconduct and conduct unbecoming are two types of action for which discipline will be administered in accordance with Section 72 of the *Legal Profession Act*. These two terms are, however, not defined nor does the Law Society of Manitoba state that breach of its rule is a disciplinary offence. One must turn to the case law to define properly these legal terms. The term "professional misconduct" is used to relate to conduct while actually engaged in the practice of a profession[96] (*i.e.*, lawyer's professional capacity that tends to bring discredit upon the legal profession), while the term "conduct unbecoming" relates to conduct outside the course of the practice of the profession (*i.e.*, lawyer's personal or professional capacity that tends to bring discredit upon the legal profession).

Culliton C.J.S. (as he was then), in *Shumiatcher* v. *Law Society of Saskatchewan*,[97] sets out the definition of professional misconduct. The Saskatchewan Court stated that "if it is shown that the lawyer in the pursuit of his practice has done something which can be reasonably seen as disgraceful or dishonourable by a professional brethren of good repute and competency, it is then open to argue that he is guilty of professional misconduct".[98]

In 1979, in *Re Stoangi and Law Society of Upper Canada (No. 2)*[99], the court stated:

> The Court should only interfere when satisfied that Convocation, charged with the statutory duty of disciplining its members and protecting the public interest, has erred in some principle of law, has misapprehended the evidence or has failed to give weight to significant factors, or has imposed a penalty totally disproportionate to the offence committed.

In 1980, Chief Justice Monnin (as he was then), in *Re Law Society of Manitoba and Savino*,[100] reiterated the following:

> Professional conduct, although subject to fines, suspension or even disbarment for its breach, is not of a criminal nature. The Law Society since its inception in the United Kingdom centuries ago has been granted monitoring and controlling powers over its membership primarily for the benefit of the public which it is called upon to serve. These societies and their counterparts in various jurisdictions exercise supervisory and controlling authorities over its membership as it should and as parliament and legislatures have granted in various pieces of legislation all identical in nature and scope.
>
> Our Legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional conduct. Professional misconduct is a wide and general term. It is conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well respected brethren in the group – persons of integrity and good reputation amongst the membership.

The Court of Appeal was clear on that point. The Court should not interfere lightly with any decision made by the Law Society with respect to the penalty imposed on lawyers breaching ethical rules. The Benchers have been granted the right by their respective legislatures to pass rules and regulations over its membership primarily for the benefit of the public; they also have the right to enforce them over its membership in imposing disciplinary measures.

With respect to "conduct unbecoming a lawyer", and in the determination of whether there has been professional misconduct, Stevenson J.A., in discussing the disbarment of a lawyer for "conduct unbecoming", declared that it was clear from his reading of Section 47 of the *Alberta Legal Professional Act* that "conduct unbecoming"

need not be disgraceful or dishonourable.[101] The Benchers' consideration with respect to "conduct unbecoming" must be limited to the public interest in the conduct or competence of a member of the profession.[102] Furthermore, the court stated that the Benchers' decision was based on professional standards which only they, being long time members of the profession[103] and the guardians of the conscience of their profession[104], could properly apply.

The *Cwinn*[105] case served as an example to define the conduct unbecoming. Cwinn was convicted of an offence under the U.S. *Mann Act* of "knowlingly transporting in foreign commerce a girl for the purposes of debauchery, or other immoral purposes." He served his sentence in the United States and on his return to Canada was disbarred after a hearing before the Law Society of Upper Canada for "conduct unbecoming a lawyer." During the hearing, it was stated that the lawyer hired a number of young girls to assist as grooms in the training, riding and showing of horses at horse shows in Canada and the United States. He seduced these young girls after having established a relationship of dependence, trust and confidence with them. Finally, Convocation of the Law Society of Upper Canada ordered disbarment for conduct unbecoming a barrister and solicitor. On appeal to the Divisional Court, counsel for the lawyer argued that although the conduct may have been reprehensible, it should not form the basis of discipline from the Law Society of Upper Canada because it was not connected with the practice of law. He further submitted that the sexual conduct in question "does not impair or reflect upon the integrity or competence of the solicitor in any dealings that he may have with clients"[106] and that Convocation of the Law Society "simply disbarred the solicitor out of a sense of righteous indignation and disgust." The Ontario Divisional Court viewed the matter differently. Thus, the Court rejected the counsel's argument and concluded that disbarment was appropriate because his conduct was reprehensible and did reflect upon and shatter his professional integrity to the point where protection of

the public was involved. The Divisional Court stated that Convocation of the Law Society of Upper Canada was correct in finding the lawyer guilty of "conduct unbecoming a barrister and solicitor." Such a case is fairly significant in law for its explicit finding that the sexual conduct of a lawyer, outside his professional activities, may impair his professional integrity to an extent requiring his removal from the practice of law.[107]

The problem of allegations of sexual abuse in professional misconduct can only be effectively addressed by maintaining the fairness and integrity of the regulatory regime, particularly as it relates to the civil and prosecutorial processes.[108] However, the burden of proving these allegations in a professional discipline case, as stated in the medical case law, lies between the ordinary civil standard of a balance of probabilities and the criminal onus of proof beyond a reasonable doubt.[109] Having that in mind, it is then necessary to determine if the evidence before a Disciplinary Committee is sufficiently cogent and convincing to uphold its findings in any case at bar.[110]

Chapter III. The Physician-Patient Sexual Relationship in Canada

(1) Introduction

Unlike the Canadian Bar Association, the Canadian Medical Association has a rule making it unethical conduct for a physician to have a sexual relationship with a patient during the medical treatment. In Manitoba, for instance, the College of Physicians and Surgeons goes even further in stating that it is unethical conduct to terminate care with the intent of engaging in a sexual relationship with the patient. This means that the physician's ethical obligation not to exploit the fiduciary relationship for his own personal advantage applies whenever the physician considers termination of the physician-patient relationship to pursue a personal relationship. The intent of this express rule is to protect the patient against any current and future harm by physicians, during and after the physician-patient relationship where the physician's conduct must have been the proximate cause of that harm.

Like the Law Societies, the Colleges of Physicians and Surgeons are the licensing and regulatory bodies and have many roles in discharging their mandate. Their mandate is to regulate the practice of medicine and to govern its members in accord with the *Health Disciplines Act*, which was the name of the Ontario legislation until 1991. It then became the *Regulated Health Professions Act, 1991*, S.O. 1991 C.18. No such statute exists in Manitoba, the equivalent, setting up the colleges being the *Medical Act*. The disciplinary activities of the Colleges of Physicians and Surgeons attract public attention because of the seriousness of professional misconduct and the harm involved.

(2) Professional Boundaries and Violations

The medical profession, like the legal profession, has written rules, policies, guidelines or statements, as well as a code of conduct that enumerates professional boundaries to protect the public. Principles of consent, decision-making, communication, and confidentiality are but a few of these rules. The medical profession acknowledges the various rights of patients by standardising physicians' obligations. As such the Code of Conduct concerns itself with boundary maintenance. According to Campbell and Grass,[111] the role of policies, guidelines and the code of conduct is connected to the history of professional self-regulation as a privilege.[112] For law and medicine, self-regulation dates back to the early medieval period, when no central government existed to dictate the code of conduct for professional groups. Instead, norms concerning acceptable conduct in practice were established by physicians themselves. For Campbell and Grass, a key characteristic of professionalism is the power of professional governing bodies to control the conduct of their members privately.[113] The authors further consider that one of the primary ways that self-regulation is achieved today is through practice guidelines that establish normative standards of professional conduct.[114] In the case of medicine, practice guidelines aim to establish the legal standard of care and to produce an authoritative reference point, which codifies proper performance of the physicians' duties recognised as good practice, as well as accommodating accepted changes in an evolving area of their profession.[115] In short, one purpose of practice guidelines defining the legal standard of care is to delineate professional boundaries to physicians who provide medical services to patients.

According to Peterson,[116] the Code of Conduct defines legal standards of care intended to safeguard the patient's trust by limiting the professional's power; therefore

physicians must always be on guard about themselves and their patients. This means that rules related to conflict of interest tend to guard the primacy of the client's need by limiting the professional's self-interest. For Peterson, the purpose of that code is to set boundaries for professionals in their efforts to further the needs of the patient. By addressing professional boundaries, patient exploitation in the professional-patient relationship ought to be at least minimised, if not prevented entirely.

The Manitoba Code of Conduct was adopted by the Council of the College of Physicians and Surgeons on 21 March 1998, with amendments to 21 June 2002. The role of the Council of any College of Physicians and Surgeons in Canada, under their respective Medical Professional Act, is to give direction and regulation concerning the practice of medicine and to ensure that medicine is practised in the interest of the public:

> General responsibilities
>
> 1. Consider the well-being of the patient.
> 2. Treat all patients with respect: do not exploit them for personal advantage.
> 3. Practise the art and science of medicine competently and without impairment.
> 6. Recognize your limitations and the competence of others and when indicated, recommend that additional opinions and services be sought.
>
> Responsibilities to Society
>
> 33. Refuse to participate in or support practices that violate basic human rights.
>
> Responsibilities to the Profession
>
> 35. Recognize that the self-regulation of the profession is a privilege and that each patient has a continuing responsibility to merit this privilege.
> 37. Avoid impugning the reputation of colleagues for personal motives; however, report to the appropriate authority any unprofessional conduct by colleagues.
>
> Responsibilities to Oneself

43. Seek help from colleagues and appropriately qualified professionals for personal problems that adversely affect your service to patients, society or the profession.[117]

The general intent of the medical code of conduct is to protect patient needs in acknowledging the power imbalance in the professional-patient relationship. This protective ability, however, is limited because there is no practical working process definition of what this means. To some extent such a document intends to establish the calculated space between physicians and patients; it fails, however, to provide practical answers to physicians who rely extensively on the College of Physicians and Surgeons to provide some direction in their practice. Essentially, this means that the medical code of conduct, like any other professional code, cannot possibly address all or even most of the daily situations encountered by physicians. Extreme boundary violations, however, ought to be addressed in order to give some directions to physicians. Physicians in our society are also all given great rights and privileges, many of which arise from a monopoly[118] which they must not abuse[119] whether, by act or word, so as to impair confidence and security.[120] It is the award of a monopoly by society at large to one particular group, defined by medical services, that physicians have been trained to provide. Even though sexual relationships, which represent extreme boundary violations are as such not illustrated in the medical code of conduct, they are, indeed, addressed in various medical committee reports, guidelines and statements of the Colleges of Physicians and Surgeons.

According to Peterson, there is an inherent understanding among patients that a professional boundary exists for the client's protection and that professionals are responsible to manage and maintain that boundary's perimeters in the professional-patient relationship.[121] For ease of reference, the term "boundaries" is defined as limits that allow for a safe connection based on the client's needs.[122] Pursuant to their oaths,

physicians must honour their commitment to the binding physician-patient relationship. This obliges physicians to conduct themselves exclusively within the dictates of the patient's needs. For Peterson, the safety of the patient becomes compromised when the boundaries guarding the patient's concerns are erased. In that regard, the covenant, which legally binds physicians to patients, is breached when physicians deny, ignore, or (ab)use the power differential in a way that negates the ethos of care.[123] In other terms, when physicians change the fundamental principles which define the inherent nature of the physician-patient relationship, they then undo or breach the covenant. In doing so physicians violate the ethos of care that obliges physicians to place patients' needs first. The professional boundary exists to protect this core understanding between physicians and patients, and to avoid professional misconduct in medicine. Professional misconduct embraces both concepts of misconduct in a professional regard and conduct unbecoming a practitioner. Unlike the procedure in Law Society matters, as discussed in the previous chapter with respect to lawyers, there are no substantial differentiations between the two in medicine at all.

For Peterson, the ethos of care is inherent in all professional relationships. Because patients acknowledge the physicians' knowledge as a storehouse of resources, they assume, by virtue of their position in the relationship, that physicians will place the patients' needs before their own. Once these boundaries are violated, the professional-patient relationship becomes ambiguous and therefore harmful consequences emerge. Such a violation is then viewed as an act that breaches the inherent core intent of the physician-patient relationship. At such times physicians exploit the legal relationship to meet their personal needs rather than the patients' needs.

According to Puglise,[124] not all boundary violations arise from unethical motives. Some may arise due to honest misunderstandings, communication problems or differences in the professional and client perceptions, while other minor breaches (*i.e.*)

holding and comforting a grieving spouse) may be forgivable or even appropriate. Puglise introduces the following American Medical Association's non-exhaustive list of professional misconduct where physicians violate the professional boundaries:

> (1) predatory physicians who suffer from serious psychological disorders and continually attempt to seduce patients;
> (2) physicians who claim sex is for therapeutic purposes;
> (3) physicians who abuse the physical examination procedure;
> (4) physicians who have long-standing patient relationships which develop into infatuation; ...
> (7) physicians who initiate sexual harassment or make suggestive comments.[125]

For Puglise, these examples concerning professional boundaries do not represent the same types of violation and, therefore, cannot be treated alike. The author also says that categorising them together and punishing physicians equally may not be the proper course of action to take. Something must, however, be done and such a list reinforces the need for examining each alleged breach individually because each case differs from every other.[126] Puglise further raises the following question: would an express rule, prohibiting all and any physician-client sexual relationships, provide the proper course of action? Assuming that such a rule exists and that consensual sexual relationships take place, would it then infringe on the privacy and personal freedoms of both physicians and patients? These related questions concerning the applicability and fairness of a prohibitory rule will be fully addressed in the next chapter; but first I will define the physician's very first obligation in the professional-patient relationship, as expressed in the Hippocratic Oath.

(a) Hippocratic Oath: No Physician-Patient Intimacy

Although there were earlier medical codes and texts, such as the Code of Hammurabi compiled around 1,650 B.C.E., Gary Schoener states that the first concerns

with respect to the physician-patient relationship survive in a written document in the *Corpus Hippocratum*[127]. This contained about seventy medical texts compiled in the Library of Alexandria during the fourth and fifth centuries B.C.E. The Hippocratic Oath defined, in covenant terms, the obligation of physicians in the professional-patient relationship. The Hippocratic Oath indicated clearly that sexual contact between physician and patient was fundamentally improper.[128] It was further stated that "in every house where I come I will enter only for the good of my patients, keeping myself far from intentional ill-doing and all seduction, and especially from the pleasures of love with women or with men, be they free or slaves".[129] This promise directed physicians to act properly with their patients. The Hippocratic *Corpus* stated:

> The intimacy also between physician and patient is close. Patients in fact put themselves into the hands of their physicians, and at every moment he meets women, maidens and possessions very precious indeed. So towards all these self-control must be used. Such then should the physician be, both in body and in soul.[130]

First, the term "intimacy" was not elaborated and this may have caused some physicians difficulty. Secondly, the term "self-control" was another which may also have caused confusion and misunderstanding among physicians; however, it stated that any intimate physician-patient relationship ought to be avoided. In essence, the Hippocratic Oath defined the obligation of the physician and directed the latter to have no intimacies with the patient. The Hippocratic *Corpus* further stated:

> I swear by Apollo Physician, and Asclepius and Hygieia, and Panaceia there I will fulfill according to my ability and judgment this oath and this covenant .... In purity and holiness I will guard my life and my art .... If I fulfill the oath and do not violate it, may it be granted to me to enjoy life and art ...; if I transgress it and swear falsely, may the opposite of all be my lot.
>
> ...

> And I will abstain from all intentional wrong-doing and harm, especially from abusing the bodies of man or woman, bond or free.[131]

The terms "intention, harm and abuse" are all used to refer to the wrong-doing, which may have caused some physicians difficulty in certain situations. Any wrong-doing violating the legal right of the patient (*e.g.*, man or woman, as stated then) ought to be avoided because this created a power imbalance between physicians and patients and caused harmful consequences to patients.

Over the years, the Hippocratic Oath was rewritten for Christian physicians centuries later, as follows:

> ... with purity and holiness I will practice my art... into whatever house I enter I will go into them for the benefit of the sick and will abstain from every voluntary act of Mischief and Corruption and further from the seduction of females or males of freeman and slaves....[132]

This implied that the intent of the later drafters was to make reference to the terms, such as "will abstain from every voluntary act" and "the seduction of females or males" (*e.g.*, patients). The phraseology used here, such as "abstention from every voluntary act" and "the seduction of female or males", implied again a prohibition with respect to intimacies between physicians and patients. Seeing that such prohibitory rules were a matter of concern for thousand of years among the medical community, what has been the current position of the Canadian Medical Association and the Colleges of Surgeons and Physicians in Canada?

(b) Canadian Medical Consensus: No Physician-Patient Sexual Relations

The Preface of the Code of Ethics of the Canadian Medical Association,[133] approved by its General Council in August 1996 and reprinted from, by permission of the publisher, stated:

> The Canadian Medical Association accepts the responsibility for delineating the standard of ethical behavior expected of Canadian physicians and has developed and approved the code of ethics as a guide for physicians.
>
> The code is an ethical document. Its sources are the traditional codes of medical ethics such as the Hippocratic Oath, as well as the developments in human rights and recent bioethical discussion. Legislation and court decisions may also influence medical ethics. Physicians should be aware of the legal and regulatory requirements for medical practice in their jurisdiction. However, the code may set out different standards of behavior than does the law.

In essence, this document stated that the standards have been introduced by the Canadian Medical Association and influenced by the Hippocratic Oath and other more recent documents with respect to human rights and bioethics. This document, prepared by and for physicians, based itself on fundamental principles of medicine, such as compassion, beneficence, nonmaleficence, and respect for persons and justice. These principles were used and adopted by McLachlin J., in *Norberg* v. *Wynrib*.[134] The Canadian Medical Association Policy, with respect to sexual relationships between physicians and patients has taken a slightly different position than the Hippocratic Oath, in that it did not refer to an "intimacy" prohibition as such, but rather to sexual misconduct. In that regard, the Canadian Medical Association policy followed a review of policies and initiatives of its provincial and territorial divisions and other professional associations. The Canadian Medical Association's approach to this policy with respect to any sexual relationship between physicians and patients considered the overall relationship in order to better understand factors associated with functional and dysfunctional professional-patient relationships, including those involving sexual abuse. In the Canadian Medical Association policy, sexual abuse is defined as follows:

> Any behaviour that transgresses the physician-patient relationship in a sexually exploitative manner by a physician's words or action.[135]

The Canadian Medical Association recognises openly that it is the responsibility of physicians to establish and maintain the boundaries or limits of behaviour for themselves and their patients. Thus, the Canadian Medical Association policy states that sexual abuse must never take place in the physician-patient relationship in order "to avoid any harm to the patient". In the event that it does, a boundary violation will then occur. This boundary violation, reinforced by the Canadian Medical Association, implies a power imbalance between parties, which supports the notion that the public ought to be protected and furthermore, harmful consequences to patients ought to be avoided. Also this means that the Canadian Medical Association expresses an expectation which means that physicians ought to protect the welfare of the public in an ethical manner and, therefore, ought to put patients' needs first.

There are comprehensive provincial reports with respect to how physicians should be governed by their self-regulating organisations, with respect to violating the professional-patient boundary.[136] The issue of sexual misconduct, as opposed to intimacy between physician and patient, came to the forefront of the Canadian public attention during the late 1980s and early 1990s. In 1991, the College of Physicians and Surgeons of Ontario fully endorsed the *Task Force on Sexual Abuse of Patients*,[137] which made numerous recommendations concerning exploitation of patients by physicians. It recommended that any sexual contact between physician and patient be sanctioned as "sexual violation" under the *Ontario Regulated Health Professions Act, 1991* and, whether initiated by the patient or not, subject to a mandatory penalty of the revocation of the physician's licence for a minimum of five years.[138] The philosophy

underlying this recommendation, named "zero tolerance", was adopted by the College of Physicians and Surgeons of Ontario. The *Task Force Report* stated that abuse is abuse, regardless of the reason why the patient walked into the office.[139]

There has been, however, a conviction among the public that licensing and regulatory bodies at large are either turning a blind eye to problems related to sexual abuse or not treating it seriously enough to protect the public interest or prevent any current and future harm to patients. In that regard, these licensing and regulatory bodies take it upon themselves to delineate limits or boundaries of physician conduct in the professional-patient relationship. In fact, they respond directly to the *Task Force Report* by examining the issue of sexual abuse, clarifying the professional conduct which, if proved, would result in disciplinary action or in a different legal forum that might support a claim for damages. For Marshall, there are three barriers to conducting a civil action in a court of law, such as limitation periods, access to information from disciplinary bodies and access to insurance.[140] Several provinces, such as Manitoba, Alberta, British Columbia, Saskatchewan, New Brunswick, Nova Scotia and Québec, have undertaken reports on their own to improve medical practice by avoiding any boundary violations.

(3) Provincial Rules and Prohibition

In Manitoba, the College of Physicians and Surgeons introduced in its guidelines and statements Rule 119[141] concerning sexual misconduct between physician and patient. It reinforces the idea that there are no circumstances in which sexual misconduct in the physician-patient relationship is acceptable. It further states that it is not acceptable to terminate a physician-patient relationship with the intent of engaging in a sexual relationship. It refers to professional misconduct as defined in the statutes and

regulations, as a spectrum encompassing the whole range of sexual improprieties with patients. These include, but are not limited to, the following:

- any behaviour, gesture or expression that is sexualized, seductive or sexually demeaning to a patient.
- inappropriate comments about or to the patient including:
  - sexual comments about the patient's body or clothing;
  - comments about the patient's sexual orientation;
  - comments about the patient's sexual performance, unless the patient consultation is for the purpose of addressing issues of sexual functions or dysfunctions and the comments are relevant to the management of the patient's performance;
  - initiation by the physician of conversation regarding the sexual problems, preferences or fantasies of the patient, unless the patient consultation is for the purpose of addressing issues and the comments are relevant to the management of the patient's problems;
- inappropriate examinations....
- inappropriate body contact, including hugging of a sexual nature and kissing.
- dating.
- sex and any conduct with a patient that is sexual or may be reasonably interpreted as sexual.
- a failure on the part of the physician to show reasonable sensitivity for a patient's need for privacy/territoriality. This list is not exhaustive.

Current Patient

- There are no circumstances in which sexual misconduct in the current physician/patient relationship is acceptable....

Former Patient

- The dynamics of the physician/patient relationship do not necessarily end with the completion of treatment or the transfer of patient care. There is a risk of abuse of power on the part of the physician since whether intentionally or not, he/she may use or exploit the trust, the confidential information, the emotions or the power created during the professional relationship.

  ...

  It is not acceptable to terminate a physician/patient relationship with the intent of engaging in a sexual relationship. The physician's ethical obligation not to exploit the physician/patient relationship for the physician's personal advantage applies whenever a physician considers termination of the physician/patient relationship to pursue a personal

> relationship. The physician must recognize the risk of abuse in any such circumstances, and must realistically assess the emotional dependence of the patient. Where a physician/patient relationship is terminated with the intent of entering a personal relationship, the physician is accountable for any exploitation.
>
> ....

Rule 119 makes an explicit reference to professional boundaries. It expects that the physician will always maintain professional boundaries and prohibit the development of any romantic sexual relationship by taking into account all warning signs, which may occur during the physician-patient relationship.[142] This adopts the Ontario approach with respect to introducing an express rule prohibiting sexual relationships between physician and patient.[143] But Rule 119 goes even further in restricting the physician's conduct in not terminating a physician-patient relationship with the intent of engaging in a sexual relationship. It further refers to the physician's duty *vis-à-vis* the patient's care not to abuse the relationship for the physician's personal advantage, which applies whenever a physician considers termination of the professional relationship to pursue an intimate relationship. The solution thus adopted by the College of Physicians and Surgeons of Manitoba is rather unique in Canada.

In June 1992, an Independent Committee on Sexual Exploitation in Professional Relationships was set up by the College of Physicians and Surgeons of Alberta to issue a similar report, particular to the experience of Alberta.[144] That College promoted the idea that sexual relationships between physicians and patients were not to be tolerated, as being unethical and unacceptable. The Council stated that there were no circumstances in which sexual activity between physician and patient was acceptable. It further implied that it always represented sexual abuse. For ease of reference, the term sexual abuse was defined:

(a) having sexual intercourse or other forms of physical sexual relations between the physician and the patient,
(b) touching, of a sexual nature, of the patient by the physician, or
(c) behaviour or remarks of a sexual nature by the physician towards the patient.

Furthermore, it was always the obligation of the physician to be responsible to set clear professional boundaries, to practice competently in an ethical manner and respect the patient's needs. In the College of Physicians and Surgeons of Alberta Policy, the Council was fully aware of the dynamic issues of power, authority, control and trust involved in the physician-patient relationship. Such dynamics created an atmosphere susceptible to boundary violations between physician and patient. The Council acknowledged that boundary violations were a continuum, which should not be divided into artificial levels of severity.

In British Columbia, the College of Physicians and Surgeons endorsed and adopted the code of the Canadian Medical Association. In November 1992, the British Columbia Committee on Physician Sexual Misconduct released a Report entitled *Crossing the Boundaries: The Report of the Committee on Physician Sexual Misconduct.*[145] This British Columbia Report adopted the same approach as Ontario with respect to a prohibitory rule concerning physician-client sexual relationships. In the British Columbia Report, Rule S-3, entitled Sexuality and The Doctor/Patient Relationship, stated:

> Ethical physicians will ensure that their conduct in the practice of their profession is above reproach, and that they will take neither physical, emotional nor financial advantage of their patients.
>
> This dictum has very specific implications with respect to sexuality and the doctor/patient relationship. If the patient appears to be evidencing provocative behaviour then the relationship is at risk and appropriate measures should be taken. When a physician is having sexual thoughts, fantasies, or feelings, then the physician should recognize that the relationship may be at risk and should reevaluate before proceeding.

> Sexual or romantic involvement between a physician and a patient is unacceptable ('inappropriate", "not okay").[146]

In short, the British Columbia Report talked in terms of "ethical physicians" who ensured that their professional conduct remained above reproach and would not take advantage of their patients. Rule S-3 prohibited any sexual or romantic relationship between physician and patient. In May 1992, in Ontario, the Council of the College of Physicians and Surgeons of Ontario passed guidelines concerning personal relationships between physicians and patients, clearly stating that sexual relationships between physicians and patients during treatment were prohibited. Furthermore, a physician "should" not have sexual contact with a former patient for a period of one-year following the date of the last professional contact with the patient, even if the physician formally terminated the professional relationship. The verb "should" involves an expectation from physicians; however, no explanation is provided to establish "the one year period". There is also a reference to physician-patient relationships involving psychoanalysis or psychotherapy where it is prohibited to engage in sexual relationships with the patient at any time after termination of the treatment. It is here to be noted that this period as a cooling off period allows the patient to step back from the influences of the professional relationship. As such, the Canadian law societies can also use the one-year period as a benchmark after termination of the professional relationship.

The guidelines respecting the prohibition during medical treatment state the following:

> (1) Sexual relationships between physicians and patients during treatment are prohibited;
> (2) When the physician-patient relationship involves psychoanalysis or psychotherapy, sexual relationships with the patient are prohibited at any time after termination of the treatment;

(3) Where the physician-patient relationship has, at any time, involved psychotherapy of such duration that it may be seen to have been a significant component of treatment, sexual contact wit the patient is also prohibited at any time after termination of treatment; and

(4) The general rule is that physicians should not have sexual contact with a former patient for a period of one year following the date of the last professional contact with the patient, even if the physician has formally terminated the professional relationship. In some instance, it may never be appropriate for a post-termination sexual relationship to develop. In others, it may be unnecessary to wait for one year before a sexual relationship can develop; for example, an emergency room physician who has treated on one occasion.[147]

Essentially, this means that such a rule is clear with respect to physician-patient relationships during and after medical treatment. Moreover, the *Ontario Health Professions Procedural Code* is deemed by Section 4 of the *Regulated Health Profession Act, 1991*[148] to be part of health profession legislation in Canada. Thus, the following Sections 1, 51 and 84 of the *Regulated Health Profession Act, 1991* deal directly with sexual abuse:

Interpretation

1(3) In this Code,

"sexual abuse" of a patient by a member means,

(a) sexual intercourse or other forms of physical sexual relations between the member and the patient,
(b) touching, of a sexual nature, of the patient by the member, or
(c) behaviour or remarks of a sexual nature by the member towards the patient.[149]

1(4) For the purposes of subsection (3),

"sexual nature" does not include touching, behaviour or remarks of a clinical nature appropriate to the service provided.[150]

Professional Misconduct

51. (1) A panel shall find that a member has committed an act of professional misconduct, if,

(a) the member has been found guilty of an offence that is relevant to the member's suitability to practise;
(b) the governing body of a health profession in a jurisdiction other than Ontario has found that the member committed an act of professional misconduct that would, in the opinion of the panel, be an act of professional misconduct as defined in the regulations;
(b.1) the member has sexually abused a patient; or
(c) the member has committed an act of professional misconduct as defined in the regulations.

(2) If a panel finds a member has committed an act of professional misconduct, it may make an order doing any one or more of the following:

1. Directing the Registrar to revoke the member's certificate of registration.
2. Directing the Registrar to suspend the member's certificate of registration for a specified period of time.
3. Directing the Registrar to impose specific terms, conditions and limitations on the member's certificate of registration for a specified or indefinite period of time.
4. Requiring the member to appear before the panel to be reprimanded.
5. Requiring the member to pay a fine of not more than $35,000 to the Minister of Finance.
6. If the act of professional misconduct was the sexual abuse of a patient, requiring the member to reimburse the College for funding provided for that patient under the program required under section 85.7.

(3) In making an order under paragraph 2 or 3 of subsection (2), a panel may specify criteria to be satisfied for the removal of a suspension of the removal of terms, conditions and limitations imposed on a member's certificate of registration.

(5) If a panel finds a member has committed an act of professional misconduct by sexually abusing a patient, the panel shall do the following in addition to anything else the panel may do under subsection (2):

1. Reprimand the member,
2. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following,

    i. sexual intercourse,
    ii. genital to genital, genital to anal, oral to genital, or oral to anal contact;
    iii. masturbation of the member by, or in the presence of, the patient,

iv. masturbation of the patient by the member,
v. encouragement of the patient by the member to masturbate in the presence of the member.

(6) Before making an order under subsection (5), the panel shall consider any written statement that has been filed, and any oral statement that has been made to the panel, describing the impact of the sexual abuse on the patient.

(7) The statement may be made by the patient or by his or her representative.

(8) The panel shall not consider the statement unless a finding of professional misconduct has been made.

Patient Relations Program

84. (1) The College shall have a patient relations program.

(2) The patient relation program must include measures for preventing or dealing with sexual abuse of patients.

(4) The measures for preventing or dealing with sexual abuse of patients must include,

(a) educational requirements for members;
(b) guidelines for the conduct of members with their patients;
(c) training for the College's staff; and
(d) the provision of information to the public.[151]

Such legislation fully recognises the self-regulation of the medical profession and considers the well-being of the patient in its fullest sense. It does, indeed, provide power to the panel for disciplinary hearings for imposing a penalty to physicians found guilty of professional misconduct.

In Nova Scotia, the Council of the College of Physicians and Surgeons also endorses the code of conduct of the Canadian Medical Association in its Policy, entitled *Sexual Misconduct in the Physician-Patient Relationship*[152] and therefore amends its own code to reflect sexual misconduct between physician and patient. As of today, there are no circumstances in which sexualised conduct in the current physician-patient

relationship is acceptable. Such conduct is abusive regardless of whether consent has been given to the physician, or the physician has used any other rationalisation to excuse his sexual conduct. It is the physician's responsibility not to violate the boundary. The *Sexual Misconduct in the Physician-Patient Relationship* Policy is similar to the one used by the Manitoba Council.

Both the Alberta Report and Ontario Report deal briefly with the express rule; however, they further address the issue of compensation for victims of sexual abuse in the physician-patient relationship. In fact, they both recommend a compensation fund called "Survivors Compensation Fund" which would receive all dollars paid as fines received from physicians as a result of sexual abuse. In addition, the Ontario Report recommends that an abusive physician pay into the Survivors Compensation Fund the equivalent of fees paid by health care insurance for services when the physician was abusing the patient. Contrary to the other Reports, the British Columbia Report states that the disciplinary process is not the proper forum to respond to the complainants' needs for reparations; the civil courts are the proper avenues to deal with the breach of fiduciary duties, obligations and damages. Even if the College of Physicians and Surgeons establishes the Survivors Compensation Fund as recommended by Ontario and Alberta, the British Columbia Committee states that it is unlikely that the amount of dollars in this fund will be adequate to provide appropriate compensation.

In summary, the Colleges of Physicians and Surgeons all endorse the Medical code of conduct of the Canadian Medical Association's Policy. They recognise that sexual misconduct between physicians and patients is a serious breach of the professional fiduciary duty. The Colleges of Physicians and Surgeons conclude that all sexual misconduct is highly detrimental to any course of treatment and prescribe professional boundaries applicable to all physicians. The professional boundaries become another means of governing conduct within the medical relationship. This puts

the parties on notice as to what constitutes unacceptable conduct in the practice of medicine. These medical organisations consider any sexual relationship between physician and patient to be "the most extreme form of boundary violation", due to its actual harm and its risk of future harm to patients. In short, the professional boundaries constitute a social norm as defined by physicians themselves and complainants have legal recourses open to them. However, administrative penalties imposed on physicians found guilty of boundary violations do not always reflect an absolute prohibition because the seriousness of the breach is evaluated on a case-by-case basis. That will bring up the argument that such violations affect the patient's autonomy in the professional-patient relationship in which the patient entrusts his welfare to the physician, to whom a fee is paid for the provision of the medical services.[153]

(4) Crossing the Professional Boundaries: Violation by Sexual Misconduct

(a) Individual Case Basis Situation

In *Branigan*,[154] the court was asked to deal with the express prohibitory rule with respect to a sexual relationship between a physician and patient. The patient and her husband become friends with the physician and his wife after the patient moved to Whitehorse in 1971. The physician was then the family's doctor. He stated that prior to having sex with his patient, he discussed with her his conflict of interest and that she would have to see another physician. The patient denied that such discussion occurred. He was accused of having sex with his patient. The Disciplinary Committee found that the sexual relationship between the physician and patient commenced within a short time of the last documented office visit, less than one month later. The physician appealed a finding of unprofessional conduct and the penalty imposed of an eighteen

months suspension and a $5,000.00 fine. Counsel for the physician's argument was that the Medical Council acted without or exceeded its jurisdiction when it purported to delegate its power to an inquiry committee; and that it erred in finding that he was guilty and in imposing a penalty that was too severe. During the hearing, the complainant at no time suggested that her participation in the sexual encounters was non-consensual. That, however, was irrelevant in the consideration of whether the appellant violated his code of conduct. The appellant did not deny that he had a sexual relationship with the complainant, just after his office consultation. He admitted that he did so but only from about late March 1977 to June 1977. He testified that the first sexual encounter took place after he and his wife separated on 17 March 1977. He described the relationship as an emotional one, not merely a sexual one. He said that he discussed with the complainant the possibility of forming an ongoing relationship. He was then looking for a partner, as he put it, and the decision to have this sexual relationship became a mutual one. The evidence revealed that the appellant was seeing the complainant's children, in his capacity as a physician, after March 1977. He also testified that he never referred the complainant to another physician or sent her files elsewhere.

In the *Branigan* case, the appeal was dismissed; but the suspension was reduced to six months. The court found no excess or lack of jurisdiction. In its lengthy decision the court underlined the power imbalance and the dilemma that often occurs for the physician when two consenting adults, albeit one physician and patient, decide to become more intimate.[155] In the Reasons for Judgment, the court referred to the document *Crossing the Boundaries: The Report of the Committee on Physician Sexual Misconduct*, prepared for the College of Physicians and Surgeons of British Columbia, to make the following comments:

> We would also say that termination (without proper referral) for the purposes of establishing a personal relationship with a patient would in itself be misconduct. ...
>
> Further, there is the risk that a physician will prematurely end a professional relationship for the purposes of entering a sexual relationship ....
>
> The imbalance of power that exists in most current doctor-patient relationships remains, in many cases, long after that relationship has ended, by virtue of the knowledge that the physician has gained about the patient in the course of the professional relationship. As one former patient said: "He knew everything there was to know about me and I knew nothing about him."
>
> It can be said that in almost any human relationship there is an imbalance of power. That may be true, but in this case, the imbalance comes about because at one time one person stood in the position of a professional physician, in relation to the other. We consider it essential to the notion of professionalism that the physician is not to be permitted, at any time, to use that position for selfish ends.[156]

In essence, the court recognised that there is "the impracticality and unfairness" of an absolute ban on physician-patient relationships with former patients. The court justified its decision by what it thought was obvious logic. Furthermore, it recommended logically a relative system of prohibitions depending on various situations, such as the nature of the professional-patient relationship, the vulnerability of the patient, the efficacy of the steps taken to terminate the professional-patient relationship, and the length of time since that termination.[157] In short, the court applied a prohibitory rule on an individual case basis, whereby the Disciplinary Committee maintained high ethical standards and applied a penalty reflecting the seriousness of the breach and the mitigating factors.

(b) Maintaining Standards and Imposing Penalties

In general terms, the Disciplinary Committee set up in accordance with the Medical Profession Act is charged with a public responsibility to ensure and maintain high standards in the practice of medicine.[158] It exercises its legislative function in the

context of a public law duty. With respect to an allegation of professional misconduct that is morally blameworthy,[159] the Disciplinary Committee must look at what its public responsibility is and the seriousness of the boundary violation.[160] The standard of proof required in cases concerning sexual misconduct between physician and patient is fairly high.

The Supreme Court of Canada has recognised the following legal principle that there are, indeed, degrees of probability within the civil standard. Thus, Clearwater J., in *Snider* v. *Manitoba Association of Registered Nurses*,[161] stated:

> The late Sopinka J., in the text of John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada (1992), comments on the dicta of the late Dickson, C.J.C. in R. v. Oakes, [1986] 1 S.C.R. 103 as follows:
>
> > … within the broad category, there exist different degrees of probabilities depending on the nature of the case ….
>
> In Oakes (*supra*), Dickson, C.J. quoted with approval the approach advocated by Cartwright, J. in Smith v. Smith, [1954] 2 S.C.R. 312, at pp.331-332, as follows:
>
> > I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences.

With the foregoing legal principle in mind, an allegation of professional misconduct should not be based on a criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities. The authorities show that a physician engaging in a personal relationship with his patient is committing a serious breach of a duty owed by the physician to the patient.[162] Such a relationship can raise the presumption that the patient is under the influence of the physician because of the power imbalance.[163]

Recognising the seriousness of sexual misconduct, penalties will be considered by the Disciplinary Committee on an individual case basis. This means that it will

impose a sentence by application of principles appropriate to the case at hand. In that regard, the court, in *Jaswal* v. *Newfoundland Medical Board*,[164] introduced a non-exhaustive list of mitigating factors that ought to be considered while sentencing a physician:

> (1) the nature and gravity of the proven allegations;
> (2) the age and experience of the offending physician;
> (3) the previous character of the physician and in particular the presence or absence of any prior complaints or convictions;
> (4) the age and mental condition of the offended patient;
> (5) the number of times of the offence was proven to have occurred;
> (6) the role of the physician in acknowledging what had occurred;
> (7) whether the offending physician had already suffered other serious financial or other penalties as a result of the allegations having been made;
> (8) the impact of the incident on the offended patient;
> (9) the presence or absence of any mitigating circumstances;
> (10) the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of medicine;
> (11) the need to maintain the public's confidence in the integrity of the medical profession;
> (12) the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct; and
> (13) the range of sentence in other similar cases.

In *Jaswal*, the physician appealed a decision of the Newfoundland Medical Board ("Board") finding him guilty of professional misconduct. The Board had suspended his licence to practise medicine for fourteen months and ordered him to pay all expenses incurred by the Board during the hearing, up to a maximum sum of $20,000. Taking all the above-noted factors into consideration, the court found that an appropriate sentence, based on the limited facts assumed to have been proven was suspension for two months. The court stated that the sentencer should be led to the proper penalty by the application of principles applicable to the case at hand.

Various penalties imposed on physicians engaging in sexual relationships with their patient and found guilty of professional misconduct can range from a public reprimand[165] to suspension[166] or expulsion, where their name is struck off the Register of

the College of Physicians and Surgeons.[167] The suspension can vary depending on the case at bar and the mitigating factors, as those mentioned-above; it varies from one-day[168] to two-years.[169] Penalties will reflect the evidence adduced in relation to the actual harm on the patient's health, potential risk of harm to other patients, and the possibility of repeat offending.[170] Furthermore, the College of Physicians and Surgeons will inform the other medical licensing authorities in Canada, the Board Action Data Bank of the Federation of State Medical Licensing Boards of the U.S., and any other licensing body with which the physician is known to be or to have been registered.

For the most part, the penalty imposed in cases of professional misconduct concerning sexual relations between physician and patient must be sufficient to act as a deterrent to physicians. The penalty must be sufficient to satisfy the demands of the general public that physicians placed in a position of trust must never take advantage of that trust, even when the patient seems to be willing to participate in the professional misconduct.[171] Furthermore, the penalty imposed in cases of sexual misconduct is not to be lightly interfered with on appeal. Unless there is an error in principle, the findings of fact are wrong or a denial of natural justice occurs in how the College of Physicians and Surgeons carries out its mandate,[172] a court sitting in appeal ought not to disturb the penalty and substitute its judgment for that of the Disciplinary Committee. In *College of Physicians and Surgeons (British Columbia)* v. *Ahmad (No.2)*,[173] McFarlane J. held that the Council, in making a finding that conduct was infamous and unprofessional, was entitled to receive great consideration from the court. It is not absolute because the court is given, by statute, the duty of reviewing the findings of the Council. But on a subject of this kind, whether the conduct should be characterised as infamous and unprofessional, as well upon the nature of the punishment to be imposed, the court would not interfere unless satisfied that the decisions were wrong. If there is an appeal, it must then be on the merits of the case.[174] In *Akuffo-Akoto*,[175] the court found that its

role in the review of administrative decisions was explained by the Supreme Court of Canada in *Canada (Attorney General)* v. *Public Service Alliance of Canada*, and quotes:

> In summary, the courts have an important role to play in reviewing the decisions of specialized administrative tribunals. Indeed, judicial review has a constitutional foundation. See Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220. In undertaking the review courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness. Second, they must ensure that it acted within the bounds of the jurisdiction conferred upon it by its empowering statute. Third, they must ensure that the decision it reached when acting within its jurisdiction was not patently unreasonable. On this last issue, courts should accord substantial deference to administrative tribunals with respect to professional misconduct.[176]

As pointed out in *Porter*,[177] a finding of sexual misconduct has devastating impact on physicians and can lead to permanent loss of the ability to practise medicine. In that regard, those responsible to investigate must comply with the strict provisions of the governing statute and the applicable rules of natural justice or procedural fairness.[178] There must be no room for doubt that the power to discipline is exercised within the terms and upon the conditions of the statute conferring that power. In *Porter*, the court referred to *Kupeyan* v. *The Royal College of Dental Surgeons (Ont.)*,[179] where the court, in rendering its decision, focused on the harm that a disciplinary action can have against a professional. It stated that the power to discipline their members, which is conferred upon the self-governing professions, is a very great one, involving as it does potential loss of professional standing, pecuniary loss and loss of the very right to pursue practice of the profession. The court, in *Porter*, finally stated that the extent to which natural justice considerations apply in a particular case varies, depending on the nature and function of the particular tribunal.

Authorities agree, mostly, that the Disciplinary Committee is best located to determine facts of sexual misconduct and the appropriate penalty for a particular case in accordance with evidence introduced during the hearing. In the *K* case,[180] the physician

was found guilty of professional misconduct. The court found that it would only be in the rarest and most unusual circumstances that the court might interfere with its determination on the issue of penalty.[181] Essentially, this means that the Disciplinary Committee in the proper discharge of its function is best able to assess the gravity of the sexual misconduct and its consequences, in terms of the public responsibility and standing of the profession.

At issue is whether the relationship between the physician and patient was in existence at the time the sexual activity in question occurred. For instance, in *Boodoosingh*,[182] Dr. Boodoosingh, a psychiatrist, commenced treatment of a 30-year-old female patient who was also a physician. The psychiatrist knew that his patient was vulnerable and suffered from depression and anxiety, which were in part the result of prior sexual affairs, but pursued a sexual relationship with her. The psychiatrist was also aware from the patient's hospital records that his patient was apt to form a physical attachment to a male therapist. Counsel for the physician argued that the professional-patient relationship no longer existed at the time of the act of intercourse. The court was satisfied that there was evidence upon which the Disciplinary Committee could find that the physician-patient relationship existed at the time of the sexual relations. The court found him guilty of professional misconduct for having consensual intercourse with a former patient and his licence to practise medicine was therefore revoked. From that decision the psychiatrist appealed to the Divisional Court which affirmed the finding of guilt, but reduced the penalty to three months' suspension from practice. He also received a reprimand for this single act of intercourse by a physician with a good background and distinguished record for community work and academic achievement. The psychiatrist did appeal the decision to the Court of Appeal. This Court rejected the argument that, because the physician-patient relationship had ended before the intercourse took place, there could be no finding of professional misconduct. The Court

found that intercourse had occurred within several weeks of the last therapy session, and there was evidence of the physician's influence over the patient at that time, even if the physician-patient relationship had ceased. The Court, in *Boodoosingh* stated:

> Whether the relationship has been formally ended or not (and there was evidence of further treatment thereafter), the influence of the doctor remained and he took advantage or might appear to have taken advantage of that influence improperly.[183]

The British Columbia Court of Appeal considered the following. The duty of the Disciplinary Committee was to hear the parties out fully, to consider their positions carefully, and to decide the matters in light of the facts as it fairly found them, and according to the law as it conscientiously interpreted it. The argument was that the Disciplinary Committee considered the evidence, which supported the findings and the inferences drawn therefrom. If the argument rested on a non-existent foundation of evidence, the Court found that it ought to fail and so did the first ground of appeal. With leave of the Court, the College appealed the penalty, the psychiatrist appealed the conviction. Both appeals were dismissed on the basis that the issue of guilt was correctly decided.

In *Hirt*,[184] the Disciplinary Committee found the physician guilty of infamous conduct and erased his name from the register. The College of Physicians and Surgeons appealed. The British Columbia Court of Appeal quashed the decision. The Court found that it was improper to impose an onus on the psychiatrist to prove that there was no undue influence in the alleged incident of November 1977. Similarly, in *College of Physicians and Surgeons (Ont.)* v. *V.*[185], a husband and a wife were patients of Dr. V., a physician. They then became social friends with Dr. V. As a result they all agreed that it would be best to terminate the professional-patient relationship. The

husband and wife separated, after which Dr. V. and the former wife engaged in sexual conduct. The husband filed a complaint with the College of Physicians and Surgeons against Dr. V. The Disciplinary Committee found Dr. V. guilty of professional misconduct. The Court quashed the decision finding that the Disciplinary Committee reached too far into the personal life of Dr. V. This case was distinguished from the facts in *Branigan*.[186]

In general terms, a case against a physician must be proven by a fair and reasonable preponderance of credible evidence.[187] This means that the evidence must be sufficiently cogent to make it safe to uphold the findings with all of the consequences for the physician's career and status in the community.[188] In *De Gregory*, Lord Denning stated that there must be cogent evidence to show that the physician abused his professional position; it was not enough to show that he abused his social friendship. A medical man who gained entry into the family confidence by virtue of his professional position must maintain the same high standard when he became the family friend.[189] In that regard, the College of Physicians and Surgeons must prove the allegations brought against a physician and it must do so to a high standard of proof.[190] In every allegation involving an element of deceit or moral turpitude, in accord with respect to professional misconduct between physician and patient, a high standard is therefore called for.[191] A court's interpretation of infamous medical conduct is applicable to cases involving physicians engaging in sexual relations with patients.[192]

(c) Statutory Offence: Infamous Conduct

In order to frame the issue as to whether professional misconduct or a wrongful conduct by a physician is infamous or unprofessional, there is some judicial guidance from earlier pronouncements in English and Canadian cases. To define such conduct, a

Disciplinary Committee will often rely upon the following statement by Lord Upjohn in *McCoan* v. *General Medical Council*:[193]

> One of the most fundamental duties of a medical adviser, recognized for as long as the profession has been in existence, is that a doctor must never permit his professional relationship with a patient to deteriorate into an association which would be described by responsible medical opinion as improper. It is for this reason that the Medical Acts have always entrusted the supervision of the medical advisers' conduct to a committee of the profession, for they know and appreciate better than anyone else the standards which responsible medical opinion demands of its own profession. Sexual intercourse with a patient has always been regarded as a most serious breach of the proper relationship between doctor and patient and their lordships do not see how the finding of the committee, on the facts of this case, that the appellant was guilty of infamous conduct in a professional respect can be successfully challenged before their lordships.

The court further stated that the term "infamous conduct" was defined by the English Court of Appeal in *Allison* v. *General Council of Medical Education and Registration*:[194]

> If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of infamous conduct in a professional respect.

This definition was made, presumably for the General Medical Council to elucidate a statutory offence called infamous conduct. To find a physician guilty of "infamous conduct" means that there has been moral turpitude of a serious nature.[195] From that definition, the court intends to impose a legal test to be utilised with respect to professional discipline as to whether the physician has been guilty of the type of conduct which the specific statute in question sets out as deserving of sanction. This means that the conduct of the physician should be measured by the judgment of the individual's fellow professionals of good repute and competency.

With respect to establishing a general rule defining infamous conduct, the *Patterson* case[196] stood for the proposition that sexual relationships between physician and patient will not, in all circumstances, constitute infamous conduct. Rather, the surrounding circumstances must be carefully examined. Indeed, the court interfered on the ground that the Council decision was wrong. The court found that Council, in concluding that the appellant's conduct was infamous, based its decision on unreliable evidence. The court concluded that the test of whether misconduct by a physician was infamous or unprofessional was a determination that should be made by the physician's professional brethren applying the standards and ethics of the medical profession. In the X case, the Court of Appeal stated that the Inquiry Committee was best able to say what constituted professional misconduct. Its finding that the conduct was unprofessional should not be disturbed because the finding was based on the application of the standards and ethics of the medical profession.[197] Such determination, although not binding on the courts, should be given great weight and should not be lightly interfered with. In that regard, a finding of infamous conduct was overturned because the surrounding circumstances were examined and did not convince the court that there was any moral turpitude on the part of the physician.[198] For these reasons the appeal was allowed and the decision of the Council set aside.

The *X* case was judicially distinguished from *Charalambous* v. *College of Physicians and Surgeons (B.C.).*[199] In *Charalambous*, Gibbs J. (as he was then) stated that if the matter had come before him *de novo*, rather than by way of appeal, he would have had no hesitation in reaching the same conclusion as the Council did in stating that the physician's conduct was infamous. The *Charalambous* case paralleled the *De Gregory* case, but with respect to moral turpitude, in the court's opinion, was worse. In *De Gregory,* Gibbs J. stated that the object of the family doctor's affections was the mother, with whom he entered into a sexual relationship.[200] Here the family physician,

over the strenuous objections of the mother and step-father, took the mother's fifteen year old child into his home and co-habited with her and had sexual relationships with her. According to the court, the fact that he subsequently married her and that they now have a family did not erase the abuse of trust and confidence implicit in the course of conduct, which the doctor undertook at the material times. There was an honourable course, which he could have followed if he had exercised patience. But he did not and, thereby, in the court's opinion, then elected to accept the risk of the fate which had now befallen him.

In *C.D.* v. *College of Physicians and Surgeons of British Columbia*,[201] the physician appealed to the court under the *Medical Practitioners Act* against a decision of the Council, which accepted a report of an inquiry committee finding that the physician was guilty of infamous conduct. During the hearing, the physician admitted having sexual intercourse with his patient, but argued that the relationship was only consensual and that the patient had not been his patient at the time. The appeal was in part only against the penalty imposed, by deleting the fine. The court found that a personal relationship between physician and patient was not always prohibited; but here there was a continuing professional interaction between the physician and the patient, and the latter was a vulnerable person with ongoing problems. The physician was aware of such a situation. The court found that the conduct of the physician was wrong, and that it resulted in harm to the patient. The physician-patient relationship was still in existence when the sexual intimacies took place. The court stated that the word "infamous" might have a lurid and melodramatic ring to it. The court considered that those in the profession could discern differing degrees of misconduct and one's professional peers would be best qualified to make such distinctions. The court found no error in categorising the professional conduct as infamous. In the court's view, the findings of wrongful conduct made by the Inquiry Committee were therefore amply justified.

At present, a patient who has been sexually abused by a physician has not only the professional disciplinary regime for breach of professional misconduct at her disposal, but also other main points of access to legal redress, such as criminal proceedings[202] and civil actions. The redress that will be discussed, in the next section, is related to the civil actions for negligence, battery and breach of fiduciary duty. That can form the basis for a lawsuit.

(5) Civil Liability of Physicians in Professional-Patient Relationships

(a) Negligence

Over the last several decades civil actions have increasingly been brought against physicians with respect to the breach of duty to provide a mandated standard of care. This breach of duty of a physician is characterised as the tort of negligence. In that regard, the two main questions that tend to arise with civil claims based on sexual abuse between physician and patient are: whether there was a continuation of the physician-patient relationship when the sexual conduct occurred? and whether the sexual conduct was completely separate from the medical treating relationship?

It may here be arguable that the second question is irrelevant as far as determining whether negligence exists. In the context of medical malpractice, one must establish that there is an ongoing physician-patient relationship. Medical malpractice is a particular form of negligence applied when a physician fails to exercise that standard of care which is ordinarily employed by other members of the medical profession. A physician, as a health care provider, is always at risk of being sued for medical malpractice. The legal principles that govern a medical malpractice action against a physician are essentially the same as apply to any other field of care. The patient must

prove a departure from the standard of care, during or after the physician-patient relationship that has caused foreseeable harm. To be successful in a court of law, a negligence action must meet the following four classic requirements:

(1) the physician must owe the patient a duty of care;
(2) the physician must breach that duty by failing to meet the required standard of care;
(3) the patient must be harmed or have suffered injury; and
(4) the physician's conduct must have been the proximate cause of that harm or injury.[203]

The standard of care required by a physician is that of a reasonable physician considering all of the circumstances related to the harm caused by the physician's misconduct. This means that liability only surfaces when the physician fails to provide the same standard of care as would a reasonably and prudent physician. The physician will be expected to carry out his services exercising reasonable skill, care and diligence. In *Wilson* v. *Swanson*,[204] the Supreme Court of Canada found that the physician ought not to be judged by the result, nor was he to be held liable for error of judgment. This case is still often cited to better define the standard of care. In *Crits* v. *Sylvester* [205], the Ontario Court of Appeal stated:

> Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability.

The requirement of the standard of care means that the physician is legally bound to exercise the ordinary degree of skill, care and diligence to be expected of physicians and surgeons in good standing.[206] Only a departure from this standard of care, as for example by performing or omitting to perform a service while engaging a sexual

relationship with the patient, will result in negligence liability. The burden of proof and persuasion ultimately resides with the patient. Expert testimony is typically required to prove the evidentiary basis upon the preponderance of probabilities. Many patients prove to be unsuccessful in actions framed in negligence because they are unable to satisfy one or more legal requirements.[207]

(b) Battery

The second basis for a legal action is battery. As stated by Laskin J. for the Court in *Reibl* v. *Hughes*,[208] the tort of battery is an intentional one, consisting of an unprivileged and unconsented to invasion of one's bodily security. Laskin J.'s statement is a very debatable proposition of law. It does seem to require an intentional act, but may be merely negligent as to the consequences. In any event, the tort of battery is highly relevant in the physician-patient sexual relationship context. This cause of action arises particularly when the physician intentionally and unjustifiably causes harmful or offensive contact with his patient.[209] Consent, either express or implied by conduct, is a defence to a claim of battery. Consent must be genuine. Consent is not genuine if it is obtained by force, duress, or if it is given under the influence of drugs.[210] There is no requirement that the physician needs "to have intended to cause" the harm, only that he intended "to make" the sexual contact with the patient. The tort of battery is actionable without actual proof of damages. For a civil action based on battery to be successful, it must be proven that there was an intentional infliction of unlawful physical contact on the patient.

One of the hurdles to a successful action based on battery is the defence of consent, which was studied in depth in the *Norberg* v. *Wynrib* case.[211] This is still the leading Canadian civil case on sexual abuse between a physician and a patient. The

six-member panel of the Supreme Court of Canada took different views. These different approaches were offered by La Forest J. for the majority (Gonthier and Cory, JJ. concurring), a minority decision from Sopinka J., and another minority decision from McLachlin J. (Justice L'Heureux- Dubé concurring). The entire Court split over the issue of consent which, indeed, was given radically different analyses in the three decisions. What is now the law and how is the law applied? McLachlin J. (L'Heureux-Dubé J. concurring) established the legal test with respect to sexual abuse and focused extensively on the fiduciary aspect of the physician-patient relationship.

The facts of the *Norberg* v. *Wynrib*[212] case are here established in order to understand the legal aspect of the physician-patient relationship and the principle of civil liability, as articulated and applied by the courts. An explicit review of this case dealing with sexual abuse in the physician-patient relationship will reveal that the judges manifested the same biases in defining legal concepts. In *Norberg* v. *Wynrib*, the physician prescribed a drug to the patient, who was addicted to it, in exchange for sexual favours. The patient brought an action for general and punitive damages against the physician[213] on the grounds of sexual assault, battery, breach of fiduciary duty and breach of contract. The Supreme Court of Canada found that, in view of the inequality of power between the parties and the patient's dependence on the drug, and the exploitative nature of the relationship, her consent to the sexual acts was not voluntary.

The majority judgment,[214] prepared by La Forest J., Gonthier and Cory J.J., allowed compensatory damages against the physician, in battery, because he committed sexual contact with the plaintiff in providing her with painkiller drugs to which she was addicted. La Forest J., writing for the majority, discussed the defence of consent to a cause of action framed in battery and found that the patient in that case did not, in the eyes of the law, "truly consent" to the sexual activity; accordingly, the physician was

liable for battery. La Forest J. found that, for consent to be a proper defence, the consent must be genuine:

> It must not be obtained by force or threat or be given under the influence of drugs. Consent may also be vitiated by fraud or deceit as to the nature of the defendant's conduct. The courts below considered these to be the only factors that would vitiate consent.
>
> In my view, this approach to consent in this kind of case is too limited.... A position of relative weakness, can, in some circumstances, interfere with the freedom of a person's will. Our notion of consent must, therefore, be modified to appreciate the power relationship between the parties.[215]

In *Norberg* v. *Wynrib*, La Forest J. was of the view that an "unconscionable transaction" between physician and patient had clearly occurred because of the power imbalance between the parties and in an extensive exploitation of that vulnerable patient. Consequently, any consent given by the patient to the sexual relationship was vitiated. La Forest J. found that there was inequality between the physician and the patient and that the patient's need for drugs placed her in a vulnerable position. In terms of the proof of exploitation La Forest J. found that exploitation occurred when the more powerful person abused his position of authority by inducing the dependent person into a sexual relationship, thereby causing harm. La Forest J. made mention of two factors to be considered, namely the type of relationship between physician and patient and the prevailing community standards. First, the physician abused his power over the patient by exploiting the information he obtained concerning her weakness, to pursue his own personal interests. Secondly, a sex-for-drugs arrangement initiated by a physician with his drug addicted patient was a relationship widely divergent from those minimum standards considered acceptable by the community at large.

La Forest J. limited his decision to a condemnation of situations where a physician exchanged drugs for sex from an addicted patient. He did not condemn as

such a physician-client sexual relationship. He then stated that in the exchange of drugs for sex with an addict, a physician exploited a medical relationship, and that ought to be condemned. La Forest J. expanded the law with respect to when a consent may be held to be invalid, encompassing a situation where there was a power dependency and exploitation. In that regard, he said that a court must consider whether there was a power dependency relationship created through the inequality of the parties and whether there was an exploitation of that relationship. La Forest J. applied this test to the facts at bar and found that an unequal distribution of power was frequently a part of the physician-patient relationship. He then discussed how Dr. Wynrib had exploited that relationship for his own benefit and therefore concluded that Ms. Norberg's consent to the sexual relationship was logically and legally ineffective. All of that left the physician without a defence of consent to an action of battery. La Forest J. found that the defence of consent, which had succeeded in the lower court, failed because of the unequal power between the physician and the patient. He further stated that the exploitative nature of the relationship removed the possibility of the patient providing meaningful consent to the sexual contact. He then referred to the *Task Force Report*:[216]

> The unequal distribution of power in the physician-patient relationship makes opportunities for sexual exploitation more possible than in other relationships. This vulnerability gives physicians the power to exact sexual compliance. Physical force or weapons are not necessary because the physician's power comes from having the knowledge and being trusted by patients.

This Report was extensively used by the Supreme Court of Canada. La Forest J. raised the issue that knowledge and trust defined the physician's conduct which must be judged, not just as a physician, but also by the minimum standards expected of a physician involved in a medical relationship with a vulnerable patient. The *Norberg* v. *Wynrib* decision took the public interest into account in defining the professional-patient

relationship. La Forest J. found tort law sufficient for civil liability.[217] After concluding that the patient had proven the tort of battery, the Court, in its majority judgment, awarded $20,000.00 for general damages, $20,000.00 for aggravated damages, and $100,000.00 for punitive damages. La Forest J. did not address the issue of fiduciary relationship.

Sopinka J. disagreed with La Forest J.'s judgment in the *Norberg* v. *Wynrib* case. In fact, he rejected the sexual assault claim on the ground of the "apparent consent" and asserted that, while the patient consented to the sexual encounters, she did not consent to the breach of duty that resulted in the continuation of her addiction, as well as those sexual encounters. Sopinka J. found that the sexual acts were causally connected to the failure to treat in accordance with standards and must form part of the damages suffered by the patient. He stated that the patient never wanted to have sexual relations with her physician; it was also established that she submitted because it was the only way to get the drug she desperately craved. Thus, her addiction was such that she wished to obtain a supply at any cost. Further, Sopinka J. emphasised that the question of consent in relation to a battery must be determined on the basis of all the circumstances of a particular case. In more general terms, he took a conventional approach with respect to the issue of consent and justified his decision by what he thought was "obvious logic". He disposed of the plaintiff's alternative cause of action in battery on the ground that she consented to sexual relationships, which formed the basis of the tort.

(c) Breach of Fiduciary Duty

The third basis for a legal action is breach of fiduciary duty. This section will demonstrate that a physician-patient relationship is fiduciary in nature because the

patient reposes trust and confidence in the physician. As McLachlin J. stated, in *Norberg* v. *Wynrib*, "the fiduciary physician-patient relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged".[218] The physician-patient relationship category is one of the accepted categories where courts will presume that a fiduciary relationship exists.[219] In that regard, LeBel J., in *Henderson* v. *Johnston*,[220] stated, in an *obiter dictum*:

> The legal relationship between a patient and his physician or surgeon has been touched upon in only a few cases, but it is clearly established in them that it is fiduciary and confidential. It is the same relationship as that which exists in equity between a parent and his child, a man and his wife, an attorney and his client, a confessor and his penitent and a guardian and his ward; *Parfitt* v. *Lawless* [1872], L.R. 2 P. & D. 462 at 468....
>
> The medical practitioner, like the lawyer or other professional adviser, is bound, then to see to it that in no circumstances will he allow his professional duty to come into conflict with his personal interests.

This shows that it is beyond dispute that such a physician-patient relationship falls into the law's catalogue of recognised fiduciary relationships. Thus, the physician is bound to see to it that in no circumstances will he allow his professional duty to come into conflict with his personal interests. The legal concern is whether the fiduciary relationship extends to situations where physicians take improper advantage of their superior power over patients or whether it is breached only by breaches of confidence, misuse of information or conflict of interest.

The *Henderson* v. *Johnston* case dealt with the relationship between physicians' fee-splitting and hospital privileges. Although the case was decided on other grounds, LeBel J. thought that the legal relationship between physician and patient was of the same kind as that which existed in equity with other individuals. A fiduciary duty should be ascribed to a broad range of professionals such as lawyers.[221] This argument, also introduced by the College of Physicians and Surgeons of British Columbia, asserts that

the professional-patient relationship imposes on the physician duties and obligations analogous to those imposed on a lawyer where a lawyer-client relationship exists.[222]

A lawyer is in a fiduciary relationship to his client and must avoid situations where he develops conflict of interests during the representation.[223] Although a client depends on a lawyer in the fiduciary relationship to solve legal problems, the dependence here is distinguishable from dependence in the context of the medical profession.[224] The physician-patient relationship, insofar as it sets up a ban on therapist-patient sex, cannot be transferred wholesale to the legal profession, as if the situations presented a perfect analogy. The physician, unlike the lawyer, engages in a professional conduct calculated to improve the patient's physical, mental or emotional well-being. The fact that the legal problems exist outside the client's person, in a social and normative construct rather than within the client's own physical, mental or emotional self, is a significant distinction between clients and patients. Whereas a physician is trained to diagnose, treat and, if and when possible, cure illness that lies inside the problem forming the basis of the physician-patient relationship, a lawyer does not exercise such power over the client's personal needs. Although there is trust and power imbalance in the fiduciary lawyer-client relationship, the power discrepancy is less pronounced than it is in a medical relationship setting; but it still exists.

The nature of the lawyer-client relationship, in terms of duration, type of information disclosed to the lawyer, and extent of physical intimacy, typically renders the client less vulnerable than when he is in a medical professional setting, which may decrease the risk of transference and exploitative sex. For Filipovic, the term "transference" refers to the process by which a person unconsciously projects onto others feelings, attributes and wishes which originally were linked with important people in one's early life.[225] Thus a physician may come to possess certain attractive or undesirable traits that stem from the patient's unconscious needs, rather than from the

client's accurate perceptions of reality. Hence, the basis for the patient's attraction may be attributed to the power the physician is to serve rather than attributable to the physician as a person. For Filipovic, this concept can operate in reverse as well [cross transference] and the outcome of the transference phenomenon is a situation easily exploited by professionals, and any sexual involvement increases the patient or client's dependency.

Returning to the minority decision of McLachlin J., in *Norberg* v. *Wynrib*, its approach was more comprehensive and not so conservative. McLachlin J. (L'Heureux-Dubé J. concurring) dissented on the issue of quantum of damages and came to the issue of breach of fiduciary duty by a route different from that taken by the majority of the Court.[226] Thus, McLachlin J. asserted that the physician was liable for breach of fiduciary duty:

> The essence of the fiduciary relationship ... is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.[227]

McLachlin J. further discussed the physician's obligations:

> Obligations can only be determined on a case-by-case basis, having reference to the degree of power imbalance and patient vulnerability present in the relationship under examination ... where such a power imbalance exists it matters not what the patient may have done, how seductively she may have dressed, how compliant she may have appeared, or how self-interested her conduct may have been – the doctor will be at fault if sexual exploitation occurs.[228]

Placing the onus on the professional might seem to relieve the patient of responsibility for her own conduct. The argument, that always placing the onus on the physician treats the female patient as a child or as being not capable of making her own decisions, was addressed by McLachlin J. within the context of the fiduciary relationship. She

discussed openly the nature of the physician's obligation as defined by the professional care being provided to the patient. McLachlin J. went on to note that it was not limited to strict legal interests; rather it encompassed what might be moral or personal interests, including the patient's integrity.[229] For McLachlin J., fiduciary obligation was not confined to traditional legal rights and ethical standards, such as confidentiality and conflict of interest and undue influence in the business sphere. Here societal and personal interests which were vital and substantial were being protected. Indeed, she placed relatively greater emphasis on the specific dynamic of the professional-patient relationship and the invasion of the patient's integrity and interests. McLachlin J. then further explained the full nature of the fiduciary relationship between physician and patient:

> It is not disputed that Dr. Wynrib abused his duty to the plaintiff. He provided her with drugs he knew she should not have. He failed to advise her to enroll in an anti-addiction program, thereby prolonging her addiction. Instead, he took advantage of her addiction to obtain sexual favours from her over a period of more than two years.
>
> The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfil his or her obligations giving rise to an action of breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of negligence. In common with all members of society, the doctor owes the patient a duty not to touch him or her without his or her consent; if the doctor breaches this duty he or she will have committed the tort of battery. But perhaps the most fundamental characteristic of the doctor-patient relationship is its fiduciary nature. All of the authorities agree that the relationship of physician to patient also falls into that special category of relationships which the law calls fiduciary....
>
> I think it is really apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship – trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires....[230]

The *Norberg* v. *Wynrib* case is authority for the proposition that an inherent vulnerability pertains in a professional-patient relationship.

McLachlin J. underscored the point that such a relationship is a fiduciary one, and a patient is vulnerable because of the power imbalance favouring, mostly, the physician.[231] In other words, the most significant implication of McLachlin J.'s decision was that it fully characterised and crystallised in law the physician-patient relationship as a fiduciary one which involved loyalty[232], trust and power imbalance. This gave a cause of action available for harm arising out of an outwardly consensual sexual relationship. Before the *Norberg* v. *Wynrib* case, such cause of action was not evidently available in tort or in contract. Thus, McLachlin J. established the legal test to define the fiduciary relationship with respect to the professional-patient relationship and stated:

> The freedom of the fiduciary is limited by the obligation he or she has undertaken --- an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd.* v. *O'Malley* (1973), 40 D.L.R. (3d) 371 at p. 382, 11 C.P.R. (2d) 206, [1974] S.C.R. 591. To cast a fiduciary relationship in terms of contract or tort (whether negligence or battery) is to diminish this obligation. If a fiduciary relationship is shown to exist, then the proper legal analysis is one based squarely on the full and fair consequence of a breach of that relationship.
>
> Wilson J. in *Frame* v. *Smith* (1987), 42 D.L.R. (4th) 81 at p. 99 [1987] 2 S.C.R. 99, 42 C.C.L.T. (approved by La Forest and Sopinka JJ. in *LAC Minerals Ltd.* v. *International Corona Resources Ltd.,* [1989] 2 S.C.R. 574, at pp. 598 and 646, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574, and by McLachlin J., Lamer C.J. and L'Heureux-Dube J. concurring, in *Canson Enterprises Ltd.* v. *Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 543-44), attributed the following characteristics to a fiduciary relationship: (1) [t]he fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[233]
>
> Dr. Wynrib was in a position of power vis-à-vis the plaintiff; he had scope for the exercise of power and discretion with respect to her. He had the power to advise her, to treat her, to give her the drug or to refuse her the drug. He could unilaterally exercise that power or discretion in a way that affected her interests. And her status as a patient rendered her vulnerable and at his mercy, particularly

> in light of her addiction. So Wilson J.'s test appears to be met. All the classic characteristics of a fiduciary relationship were present. Dr. Wynrib and Ms. Norberg were on an unequal footing. He pledged himself – by the act of hanging out his shingle as a medical doctor and accepting her as his patient – to act in her best interests and not permit any conflict between his duty to act only in her best interests and his own interests – including his interest in sexual gratification – to arise. As a physician, he owed her classic duties associated with a fiduciary relationship – the duties of "loyalty, good faith, and avoidance of a conflict of duty and self-interest".

McLachlin J. was of the view that the principles outlined by Wilson J., in *Frame* v. *Smith*,[234] applied in varying force depending on the very nature of the physician-patient relationship. First, McLachlin J. stated that the physician-patient relationship must be entrusted with power to perform professional duties. What went wrong in the *Norberg* v. *Wynrib* case was that the risk inherent in entrusting Dr. Wynrib with such a power was realised and he then abused the power, which was entrusted to him by his licensing and regulatory body. Secondly, McLachlin J. endorsed Wilson J.'s position in stating that, when such a power or discretion was used to affect the beneficiary in a damaging way, that made the imposition of a fiduciary duty necessary to protect the beneficiary's "vital and substantial practical interests."[235] To the extent that the law requires that a physician who breaches that duty be disciplined, the fiduciary duty has, therefore, legal force. In *Norberg* v. *Wynrib*, Dr. Wynrib abused his power in affecting Ms. Norberg's "vital and substantial practical interests." Finally, McLachlin J. asserted that the issue of vulnerability was the other side of the differential power equation, fundamental to all fiduciary relationships. Only where a "material discrepancy" existed between the power of the fiduciary and the vulnerability of the beneficiary could that fiduciary relationship be recognised by the law. She stated that, where the parties were on a relatively equal footing, contract and tort provided the appropriate analysis. This was not the situation in this case. In summary, all of these three requirements were fulfilled.

In rendering her decision, McLachlin J. also discussed the Hippocratic Oath. She stated that any consensual sexual relationship between physician and patient was unethical because that malfeasance took precedence over patient autonomy. In developing such a power imbalance between physician and patient, McLachlin J. agreed throughout that the patient becomes more vulnerable.[236]

Finally, *Norberg* v. *Wynrib* is a case concerning boundary violation where the fiduciary physician-patient relationship is recognised and where the patient ought to be protected in law against any sexual abuse from the fiduciary. The Court also recognises that the true measure of vulnerability differs from one fiduciary relationship to the next. This case also deals with the issue of sexual exploitation by the physician and clearly establishes that it is about misuse of power and violation of trust by individuals in a position of authority.[237] In all instances, however, it is clear that a patient in the fiduciary physician-patient relationship relinquishes some measure of autonomy, which automatically restricts the ability to choose freely when there is an imbalance of power between the physician and the patient.[238]

Chapter IV. The Lawyer-Client Sexual Relationship in the United States

(1) Introduction

For years, some clients have been publicly dissatisfied with their legal representation, based on sexual impropriety. In the last decade, lawyers have been found guilty of violating ethical rules and suspended from the practice of law. In this vein, calls for increased regulation of lawyer-client sexual relationships have led several states' courts, legislatures and bar associations to take a stand to protect the public interest and consider specific rules restricting sexual impropriety. Some states have enacted prohibitions related to lawyer-client sexual relationships; others prefer to rely on existing disciplinary rules governing professional misconduct. Critics carefully examine these legal and ethical issues. In contrast to Canada, numerous papers have been published in American journals with respect to sexual relationships between lawyer and client.

(2) Public Debate

(a) The Lawyer-Client Sexual Relationship

It is well within a client's power to have an affair with whomsoever the client desires, but it is the lawyer's fiduciary duty to not enter into a consensual relationship that is potentially harmful to the client's interests. In the event that the client realises that his trust has been abused, or that exploitation has occurred in the lawyer-client relationship, public confidence in the system will be seriously affected. The following two

questions also remain in the United States: should there be a rule making it an ethical violation for a lawyer to have a sexual relationship with any client? And, should any distinction be based on time, allowing a relationship prior to, during or after the lawyer-client relationship?

In that regard, increased sensitivity to sexual abuse has led members of the legal profession and state legislatures to call for specific restrictions to control lawyer-client sexual relationships.[239] Numerous proposals by legal practitioners and scholars have been introduced and fully discussed. They range from a specific prohibition on relationships where the client is too vulnerable to give consent in the areas of family law and criminal law to an express prohibition on all sexual relationships between lawyer and client. Indeed, there are several schools of thought on whether a prohibitory rule governing the lawyer-client sexual relationship is needed to prevent a potential harm, or whether existing rules are sufficient to discipline lawyers who engage in sexual relationships with their clients. [240] The potential harm to a client's case should be obvious to the lawyer. The sexual relationships between lawyers and clients reinforce the power imbalance between the parties. For Myers *et al.*, the degree to which the power imbalance exists will vary depending on the following five qualifications:

(1) Reward power based on a lawyer's ability to provide a legal service that the client cannot accomplish alone;

(2) Coercive power based on the lawyer's capacity to damage the client's interests by providing inadequate service due to the impaired judgment;

(3) Legitimate power based on the normative perception that the lawyer can proscribe an acceptable conduct;

(4) Referent power based on the respect and admiration a lawyer's professional role may inspire to the client; and,

(5) Expert power based on the perception that the lawyer is privy to special knowledge and expertise that can be used to the client's benefit at any costs.[241]

Public debate has arisen[242] with respect to coercive power, based upon the lawyer's capacity to harm a client's interest by providing inadequate services, due to conflict of interest emerging from a lawyer-client sexual relationship.

(b) Formal Opinion 92-364: Fiduciary Obligations

In reviewing professional standards, the American Bar Association[243] recognises the danger related to the coercive power in its Formal Opinion 92-364 on lawyer-client sexual relationships. To control that danger the ABA has a compelling interest to protect the general welfare of the public by regulating the practice of law. It also promotes competent legal services in insuring legal representation, avoiding conflicts of interest and curtailing unethical conduct that adversely reflects on the practice of law, as prejudicial to the administration of justice. Furthermore, the ABA asserts a compelling interest in preserving the integrity of the Bar and public image of the profession. In essence, the rule prohibiting any sexual relationship is narrowly drawn to avoid any boundary violation and achieve these compelling interests.[244]

The ABA's Standing Committee on Ethics and Professional Responsibility[245] is charged with interpreting the professional standards of the ABA and recommending appropriate amendments and clarifications, interpreting the Model Rules of Professional Conduct and the Model Code of Judicial Conduct. On 6 July 1992, the Committee

published a Formal Opinion 92-364,[246] extensively used by various American Bars and scholars. The main purpose of Formal Opinion 92-364 is to define the lawyer-client sexual relationship in the following terms:

> A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, and therefore may violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility.[247]

As such, the Committee was asked to provide an answer as to whether a lawyer violates the ABA Model Rules of Professional Conduct (1983, amended 1991) or the ABA Model Code of Professional Responsibility (1969, amended 1980) by entering into a sexual relationship with a client during the course of representation. In that regard, the Committee first raised the fact that a sexual relationship predating the professional-client relationship could, in some circumstances, raise the same ethical problems as are here considered during the legal representation. It then acknowledged that, although there was no specific ethical provision addressing lawyer-client sexual relationships, provisions of the Model Rules of Professional Conduct were already implicated by the use of the terms "sexual relationship".[248] Although the Committee recognises the problem of the lawyer-client sexual relationship and warned lawyers of potential negative ramifications to both parties, it failed to ban sexual contact between lawyer and client by current Model Rules of Professional Conduct.[249]

In its Formal Opinion 92-364, the Committee focused, in large part, on the relevance of the fiduciary obligations with respect to regulating the lawyer-client relationship,[250] requiring that the lawyer not take advantage of his dominant position or exploit the vulnerable position of the client. The Committee reinforced the idea that the lawyer-client relationship is a fiduciary one in which the client places trust and

confidence in the lawyer in return for the lawyer's undertaking to place the client's interest ahead of any self-interest of the lawyer. The Committee further stated that the fiduciary duties arise from basic principles of common law and refers to *Stockton* v. *Ford*,[251] which stated:

> There are few business relations of life involving a higher trust and confidence than those of attorney and client, or generally speaking one more honorably and faithfully discharged, few more anxiously guarded by the law or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment of prejudice of the rights of the party bestowing it.

For the Committee, the fiduciary duty imposes the highest standards of ethical conduct on a lawyer during legal representation. Further, a lawyer is bound to conduct himself as a fiduciary occupying the highest position of trust and confidence, so that, in all relationships with clients, the fiduciary duty is to exercise and maintain utmost good faith, honesty, integrity, fairness and fidelity. This fiduciary or trust relationship precludes the lawyer from personal interests antagonistic to those of the client or from obtaining personal advantage or profit out of the relationship.[252] In essence, the position of trust places the burden on the lawyer to ensure that all professional-client business dealings are fair and reasonable, and do not interfere with competent representation. For the Committee, this sets the tone for legal representation where trust and reliance on the lawyer place the lawyer in a position of dominance and the client in a position of vulnerability and dependency. All of the positive characteristics that the lawyer is encouraged to develop (*e.g.*, skills, knowledge, competitiveness, etc.) ought to reinforce confidence in the client that he or she is well represented.

In its Formal Opinion 92-364, the Committee warns lawyers that there are different types of clients. In commercial business settings, sophisticated corporate

clients usually have little or no sense of dependence towards their lawyer. In other settings, clients, by virtue of their state of mind, education, age, or social status, length of the case, often feel dependent and, to some extent, disarmed *vis-à-vis* their lawyer.[253] In such situations the Committee states that the level of stress is directly affected by the level of loss control, such as fighting to keep custody of children, avoiding gaol time, experiencing fear of deportation, or fighting to save the client's patent to avoid business loss. In that regard, the Committee defines the legitimacy of the fiduciary obligation inherent in the lawyer's position which is heightened if the client is vulnerable or at risk in a way that affects his ability to make rational decisions.[254] It is also suggested that the more vulnerable is the client, the heavier the obligation of the lawyer will be to avoid engaging in any personal relationship. If, however, the lawyer engages in sexual relations, the Committee stipulates that he may put himself at risk to violate one of the most basic ethical rules, *e.g.*, not intentionally to prejudice, use or damage the trust of the client against his own interests in accordance with Rule DR 7-101(a)(3) of the Model Rules of Professional Conduct.[255] In short, it sets forth the following dangers related to the existence of a lawyer-client sexual relationship:

> (1) It may deprive the lawyer of independent judgment. Emotional detachment is essential to the lawyer's ability to render competent legal services.
>
> (2) It creates risks that the lawyer will be subject to a conflict of interest. One of the hallmarks of the legal profession is the obligation of a lawyer to exercise professional judgment solely on behalf of the client and a sexual relationship with his client may hinder the lawyer's ability to meet this obligation.
>
> (3) It may risk unwarranted expectations regarding the preservation of confidences and related dangers. Client confidences are protected by privilege only when they are imparted in the context at the lawyer-client relationship. The courts will not protect confidences given as part of a personal relationship. A blurred line between any professional and personal relationship may make it difficult to predict to what extent client

> confidences will be protected. Expectations of confidences will be forced to rest on ever shifting sands. [256]

The Committee's conclusion is based upon a recognition that a lawyer-client sexual relationship may seriously harm the client's interests. The lawyer must refrain from an intimate relationship with the client because it does not procure any advantage for the client's interests.

The dual roles of "lover" and "lawyer" are in constant conflict because of the emotional involvement which have the potential to undercut the objective detachment often demanded for adequate representation. At the outset, this argument introduced by the Committee is justified on consequentialist grounds; it had received a number of complaints[257] related to lawyer-client sexual relationships, to substantiate both the existence and the seriousness of ethical problems where the private sphere is intertwined with the public sphere.

(c) Rule 1.8 (j) of Model Rules: The American Bar Association

Before 1992, efforts in several states to draft new ethical rules related to sexual relations highlighted the need to clarify precepts that govern lawyers' conduct in this area. Since 1992, several states amended their disciplinary Codes or Model Rules with provisions ranging from outright prohibitions on a lawyer-client sexual relationship to warnings in comment sections related to possible negative ramifications resulting from the lawyer-client sexual relationship.[258] Proposed amendments and clarifications made by the ABA Standing Committee on Ethics and Professional Responsibility, and the adoption of a rule prohibiting sex between lawyer and client, have influenced the direction of the states to enact their own statutes or advisory opinions. Such ethical

amendments have, however, been rejected in several other states. According to Struzzi, Michigan and Washington States are only two examples where the prohibiting rule was rejected as a proposed amendment to Model Rule 8.4 of the Model Rules of Professional Conduct prohibiting lawyer-client sexual relationships. Michigan's Supreme Court has rejected this amendment.[259] The proposed rule stated that it is professional misconduct for a lawyer to have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced. The court declined to adopt Model Rule 8.4 for similar reasons as Washington. It stated that the existing Rule MCR 9.104(3) which provides that "a lawyer may be disciplined for conduct that is contrary to justice, ethics, honesty, or good morals" is sufficient to discipline lawyers who engage in inappropriate relationships with a client. The court pointed out the fiduciary duty of the lawyers toward the client. Finally, the court held that a lawyer who has conflict of interest, whose actions interfere with effective representation, who takes advantage of a client's vulnerability, or whose behavior is immoral, risks severe sanctions under the existing rules.

In *re Heard*, Washington's Supreme Court was asked to make a determination on the issue of whether a lawyer engaging sexual relations with his client commits an act of moral turpitude and can be punished under the existing rules.[260] In its reasons, the court found that the lawyer's actions constituted acts of moral turpitude. The court applied its existing rules concerning sexual relationships in making the determination. The court, however, stated that the moral turpitude was not defined and that its application depends on the collective conscience and judgment of the members of the court. In essence, this suggests a measure of self-consistency. Finally, in *re Heard*, the court stated that the definition of the moral turpitude does not gain in clarity by prolixity of statement.

The proposed amendments and clarifications made by the ABA Committee were also placed before the Pennsylvania Supreme Court. The court, however, did not take action. The Pennsylvania Bar Association issued formal opinion 97-100 which included an express rule; this was never proposed. The state of Pennsylvania has then attempted a limited solution in the form of a sexual harassment prohibition.

The most recent change concerning the conflict of interests in the lawyer-client relationship, and perhaps the most influential ethical development, occurred when the ABA released, as part of its proposed amended Model Rules for the year 2000, Rule 1.8 (j) of the Model Rules of Professional Conduct concerning sexual relations between lawyer and client. In August 2001 the ABA House of Delegates, pursuant to a recommendation by the Ethics 2000 Commission,[261] proposed and adopted a new rule prohibiting all sexual relationships between lawyers and clients, except those existing prior to the formation of legal representation. This rule underlines that lawyers are governed by the state bar and subject to its Code and Model Rules. The ABA House of Delegates rejected the idea of a partial prohibition, stating that such a position does not address the conflict of interests and further does little to prevent problems from arising in the first place. The ABA Rule 1.8 (j) of the Model Rules of Professional Conduct, describing the lawyer-client relationship as a fiduciary one, provides:

> CURRENT CLIENTS: SPECIFIC RULES
>
> (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
>
> Comments:
>
> Client-Lawyer Sexual Relationships
>
> [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can

> involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.
>
> [18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues related to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.
>
> [19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with the lawyer concerning the organization's legal matters.[262]

Essentially, this rule has two main objectives: (1) putting the lawyer on notice, and (2) providing protection to clients by eliminating the burden to prove anything other than the existence of a sexual relationship between lawyer and client. It also deals only with the lawyer-client sexual relationship during legal representation and makes it clear that it prohibits the lawyer from having sexual relationships with a client, regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Although the Committee's position is that a client may consent to a sexual relationship with his lawyer, Rule 1.8 (j) makes expressly clear that the client's consent to sex alone will rarely be sufficient to eliminate the danger occurring between the lawyer and the client. In this manner, the client's ability to provide meaningful consent would be

vitiated by the lawyer's potential undue influence and/or the emotional vulnerability of the client. For the Committee, whether the client could adequately provide an informed consent to a sexual relationship with the lawyer still remains questionable. For Vincent, Rule 1.8 (j) does not go far enough to protect individuals who interact with lawyers without defining them as clients; these individuals can still be harmed during the legal representation for all the same reasons any client may be.[263] This means that a lawyer providing legal services to Ms. X may not define her as a client until he receives the retainer. In that regard, Vincent points out that Rule 1.8 (j) fails to include the fiduciary duty to gain legally effective consent from clients to potential conflicts of interest.

(3) Arguments for the Express Rule

Several arguments for the express rule have been introduced in the American literature. We will here focus mainly on the necessity of enacting a rule, the fiduciary obligations, and the analogy between physicians and lawyers.

(a) Necessity of Enacting an Express Rule

For many scholars and courts, an express rule prohibiting lawyer-client sexual relationship is necessary to protect clients against potential harms, preserve professionalism and, above all, maintain existing fiduciary duties. Jorgenson and Sutherland, proponents for the regulation of an express rule, argue that existing ethical rules are not always interpreted consistently by courts. [264] Depending on the facts, the court's application of a particular rule and its wide discretion with respect to sexual misconduct, justice may or may not result.

In *Re Lewis*, the lawyer allegedly videotaped himself having sex with his clients, in an exchange of legal services. [265] The Georgia Supreme Court found him guilty of sexual misconduct. The lawyer received a three-year suspension rather than disbarment, recommended by the disciplinary referee. The lawyer violated the ethical standards relating to professional judgment affected by personal interests. Because the State of Georgia lacks a specific rule prohibiting lawyer-client sexual relationships, the court declined to a set a standard of disbarring a lawyer for an extramarital encounter with his client. The court suspended his license to practice law based upon his failure to exercise proper professional judgment in representing his client.[266] This case illustrates that existing law and rules provide the court with wide discretion in addressing the issues of lawyer-client sex.

A lawyer violating an ethical rule or inducing another to violate an ethical rule can be sanctioned for professional misconduct. Rule 8.4 of the ABA Model Rules of Professional Conduct provides that a lawyer may be disciplined if the lawyer engages in conduct that is prejudicial to the administration of justice.[267] Disciplinary Committees have a difficult time finding a rule that applies to seemingly obvious professional misconduct. For Crumpacker,[268] a specific rule was requested to establish a test of predictability and uniformity used by courts to avoid the blurring between a lawyer's role as advocate and as lover, occurring when the lawyer begins a sexual relationship with his client during legal representation. It is argued that the client can be confused about the lawyer's role and feels a betrayal of the lawyer's trust; the client can also feel some anxiety over the secrets and confidences[269] revealed to the lawyer, as the latter's role changes from impartial advocate to partial lover. Crumpacker states that the existence of the lawyer's sexual misconduct may cause the client to experience mental anguish, suicidal ideation, inability to trust others, nightmares and flashbacks, depression, and even hospitalisation. In *Re Gibson*,[270] the Wisconsin Supreme Court found that the

lawyer stands in a fiduciary relationship with the client and should always exercise professional judgment solely for the benefit of the client and free of compromising influences and loyalties.

In 1991, Hazard, who is a leading authority on legal ethics, argued that an unqualified prohibition with respect to a lawyer-client sexual relationship would be a mistake.[271] The author introduced situations where an exception to the prohibitory rule must be taken into account before enacting a rule prohibiting lawyers having sex with clients. An exception must be given where lawyer and client have a pre-existing social relationship that has a sexual aspect and where legal representation involves a business matter rather than a personally intimate subject such as divorce. Hazard has also suggested that those arguing that there should be a specific rule should realise that a qualified prohibition will have as much deterrent effect as can be reasonably expected from any legal rule, while always recognising the lawyer-client relationship as a fiduciary one.[272]

(b) Fiduciary Obligations

Myers *et al.*[273] argue that the express need to regulate can be justified from the lawyer's perspective: lawyers have fiduciary obligations and duties which necessitate specific expertise and conformity to ethical rules. In that sense, the lawyers' professional conduct must meet the client's needs. By the nature of the professional-client relationship, Myers *et al.* are of the view that the lawyers' conduct is driven by demands of the clients. Because lawyers perform work within the legal system, which is unique in formalising the link between society and clients, lawyers' obligations and duties ought to reflect social demands[274] which may be jeopardised by the existence of a lawyer-client sexual relationship.

First, the duty of confidentiality is introduced in ABA Rule 1.8 (b) of the Model Rules of the Professional Conduct and provides that lawyers may not use confidential information to the client's disadvantage without gaining the client's consent. The *Tante* v. *Herring*[275] case dealt with Rule 1.8 (b) and involved a female client who consulted a lawyer for help in collecting a social security disability claim. The lawyer helped her get a favourable award. The lawyer learned that the client was emotionally unstable; he subsequently used that information to persuade her to have an affair with him. As a consequence, the lawyer infected her with two strains of venereal disease and she, in turn, infected her husband. Both husband and wife were allowed to recover from the lawyer for breach of fiduciary duty. The lawyer was suspended from practice for eighteen months.

In *Drucker*,[276] a lawyer represented a client in a divorce. He found out that his female client was under psychiatric care and emotionally fragile; and he initiated a sexual relationship with his client and then ended the affair. The lawyer continued to represent her. Meanwhile, the latter had fallen in love with the lawyer and the client's husband found her diary describing her feelings, thus making her divorce more intense. The Disciplinary Committee found that the lawyer took advantage of his client and that he violated Model Rule 1.8 (b) because he used information related to the client's emotional vulnerability to his own advantage. Consequently, the Disciplinary Committee suspended him for two years. The New Hampshire Supreme Court upheld Drucker's two-year suspension from the practice of law and found that, because the lawyer failed to maintain an ethical lawyer-client relationship, his client and her family suffered mental anguish well beyond that normally associated with a difficult divorce.

In *Re Woodmansee*,[277] the lawyer represented his client in a divorce action. In their early meetings, the client revealed to the lawyer that her husband abused her physically and emotionally. She also disclosed that her husband told her that he blamed

her for the death of their infant son who had died recently of Sudden Infant Death Syndrome. At such time, the client was undergoing therapy and taking anti-depressants and anti-anxiety medications. The lawyer suggested to the client that it was necessary for him to come to her place to discuss documents relating to her divorce. After discussing the divorce, the lawyer then brought his client into her bedroom and attempted to touch her sexually. The client refused his sexual advances and a struggle ensued. After this sexual assault, she became more depressed and therefore was hospitalised after becoming suicidal. Her psychiatrist diagnosed her as suffering from post-traumatic stress disorder. After being released from the hospital, the client began having recurring nightmares about the sexual assault. Shortly after, she had to be re-hospitalised. The court stated that the lawyer had taken unfair advantage of his vulnerable client in using the privileged information and placing his own sexual gratification above the client's best interest.

In *Suppressed* v. *Suppressed*,[278] a client hired a lawyer to represent her in a divorce. In this particular case, the lawyer did just about every improper means short of force. During the third meeting at the lawyer's office, he allegedly locked the office door, unzipped his pants and induced the client to have oral sex with him. The female client filed a discipline charge against her lawyer in stating that she complied with his sexual advances because she was fearful that the lawyer would not advocate for her and her children's interests in her divorce case. During the hearing, the complainant testified that her lawyer twice took her to an apartment where he had her inhale something that disoriented her, and then had sexual relations with her. Even though she filed a formal discipline charge, the Illinois Bar did not take the conduct seriously and dismissed the matter. The action alleging breach of fiduciary duty was also dismissed. The Illinois Court of Appeal found that the client failed to allege facts sufficient to raise a breach of fiduciary duty. It held that a lawyer's fiduciary obligation to a client was not to make sex

a *quid pro quo*. The Court considered that the client, who felt coerced into sex, only suffered emotional harm, not quantifiable injury.

Suffice it to say the *Suppressed* v. *Suppressed* case has been highly criticised. Murial, for instance, stated that the Court of Appeal failed to give needed guidance to the legal profession in raising the issue of sexual exploitation in lawyer-client relationships.[279] In criticising the *Suppressed* v. *Suppressed* case, Crumpacker[280] asserted that whether the client was able to discern her choices adequately, and comprehended the likely results of those choices, and then acted with a full understanding of her own values and emotional needs, still remains debatable. In his analysis, he further raised Stephen Ellman's following conditions[281] which enable the lawyer and the legal community to identify the presence of informed and effective consent and bring focus to competent decision-making:

> (1) The clients are aware that a decision is to be made and that they are entitled to make it;
>
> (2) The clients know the choices open to them and comprehend the extent and the likelihood of the costs and benefits of the various alternatives; and
>
> (3) The clients are acting with as full an understanding of their own values and emotional needs as possible.[282]

Ellman took a strong protectionist stance, arguing for maximum protection of client confidences in legal representation. Relying on Ellman's analysis, Crumpacker stated that it is difficult to conclude that a client's informed consent will be truly voluntary when the client is educationally or financially subordinate to the lawyer. In applying Ellman's conditions to the *Suppressed* case, Crumpacker was of the view that one can determine that the client is aware that a decision had to be made with respect to having oral sex with the lawyer. At the same time, the client was in the lawyer's locked office and the

latter was beside her, his pants unzipped. During the hearing, the client asserted that she consented to performing oral sex with the lawyer out of confusion and fear. As a mother and wife with children, facing divorce, there is no doubt that she was vulnerable and was taken unfair advantage of by her lawyer in abusing his power. Crumpacker raised the issue that consent under such circumstances is not consent at all because of the lack of equal lawyer-client dealings found in the lawyer-client relationship. The author further stated that such unequal balance allowed the lawyer to exercise substantial power at the expense of the client's interests.[283]

In *Barbara A.* v. *John G.,*[284] the California Supreme Court found that the essence of a fiduciary relationship is that the parties do not deal on equal terms, because the person in whom the trust and confidence is reposed and who accepted that trust and confidence is in a superior position to exert unique influence over the dependent party. The court further stated that once the client showed a fiduciary relationship was created, the burden shifted to the lawyer in order to prove that the client's consent was informed or that the client's reliance was unjustified. Notice, the fiduciary nature of the lawyer-client relationship, as defined by the court, created a power imbalance between lawyer and client, where trust and confidence had been given to and accepted by the lawyer. It thus placed a countervailing responsibility on the lawyer to act with the utmost good faith and fair dealing with the client.

Secondly, the ABA Rule 1.7(b) of the Model Rules of Professional Conduct[285] raises the issue of conflict of interest. Rule 1.7(b) provides that a "lawyer has a fiduciary duty of loyalty to avoid conflicts of interests and that loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests". The conflict in effect forecloses alternatives that would otherwise be available to the client. Furthermore, Rule 1.7(b) of the Model Rules of Profession Conduct provides that "the lawyer shall not

represent a client if the lawyer's personal interests may materially affect his representation of the client, unless a reasonable lawyer would not think the representation would be materially affected and the client consents after a full consultation: and that a lawyer has a duty to obtain written consent to potential material conflicts."

In *Re Halverson*,[286] the lawyer, while representing his client in a divorce action, began a sexual relationship with her. The client was also the lawyer's former employee. The lawyer lay down the ground rules to her. The client's spouse was not to be able to find out about the sexual relationship; and the lawyer could not get to know or become attached to the client's child. The court found that the lawyer failed to obtain a written consent from the client pursuant to Rule 1.7 (b) of the Model Rules of Professional Conduct and could have not reasonably believed that this could not materially affect such representation. The lawyer was, therefore, found to have violated that rule.

The *Ridgeway*[287] case illustrates how easily conflicts of interest may arise between a lawyer and client in challenging the lawyer's ability to remain detached from the client's situation and objective. The court observed that it had not been in the client's best interest to consume alcohol if she hoped to succeed in avoiding probation revocation. The lawyer knew that his client was under court order to not consume alcohol and the client feared going to jail. Yet the lawyer, well knowing this, gave her beer before initiating sexual contact. The court stated that the lawyer considered his personal interests in a sexual relationship with his client paramount to his own responsibility to remain objective in assessing his client's ability to act in her own best interests. The lawyer was therefore suspended for six months. The court determined that the lawyer used his professional relationship with a vulnerable client for his own personal gratification and encouraged her to violate the terms of probation, imposed following her conviction in a matter in which he had represented her.

Finally, Rule 1.1 of the Model Rules of Professional Conduct provides that competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation. Additionally, Rule 1.3 of the ABA Model Rules of Professional Conduct provides the duty of competence to include acting with reasonable diligence. In *Kraemer*,[288] the lawyer was retained in a personal injury matter and had sexual contacts with the client. The client retained the lawyer in a paternity matter, for which he did not charge a fee. He then failed to file promptly a judgment lien related to that legal representation and was found to have violated Wisconsin SCR 20:1.3, which is analogous to Rule 1.3 of the AMA Model Rules of Professional Conduct, providing the duty of competence. The court found that the lawyer violated his duty of competence by not acting on legal matters with diligence and was therefore subject to civil liability because he did not gain legally effective consent, which affected his legal representation. The court stated that a lawyer could not provide zealous representation without being competent; any personal interests of a lawyer, which can temper or reduce the competence of the lawyer must be avoided. His duty of competence required a level of objectivity and detachment on behalf of the lawyer when rendering competent legal services. The need of impartiality was of paramount concern in providing legal services: when the lawyer engages the client to exploit sexual opportunities, his own ability to judge objectively, whether he can act in the client's best interest and breach the duty of confidentiality, can therefore be affected.

(c) Analogy between Physicians and Lawyers

In 1993, Livingston[289] raised the necessity of enacting an express rule in pointing out that the medical community had long viewed physician-patient sexual relationships during the course of treatment, and even thereafter, as unacceptable. It had long been

argued that such a relationship can cause immeasurable harm to the patient, such as worsening depression and attempted suicide. In *Simmons* v. *United States*,[290] the client suffered depression and attempted suicide after engaging in sexual relations with the therapist. Although many lawyer-client relationships are less emotionally intense than those of physician-patient, Livingston considered that lawyers are still undeniably in a position of trust and power with respect to their clients because of the fiduciary relationship. The author was of the view that clients trust lawyers to use their power wisely on a client's behalf[291] and physicians occupy a position of trust and power with their patients because of the fiduciary relationship. Since the Hippocratic Oath, Livingston further stated, physicians have long prohibited any kind of sexual activities between physicians and patients during and after treatment. The author stipulated also that the same concerns leading to the prohibition of a physician-patient sexual relationship were equally applicable to the lawyer.[292] For Livingston the lawyer-client relationship posed the same risk of over-reaching, abuse, betrayal of trust, harming the client's interests, and diversion from professional goals that create the professional-client relationship.

Livingston attempted to assess the linkage between physicians and lawyers and to assess the similarities between these two professions. The physician-patient relationship is characterised by several variables, such as confidentiality, isolation, a relatively long duration, and interaction between a trained, caring professional and a vulnerable lay person; and the lawyer-client relationship is defined by the same characteristics. Clients come to lawyers with serious problems requiring the lawyer's expert advice. They may reveal confidential information about different aspects of their lives, such as finance, health, family relationships, and even state of mind. Such communication is often conducted in isolation and may be of relatively long duration, if the legal problem requires litigation or other lengthy negotiations or proceedings.[293]

From Livingston's perspective, professional relationships dealing with lawyers and physicians are similar in nature. The author asserted that common characteristics will cause clients or patients in both professional settings to develop close, trusting, perhaps idealised relationships with the professional. In that regard, the danger of transference[294] and over-reaching may be present in both legal and medical representations.[295] As such, Livingston argued that the risk of abusing the position of trust suggests that a prohibitory rule on a lawyer-client relationship, similar to the one in the physician-patient relationship, is warranted. Myers *et al.* stated that it is commonly believed that transference can exist in any relationship in which there is a power imbalance. However, despite the potential for transference to arise in all types of relationships, its occurrence and its misuse are most likely to be linked to the therapist-patient relationship.[296] The issue of vulnerability is less transparent in the lawyer-client relationship, to generate transference and over-reaching between lawyer and client. Livingston argued that clients using lawyers may have more financial and emotional freedom to discharge their lawyers than patients with their physicians. Indeed, patients may develop strong emotional dependence on their physicians and be more reluctant to terminate the relationship, even when physicians propose an affair.[297]

(4) Arguments Against an Express Rule

Several arguments against the express rule have also been expressed in the American literature. We will here focus on the sufficiency of existing rules and the invasion of privacy.

(a) Sufficiency of Existing Rules

The first concern against the regulation of the lawyer-client sexual relationship is the sufficiency of existing rules. Mischler[298] stipulated that dual relationships (*i.e.*, lover and lawyer) impacting on legal representation have been adequately addressed by the existing ethical rules without the need for a special focus on sex. In that sense, the author argued that introducing a new ethical rule for lawyer-client sex relationships shifted the profession's focus toward the mere fact of physical contact and away from where it should be. For years, the Model Rules and Model Code have addressed the lawyer's conduct directly related to the practice of law conducted by lawyers. Mischler[299] further said that an express rule banning sex between lawyer and client prescribed a personal morality for lawyers, as opposed to promoting the appropriate practice for a lawyer based on professional ethics. For Mischler lawyers who serve in a relationship of trust have a legal and ethical responsibility to act in the best interest of their clients. For Mischler it is clear that the profession has no ethical justification for prohibiting the consensual sexual activity between adult lawyers and clients by means of an instrumental and discriminative rule.[300] Existing rules protect clients' interests against unethical lawyers and an express rule will not deter the truly unethical lawyer who has non-consensual sex with his clients. In that regard, state laws have already prohibited sexual-boundary violations such as rape, child molestation, and sexual harassment.[301]

According to Struzzi, [302] most courts have little problem, if any, when a disciplinary case has involved obvious conflict of interests between lawyer and client, criminal or immoral behaviour from the lawyer. In this regard, opponents of the regulation of a lawyer-client sexual relationship point to several cases in which courts have successfully applied substantive laws and ethical rules against unethical lawyers. The *Cleveland Bar Association* v. *Fenelli*[303] case involved physical injuries incurred in a car accident. The Supreme Court of Ohio found that the lawyer violated several disciplinary rules when he had sexual relations with his female client and proposed that

she barter sexual favours for legal fees. In response, the client engaged in oral sex with the lawyer in lieu of fees. At a particular meeting at the client's apartment, recorded by the Mayfield, Ohio, police, the lawyer suggested prices for certain sexual acts that would satisfy the legal fees. The court upheld the disciplinary board's findings, that the lawyer violated the ABA Rule DR 1-102 (A)(6) providing that a lawyer shall not engage in an unethical conduct that adversely reflects on his fitness to practice law and the ABA Rule DR 1-102 (A)(1), providing that a lawyer shall not violate a disciplinary rule.

Re Heard[304] involved a case of moral turpitude. The lawyer represented a female passenger who was injured in a motorcycle accident and suffered serious head injuries and spent one week in a coma. The lawyer secured a guardian *ad litem* for the client and instituted a separate guardianship proceeding which was later dropped. Because of his access to his client's medical records and case file, the lawyer was fully aware of the client's problems with drug and alcohol abuse.[305] He was informed that his client had been sexually abused in the past and continued to have memory, reading comprehension, auditory processing attention, speech, problem solving, and other cognitive defects. In that regard, the Supreme Court of Washington found that the lawyer was fully aware of the vulnerabilities of the client. The court stated that the lawyer brought the client to several bars to discuss her case during which time they became intoxicated and returned to his apartment where they engaged in a consensual sexual relationship. In rendering its judgment, it was held that this lawyer-client sexual relationship was an act of moral turpitude. The lawyer was suspended for two years and ordered to pay restitution to the client. The judicial dissent was in favour of the sex prohibitory rule and stated that it was legally, if not patently unfair, to apply a rule without first adopting it. The dissent considered that there was no ethical violation under any of the existing rules for the lawyer's sexual behaviour, because the latter had not adversely affected the client's representation. The dissent stated that, if it is the court's duty to

uplift the moral character of lawyers, the court has its work cut out. In essence, the majority lacked any principled basis to limit its moral insight to engaging in sexual relationships with clients.

For various reasons, Crumpacker has argued that the opponents of the regulation of the lawyer-client sexual relationship reject the necessity of a rule.[306] Their conclusion was unjustified only in the strong sense that the existing ethical framework was sufficient to rid the legal community of unacceptable and unconsensual sexual conduct by lawyers during representation. Interestingly, a prohibitory rule would be difficult to enforce because of the high degree of evidence that prosecutors require. The prosecution would not be able prosecute such cases due to insufficient evidence to meet the burden of proof.[307] In that sense, Jorgenson and Sutherland[308] have pointed out that sexual contact between lawyers and clients usually takes place in private, so proving the existence of a sexual relationship may cause the most evidentiary headaches. In addition, such regulation may prove no more successful with respect to the actual reporting of lawyer sexual misconduct than the negligible reporting resulting from the regulation of psychotherapists. Finally, Jorgenson and Sutherland have further pointed to other professions, such as teaching and the clergy, which have not yet seen a legal need to regulate a professional-sexual relationship.[309]

(b) Invasion of Privacy

In the literature, a second concern against the regulation of a lawyer-client sexual relationship is the invasion to privacy. This issue was first raised by Hazard who served as a reporter for the ABA Kutak Commission, which drafted the Model Rules of Professional Conduct.[310] During the drafting, Hazard stated that most ethical rules with respect to a lawyer-client sexual relationship were originally denounced as invasions of

privacy. Hazard did not elaborate on the rationale behind the comment; however, many practicing lawyers agree. As one lawyer stated: "the question is do we want the state in our bedrooms? The answer is ... absolutely no."[311] In that sense, Hazard stated that an express rule prohibiting the lawyer-client sexual relationship is paternalistic and violates the constitution; however, this argument does not stand up in court.

The privacy argument first used the landmark cases of *Griswold* v. *Connecticut*[312] and then its progeny, *Eisenstadt* v. *Baird*[313], which both dealt with contraception. In 1965, in *Griswold* v. *Connecticut*, the Supreme Court of the United States stated that married couples have a constitutionally guaranteed right to privacy in their personal lives. In 1972, in *Eisenstadt* v. *Baird*, the court extended the constitutional right in stating that one's right to privacy must extend to unmarried individuals, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person. It was then asserted that consenting adults should be able to sort out their sexual activities without any advice from the state bar.[314] In 1983, in *Barbara A.*,[315] the lawyer had become sexually involved with a client he represented in a family matter. Although this California case did not focus on a rule prohibiting any lawyer-client sexual relationship, it highlighted the reluctance of courts to give lawyers an absolute privacy right to engage in sexual relationships with clients. The California Supreme Court rejected the argument related to the right of privacy in a lawyer-client relationship. In appeal, the court declined to consider whether the lawyer breached an ethical duty by having sex with the client. In its reasons, the court stated that the lawyer cannot use his right to privacy argument to protect himself from judicial inquiry into sexual relations. The court found that, although the constitutional right to privacy normally shielded the sexual relationship from judicial scrutiny, it did not do so where the right to privacy is used as a shield from liability at the expense of the other party. Even though the right to privacy is a freedom to be carefully guarded, the court stated that it does not insulate a person from all judicial inquiry into

his sexual relations.[316] This means that the state had a fundamental right to enact laws which promote public health, welfare and safety, even those which may invade the other's right to privacy.

In *Committee on Professional Ethics & Conduct* v. *Hill*,[317] an unemployed woman who suffered from drug addiction and emotional instability retained a lawyer, Hill, in an effort to gain custody of her three children from her estranged husband. The lawyer offered to have sex with the client in exchange for her legal fees. At first, the lawyer offered to extend her a loan. Later on, he decided to exchange money for sex after the client told him that she would not be able to pay his legal fees. Eventually, the client reconciled with her husband and successfully completed a drug dependency program.[318] In its reasons, the Iowa Supreme Court rejected the lawyer's right to privacy defense for sexual misconduct with his client. In suspending the lawyer's license to practice law for three months, the Iowa Supreme Court stated that constitutional considerations of privacy were not without limits. The court further stated that the professional-client relationship with respect to the exchange of sex for legal fees constituted unethical conduct on the part of the lawyer.

The privacy argument, often raised in courts, fails on two grounds: (1) the proposed Rule prohibiting the lawyer-client sexual relationship does not restrict with whom a lawyer may engage in consensual sexual activity; and (2) the express rule, like other professional ethical rules, merely regulates whom the lawyer may represent. Livingston[319] asserted that, whether the lawyer's right to engage in a consensual sexual relationship was considered a fundamental right (*i.e.*, strict scrutiny) or not (*i.e.*, rational basis), regulating professional conduct will not violate the lawyer's privacy rights. Crumpacker[320] and Levy[321] too have concluded that the right to privacy was not constitutionally violated. Awad[322] also argued that an express rule prohibiting sex was simply a minor regulation of the lawyer's conduct and should pass constitutional and

strict scrutiny. Overall, it is argued that preventing a lawyer from engaging in a sexual relationship with his client can violate his privacy interests and, therefore, is unconstitutional unless it can be proven that such activity has some significant bearing on the lawyer-professional relationship itself during legal representation. Myers *et al.*[323] asserted that the right to privacy could be easily manipulated to support an argument either for or against constitutional protection for the lawyer-client sexual relationship, in accordance with the privacy theory. In that vein, some invasion of privacy can also be constitutionally justified because the court is likely to point to a compelling interest, in regulating the legal profession and in securing the public's confidence in members of the state bar.

(5) State Legislation Against Lawyer-Client Sexual Relationships

In several states, the interest of protecting the public from lawyers engaging in sexual relationships with their clients seems to have prevailed in the public debate over whether to regulate lawyer-client sexual conduct. The national debate has caused the following states to promulgate a prohibition irrespective of the type of lawyer's practice involved: California, Oregon, New York, Minnesota, Wisconsin, Florida, Iowa, West Virginia, Utah, and North Carolina.

(a) California: Rule 3-120[324]

In 1989, the California state legislature ordered the California Bar Association to adopt a specific rule of professional conduct governing sexual relationships between lawyers and clients in cases involving, but not limited to, probate matters and domestic relations.[325] The California Rule 3-120 was adopted by the Board of Governors on 30

April 1991, subject to approval by its Supreme Court. In the fall of 1991, the California Bar Association recommended to the California Supreme Court adoption of a rule prohibiting lawyer-client sexual relationships. The court initially declined to adopt such a rule, pending further opportunity for public comment. It was later approved by the Supreme Court on 13 August 1992 and became operative on 14 September 1992.

In 1992, California became the first State to enact a rule intended to ban lawyer-client sexual relationships. Rule 3-120 (A), (B), (C) and (D) provides:

> (A) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification or abuse.
>
> (B) A member shall not:
>
> (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation;
>
> (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
>
> (3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110.
>
> (C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.
>
> (D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relation.[326]

Rule 3-120 provides the needed impetus for a client-victim to come forward. It infers that a client expresses great emotional vulnerability and dependence upon the advice and guidance of counsel. In that regard, and as raised earlier in the Canadian situation, it is said that lawyers owe the utmost duty of good faith and fidelity to their clients[327] in the context of a fiduciary relationship. As a result, California provides that all

professional dealings beneficial to the lawyer and prejudicial to the client will be closely scrutinised with utmost strictness for unfairness.[328]

Three circumstances are covered by Rule 3-120 with respect to the prohibition: (1) *quid pro quo* arrangements; (2) use of coercion or intimidation; and (3) effects on lawyer competency. Rule 3-120(B)(1) deals only with *quid pro quo* arrangements and intimidating advances by lawyers. Under the Supreme Court rule, lawyers cannot demand sex from their clients "incident to or as a condition of any professional representation." Rule 3-120(B)(1) applies to situations where a *quid pro quo* arrangement is implicit rather than explicit. Lawyers usually do not openly ask, require or demand sexual favours from clients for legal services; instead, they suggest through innuendo that the vigour and efficiency of their legal representation may depend on whether the client agrees to engage in a sexual relationship with a lawyer. Rule 3-120(B)(2) intends to prohibit lawyers from using "coercion, intimidation, or undue influence in entering into a sexual relationship with a client." It implies the deliberate exercise of force or persuasion by the lawyer and, above all, the unwillingness of the client to have sexual contact with the lawyer. Rule 3-120(B)(3) creates exceptions for family relationships that predate legal representation, and work relationships with a lawyer in the firm who is not personally representing the client. Rule 3-120(C) has the broadest reach; it intends to prohibit continued representation of clients with whom lawyers have engaged in a sexual relationship, in the event that such a relationship causes the lawyer to perform legal services incompetently. Finally, Rule 3-120 does not address the issue of requiring a laweyer to withdraw from representing a client if personal interests affect professional judgment and prejudice the interests of the client.

(b) Oregon: Rule DR 5-110[329]

At approximately the same time that the California State Bar codified limitations on a lawyer-client sexual relationship, the Oregon State Bar also approved a prohibitory rule. An amendment to its Code of Professional Responsibility created an across-the-board prohibition on lawyer-client relationships. On 13 December 1992, the Oregon Supreme Court issued an order approving new ethical Rule DR 5-110, which the Oregon State Bar membership voted to adopt at its annual business meeting on 25 September 1992. Rule DR5-110, which is modelled on the ABA Model Code of Professional Responsibility, enacts a total prohibition on the lawyer-client sexual relationship unless such a relationship existed before legal representation began. The exception introduced in Rule DR 5-110 (A) allows lawyers to represent their spouses and other pre-existing lovers.[330] It appears that Rule 2.04 of the Law Society of Upper Canada is modelled on the ABA Model Code of Professional Responsibility and Rule DR5-110. However, the lawyer-client sexual relationship in Rule DR 5-110 is regulated under the heading of a conflict of interest and mediation, and provides that:

> (A) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer/client relationship commenced.
>
> (B) A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.
>
> (C) For purposes of DR 5-110 "sexual relations" means:
>
> (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.
>
> (D) For purposes of DR 5-110 "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.[331]

The Oregon State Bar was one of the first states to adopt a specific rule. The rationale behind the Oregon Rule DR 5-110 was that lawyers recognise that only a bright-line rule can protect clients because it gives them clear notice that romance and legal representation do not mix. It also appears that the Oregon State Bar Association has a distinguished history of being in the public forefront of important issues affecting the legal representation of Oregon's citizens. The Board of Governors's findings in Legal Ethics Opinion No. 429 is DR 5-101(A), which require a lawyer to withdraw from representing a client if his personal interests might affect the exercise of his professional judgment, also require that he obtain written consent after full disclosure. Prior to adoption of Rule 5-110, DR 5-101(A) provided the ethical rule used to discipline lawyers for sexual misconduct.

Both the California Rule 3-120 and the Oregon Rule DR 5-110, as adopted or proposed do not solve the dilemma of when sexual relationships between lawyers and clients constitute unethical practice. Rule 3-120 (B) prohibits lawyers from demanding or coercing sex from their clients: the legal measure of unethical conduct, however, remains rooted in performance of legal representation. A violation of the prohibitory rule will only exist when the sexual relationship will impair the lawyer's ability to render competent legal services. Thus, the issue of harm to a client, beyond the legal representation, has not been addressed.

(c) New York: Rule DR 1-102[332]

Unlike California, Florida, Iowa and Minnesota, New York was the first state to regulate sexual relations with clients in domestic matters. In essence, Rule DR 1-102(7) provides that a lawyer or law firm shall not "in domestic relations matters, begin a sexual relationship with a client during the course of the lawyer's representation of the client." Rule DR 1-102(7) places a ban on a lawyer-client sexual relationship in domestic

matters under the theory that these clients are the most vulnerable and in need of protection. Although lawyer-client sexual relations in non-domestic matters are not prohibited, New York case law suggests that sexual relations in non-domestic cases may violate the code of conduct.[333]

Rule DR 1-102(7) may soon change. Among the proposed amendments to the New York Code of Professional Responsibility is an amendment dealing with sexual relations. Rule DR 5-111 provides:

A. "Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse.

B. A lawyer shall not:
   1. Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation.
   2. Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.
   3. In domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

C. (B shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual relationships that predate the initiation of the lawyer-client relationship.

D. Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.[334]

The above draft rule on sexual relations was adopted by the New York House of Delegates on 24 January 1997.[335]

(d) Minnesota: Rule 1.8 (k)[336]

In 1994, Minnesota regulated the lawyer-client sexual relationship by statute enacted under the conflict of interests heading. The Minnesota Rule 1.8 (k) provides:

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

(1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.
(2) If the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7(b) rather than by this Rule with respect to sexual relations with other employees of the entity they represent.

If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to charge any violation based on allegations, shall consider the client's statement regarding whether the client would be unduly burdened by investigation or charge.

Now, Rule 1.7 provides the conflict of interest Rule:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:

(1) the lawyer reasonably believes the representation will not be adversely affected.
(2) the client consents after consultation.
(3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.[337]

The Minnesota Rule 1.8 (k) does not adopt a complete prohibitory rule on a sexual relationship between lawyer and client. Unlike California and Florida, which focus on the notion of sexual exploitation, the Minnesota Rule 1.8 (k) to a great extent has a blanket prohibition of the lawyer-client sexual relationship *simpliciter*. Indeed, Rule 1.8 (k) provides that a lawyer "shall not have sexual relations with a current client ...". Interestingly, like California, the Minnesota Rule 1.8 (k) explicitly states that a

consensual sexual relationship is not prohibited, provided that such relationship "existed between them when the lawyer-client relationship commenced." Like California, under the Minnesota rule, a sexual relationship with a client of the firm is not prohibited, as long as the lawyer has no involvement in the performance of the legal work for that client.

(e) Wisconsin: Rule 20:1.8 (k)[338]

In 1995, the State of Wisconsin regulated the lawyer-client sexual relationship under the conflict of interest heading.[339] The Wisconsin Supreme Court adopted Rule 20:1.8 (k) of Professional Conduct and provided:

> It is ordered that, effective the date of this order, the Supreme Court Rule 20:18 (k) created:
>
> (1) In this paragraph:
>
> (i) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyers.
> (ii) If the client is an organization, "client" means any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization.
>
> (2) A lawyer shall not have any sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
> (3) In-house attorneys representing governmental or corporate entities are governed by SCR 20:1.7(b)[340]

Thus the Wisconsin Rule 20.1.8 (k) adopts nearly a complete prohibition on a sexual relationship between lawyer and client. Wisconsin Rule 20:1.8 (k) (2) provides language identical to that adopted by the states of Oregon, Minnesota and West Virginia. Rule 20:1.8 (k) mirrors the Minnesota rule.

(f) Florida: Rule 4-8.4[341]

In 20 July 1995, amendments to the disciplinary Rules regulating the Florida Bar prohibited sex in the lawyer-client relationship. Thus Rule 4-8.4 (i) is an amendment to the misconduct provision and provides:

> A lawyer shall not engage in sexual conduct with a client that exploits the lawyer-client relationship.
>
> Subdivision (i) proscribes exploitation of the client and the lawyer-client relationship by means of commencement of sexual conduct. The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. A sexual relationship between a lawyer and a client that exists before commencement of the lawyer-client relationship does not violate this subdivision if the lawyer and client continue to engage in sexual conduct during the legal representation. For purposes of this subdivision, client means an individual, not a corporate or other non-personal entity, and lawyers means only to the lawyer(s) engaged in the legal representation and not other member of the law firm.[342]

The Florida Rule 4-8.4 prohibits the lawyer-client sexual relationship only when it exploits such a relationship. The use of the verb "exploit" seems to have been the key element in the drafting of the rule; however, there is no specific guidance as to what "exploit" exactly means.

(g) Iowa: Rule EC-525[343]

In 1995, the Iowa state legislature ordered the Iowa Bar Association to adopt a rule of professional conduct dealing specifically with lawyer-client sexual relationships.[344] The ethical consideration related to prohibition of a lawyer-client sexual relationship in Iowa's Rule EC-525 provides:

> The unequal balance of power in the attorney-client relationship, rooted in the attorney's special skill and knowledge on the one hand and the client's potential vulnerability on the other, may enable the lawyer to dominate and take unfair advantage. When a lawyer uses this power to initiate a sexual relationship with a client, actual harm to the client, and the client's interest, may result. Such overreaching by an attorney is harmful in any legal representation but presents an even greater danger to the client seeking advice in times of personal crisis such as divorce, death of a loved one, or when facing criminal charges. Clients may rightfully expect that confidences vouchsafed to the lawyer will be solely used to advance the client's interest, and will not be used to advance the lawyer's interest, sexual or otherwise.[345]

Like Oregon, the states of Iowa, Minnesota and Wisconsin have enacted a total ban on a lawyer-client sexual relationship unless such a relationship existed before legal representation. The Iowa Rule EC-525 does not adopt, however, a complete prohibitory rule on lawyer-client sexual relationships. Although substantially the same as Iowa, Minnesota and Wisconsin, Rule EC-525 differs in one respect. It provides protection for the client if the sexual relationship begins before the legal representation. Rule EC-525 requires a lawyer to scrutinise his professional conduct with a client when a sexual relationship predates the legal representation and to withdraw if any detriment to the client or the client's case results from the sexual relationship. It also describes the lawyer-client relationship as fiduciary in nature.

(h) West Virginia: Rule 8.4[346]

In 1995, the West Virginia Supreme Court of Appeal adopted the Rule 8.4 of its Model Rules of Professional Conduct. Like the states of New York and Florida, West Virginia regulates the lawyer-client sexual relationship under the misconduct heading. Rule 8.4. provides:

> It is professional misconduct for a lawyer to:

> (g) have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of the lawyer/client relationship. For purposes of this rule, "sexual relations" means sexual 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.[347]

The West Virginia Rule 8.4 seems to be almost identical to that of the states of Oregon and Minnesota. It provides that it is professional misconduct for a lawyer to have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of legal representation. Contrary to California and Florida, where the sexual relationship must be exploitative or prejudicial to the client's interests, the West Virginia Rule 8.4 prohibits a sexual relationship with a client, unless such a relationship predated representation. Like Minnesota, Iowa, North Carolina, and Oregon, West Virginia bans the sexual relationship even if it was not prejudicial or exploitative.[348]

(i) Utah: Rule 8.4.1[349]

In 1995, the state of Utah too enacted a rule dealing with lawyer-client sexual relationships and Rule 8.4.1 provide that:

> It is professional misconduct for a lawyer to:
>
> (g) Engage in sexual relations with a client that exploit the lawyer-client relationship. For purposes of this subdivision:
>
> 1. "Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal , gratification, or abuse; and
> 2. Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client

> relationship, sexual relations between a lawyer and a client shall be presumed to be exploitative. This presumption is rebuttable.[350]

The Utah Rule 8.4.1 adopts a less absolute rule regulating the lawyer-client sexual relationship. It does not provide sufficient guidance with respect to the definition of a lawyer-client sexual relationship. However, Rule 8.4.1 is similar to Rule 3-120. Interestingly enough, it goes one step further. Unlike California, the Utah Rule 8.4.1 creates a rebuttable presumption that a lawyer-client sexual relationship is exploitative unless the parties are spouses or the relationship predates representation. Like California, the Utah Rule 8.4.1 focuses on the exploitative nature of the lawyer-client sexual relationship before prohibiting it.

(j) North Carolina: Rule 1.18[351]

In 1995, North Carolina also enacted a rule with respect to sexual misconduct. Indeed, Rule 1.18 of the Professional Conduct provides:

> (a) A lawyer shall not have sexual relations with a current client of the lawyer.
> (b) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced.
> (c) A lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation.
> (d) For purposes of this Rule, "sexual relations" means:
>
> > (1) Sexual intercourse.
> > (2) Any touching of the sexual or any 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.
> > (3) For purposes of this Rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.[352]

The North Carolina Rule 1.18 adopts almost a complete prohibition on a sexual relationship between lawyer and client. North Carolina is the most recent state to enact a strict prohibition against all types of consensual sexual relationships between lawyers and clients, unless there is a prior relationship or, if lawyers are members of a firm, another member of such a firm takes over representation. Like most jurisdictions, the North Carolina prohibitory rule does not apply to a spouse or to a pre-existing consensual relationship. Moreover, Rule 1.18 (c) provides that "a lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation." Only the lawyer who is directly involved in the case is prohibited from engaging in a sexual relationship with a client, while other lawyers in the firm are not within the ambit of the prohibitory rule. Rule 1.18 implies that a sexual relationship with a client is always prohibited.

Chapter V. Conclusion

In this thesis, the most relevant literature that has emerged in the last decade in the United States and Canada has been considered and carefully scrutinised to properly answer the legitimate concerns respecting sexual relationships between lawyers and clients. In reviewing the material, the main question has turned on whether a rule should be adopted establishing a prohibition against lawyers' sexual involvement with clients? And depending upon the answer to this question are the answers to a number of related questions. Of these, the most widely discussed is whether this prohibition should be a total ban, or are there any circumstances where lawyers and clients should be allowed to continue with a sexual relationship?

Recent work in legal ethics has demonstrated that lawyers, by engaging in a sexual relationship with a client, can no longer escape any criticism and avoid any disciplinary action prohibiting such conduct. It appears that the judicial trend is unequivocally in the direction of prohibition of the lawyer-client sexual relationship. Physicians have long prohibited this type of relationship between physicians and patients. Like physicians, lawyers must be accountable and must be held in the same high standard of care and responsibility.

It is clear, upon analysis that for the main question to be meaningful there must be a will for the law societies to embrace a change and therefore respond to the public interest, protection and confidence. It is time to make a rule clear to lawyers: a sexual relationship with a client violates ethical rules. This thesis favors a rule of prohibiting sexual activities between lawyer and client with a delimited exception where relationships existed before the representation. By relying on the fiduciary character of the lawyer-client relationship, the issue of vulnerability of the client must be addressed,

because the lawyer has pledged by the nature of his profession to refrain from using his power against the interest of the client. Again, if the lawyer abuses his position regardless of the maturity, sophistication and wealth of the client, he breaks that pledge made as an officer of the court. Construed this way, the sexual relationship between a lawyer and a client reinforces the power imbalance between the parties in the context of the fiduciary duties. For Myers *et al.*, the degree to which the power imbalance exists will vary depending on the nature or qualification of the power of the lawyer and the type of retainer agreed between the lawyer and the client. It should then be ethically clear that, where lawyers exercise influence over clients to take advantage of them, professional discipline is deemed appropriate under an express rule respecting the sexual relationships introduced in the Code of Professional Conduct.

A lawyer has a duty to keep the client's interest paramount in the course of the representation. As such the lawyer must refrain from acting for a client when the interests of the client and the personal interests of the lawyer are in conflict. A lawyer must also refrain from intentional prejudice, use or damage of the trust of clients to protect them against any potential harm. In engaging in sexual relationships, the exercise of his independent judgment solely on behalf of the client may be deprived. He puts himself at risk in violating the most basic ethical rules. Furthermore, the lawyer's ability to meet his obligation may significantly be impaired or hindered in representing the client competently. Emotional detachment is one of the hallmarks in the profession essential to the lawyer's ability to render competent legal services.

In the Formal Opinion 92-362, discussed above, conduct may risk unwarranted expectations regarding the preservation of confidence in the professional relationship. Indeed, this is protected by privilege only when it is imparted in the context of the professional-client relationship. Regulatory bodies and courts will not protect confidence given as part of a personal relationship. The court has stated that a blurred line between

a professional relationship and an intimate relationship may make it difficult to predict to what extent client confidence will be protected.

In the literature, Jorgenson and Sutherland, Crumpacker, Hazard and Myers *et al.* argue for the rule to protect clients against potential harms, preserve professionalism and maintain existing fiduciary duties. For Hazard, an exception must be given where lawyer and client have a pre-existing social relationship that has a sexual aspect to it. In that sense, Hazard points out that an unqualified prohibition would be a mistake. This statement is endorsed by several American jurisdictions. For Livingston and Myers *et al.* there is an analogy between physicians and lawyers in the conduct of professional-relationship; physicians and lawyers are confined into a fiduciary relationship and as such can potentially cause immeasurable harms to clients or patients. In arguing against the rule, Struzzi states that an express rule is not necessary because tribunals and courts have, in the past, successfully applied substantive law and rules against unethical lawyers.

In enacting an absolute prohibition on sexual relationships between lawyers and clients, with a limited exception for relationships that pre-dates lawyer-client relationships, the public interest is protected and confidence is maintained in the system of justice. In that vein, the most influential ethical change respecting the conflict of interests in the lawyer-client relationship occurred when the American Bar Association releases, as part of its proposed amendment in the year of 2000, Rule 1.8 (j) of the Model Rules of Professional Conduct. Shortly after, this prohibition rule was enacted. As discussed above, the idea of a partial prohibition was rejected on the basis that such a position did not address the issue of conflict of interests. Rule 1.8 (j) put the lawyer on notice and provided protection to client by eliminating the burden to prove anything other than the existence of a sexual relationship between lawyer and client. It is clear that its adoption provides the direction of several states to enact their own statutes or advisory

opinions. However, this amendment suggested by the American Bar Association was rejected in several states of the United States such as Michigan and Washington. Be that as it may, we have seen the states of California, Oregon, New York, Minnesota, Wisconsin, Florida, Iowa, West Virginia, Utah and North Carolina enact a total prohibition rule regarding sexual relationship unless such a relationship existed before legal representation. Most of the above rules, adopted in all of these states, use identical language. As shown above, Rule 20:1.8 (k) of the state of Wisconsin mirrors the Minnesota rule. Further, the state of Oregon models its rule on Rule 1.8 (j). Finally, the California rule is the starting point to address the whole issue of sexual relationships between lawyers and clients.

As a step in the right direction, the Nova Scotia Barristers' Society Rule 7 (a) offers the first rule of this kind in Canada. Rule 7(a) is meant to deal specifically with the client's vulnerability in the lawyer-client relationship. In amending its Code of Professional Conduct, the Nova Scotia Barristers' Society shows determination in the context of conflict of interests and a lawyer's fiduciary duty to his clients. In its action, the Nova Scotia Barristers' Society improves its regulatory system and responds to the public needs.

Like the Nova Scotia Barrister's Society, the Canadian Bar Association and other Canadian law societies make a substantial and insightful contribution to re-thinking the Code of Professional Conduct. A necessary aspect of this contribution is an increase of public awareness over regulating conduct within the bounds of the law. In responding to the issue of conduct, law societies are sensitive and, above all, do not fail to exercise the regulatory function conferred upon it by its empowering statute. With its amended Rule 2.04, the Law Society of the Upper Canada also reinforces the idea that the issue of conduct must be answered. Across jurisdictions, professional bodies are forced to consider the implications of conduct in making sure that lawyers avoid abusing boundary

violations. Once a lawyer is found to stand in the position of a fiduciary, governing bodies, such as the Law Society of Manitoba, are forced to follow the trend of thoughts in imposing obligations upon the profession to constrain the fiduciary's ability to act in a self-interested manner. The rationale of this comment, when particularly applied to the legal profession, suggests that the enactment of an express rule will be a victory in the long term.

In conclusion, the above express rule is important in assisting tribunals and courts with questions of professional responsibility and disciplinary action. It may also be the determinative element in the outcome of a disciplinary case. The professional code as an ethical framework or a benchmark for lawyers' conduct, must reflect the pace of change in our society and respond to it accordingly.

ENDNOTES

* Throughout this paper the masculine form of pronouns is used for the sake of simplicity, except where the client-victim is concerned. These masculine pronouns must be understood in a universal, gender-neutral sense.

[1] D. Cheatham, "Availability of Legal Services; The Responsibility of the Individual Lawyer and the Organized Bar' (1965), 12 University of California in Los Angeles 438 at 440, as quoted by Matthew Certosimo in "A Conflict is a Conflict is a Conflict: Fiduciary Duty and Lawyer – Client Sexual Relations" (1993) 16 *Dalhousie Law Journal* 448 [hereinafter Certosimo].

[2] S. M. Grant, "Sex, Lies and Legal Ethics" (1990) 24 *Law Society of Upper Canada Gazette* 103, at 126 [hereinafter Grant].

[3] S. M. Grant and L.R. Rothstein, *Lawyers' Professional Liability* (Toronto: Butterworths, 1989). As stated by the authors, at 31, actions against lawyers were already dramatically on the rise, and increasingly, fiduciary obligations play a significant role in the liability of lawyers.

[4] Canadian Bar Association, *Code of Professional Conduct* (Canada: The Canadian Bar Association, 1987) [hereinafter Canadian Bar Association].

[5] Certosimo, *supra* note 1, at 451.

[6] *Ibid.*

[7] [1992] 2 S.C.R. 226 [hereinafter *Norberg* v. *Wynrib*].

[8] M. Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66 *California Law Review* 669 [hereinafter Schwartz].

[9] Halifax, Nova Scotia Barristers' Society, 1990 [hereinafter Nova Scotia Ethics Handbook].

[10] *Ibid.*

[11] *Supra* note 1.

[12] *Terra Energy Ltd.* v. *Kilborn Engineering Alberta Ltd.* (1997), 32 C.L.R. (2d) 85; reconsideration referred *ibid.* (p. 483n) (Alta Q.B.), at 125.

[13] Standing Committee on Ethics and Professional Issues, "*Modernizing the CBA Code of Professional Conduct – Seeking Your Input, Emerging Professional Issues Initiatives Program*" (Canada: Canadian Bar Association, May 2003) [hereinafter Standing Committee]; Professional Regulation Committee, *Report to Convocation* (Canada: The Law Society of Upper Canada, 22 January 2004), at 3-5.

[14] Winnipeg: The Law Society of Manitoba, 1992 [hereinafter Manitoba Code].

[15] Report to Convocation, *supra* note 13.

[16] Linda Fitts Mischler, "Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Clients Sex," 10 *Georgetown Journal of Legal Ethics* 209, at 220 [hereinafter Mischler I].

[17] Jennifer L. Myers, *et al.*, "To Regulate or Not Regulate Attorney-Client Sex? The Ethical Question in Pennsylvania," (1996) 69 *Temple Law Review* 741, at 755 [hereinafter Myers, *et al.*].

[18] *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at 631 and 646, 44 D.L.R. (4th) 592 (Ont. C.A.); (1986), 25 D.L.R. (4th) 504 (Ont. H.C.) [hereinafter LAC Minerals].

[19] Thomas L. Shaffer, "Legal Ethics and the Good Client" (1987) 36 *Catholic University Law Review* 319.

[20] Hereinafter, the American Codes.

[21] *Adams* v. *Law Society of Alberta*, [2000] A.J. No. 1031 (Alta.C.A.) [hereinafter *Adams*].

[22] *Ibid.*

[23] *Law Society of Manitoba* v. *Davis*, [2001] L.S.D.D. No. 29 (Q.L.) [hereinafter *Davis*].

[24] [1992] L.S.D.D. No. 47 [hereinafter *Ramsey*].

[25] [1991] L.S.D.D. No. 103.

[26] *Ibid.* at 107.

[27] *Adams*, *supra* note 21.

[28] Section 153(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46 [*hereinafter Criminal Code*].

[29] *Law Society of Upper Canada* v. *Gower* [1992], L.S.D.D. No. 34.

[30] *Ibid.*

[31] *Re MacDonald* (June 19, 1991), Nova Scotia Barristers' Society.

[32] Certosimo, *supra* note 1, at 450.

[33] *Nova Scotia Barristers' Society* v. *Pavey* [2001], L.S.D.D. No. 3 [hereinafter *Pavey*].

[34] Nova Scotia Ethics Handbook, *supra* note 9.

[35] When used for payments of legal services, sexual abuse reinforces the power imbalance and harm in the breach of the fiduciary obligation on the client's interests.

[36] Geoffrey C. Hazard and Susan P. Koniak, *The Law and Ethics of Lawyering*, (New York: University Casebook Series, 1990); Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers* (Oxford; Hart Publishing, 1999) at 7.

[37] Manitoba Code, *supra* note 14.

[38] *Supra* note 4.

[39] B. G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Buttersworths, 1989), at 6.

[40] Donald E. Buckingham, *et al.*, *Legal Ethics in Canada: Theory and Perspective* (Toronto: Harcourt Brace Canada, 1986), at 40 [hereinafter *Legal Ethics*].

[41] Standing Committee, *supra* note 6.

[42] (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.), at 157.

[43] [1990] 3 S.C.R. 1235 [hereinafter MacDonald] at 1245-6.

[44] John Sopinka, "Professional Responsibility of Lawyers at Common Law", in *Meredith Memorial Lectures 1983-1984* (Don Mills, ON: Richard De Boo Publishers, 1985) at 261.

[45] *R.* v. *Ryan*, [1976] 6 W.W.R. 668 (Alta.C.A.).

[46] *Morton* v. *Registered Nurses Assn. (Nova Scotia)* (1989), 92 N.S.R. (2d) 154 at 166 (N.S.T.D.). For more information, consult also: *Matthews* v. *Board of Directors of Physiotherapy (Ontario)* (1987), 61 O.R. (2d) 475 at 475-476 (C.A.).

[47] Manitoba code, *supra* note 14.

[48] *Re Ogilvie* [1999] L.S.B.C. No. 17.

[49] Division 9 of the *Legal Profession Act*, S.M. 2002, c. 44 [hereinafter*Legal Profession Act*].

[50] *Cwinn* v. *Law Society of Upper Canada* (1980), 108 D.L.R. (3d) 381 (Div.Ct.), leave to appeal to Ontario Court of Appeal refused (3 March 1980), leave to appeal to Supreme Court of Canada refused and appeal squashed (16 June 1980) 28 O.R. (2d) 61n (S.C.C) [hereinafter *Cwinn*].

[51] *Law Society of British Columbia* v. *Pierce* [2001] L.S.D.D. No. 41.

[52] For a more complete analysis of the Law Society's discipline proceedings, consult Gavin Mackenzie, "Law Society Discipline Proceedings" 11 *Advocates' Soc. Journal*, 2, 3.

[53] Manitoba Code, *supra* note 14.

[54] *Ibid.*

[55] *Ibid.*

[56] (1986), 54 O.R. (2d) 663 (H.C.); appeal dismissed, (1988), 66 O.R. (2d) 350 (C.A.) [hereinafter *Szarfer* v. *Chodos*].

[57] *Ibid.*, 677.

[58] The term "fiduciary" derived from the Roman law and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good "faith " and candor which it requires: *Black's Law Dictionary*, 6th ed, (St. Paul, Minn.: West, 1994), at 810 [hereinafter Black's Law Dictionary, at 431. This term is derived from the Latin words "fiducia" which means trust or reliance and "fiduciarius" which translates to something that is entrusted or given in trust. The Latin terms "fiducia" and "fiduciarius" are both derivative of the verb "fidere", which means to have faith: *Cassell's Latin Dictionary* (New York: MacMillan, 1959) at 247.

[59] D. W. M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 712.

[60] Leonard J. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding", (1996) 34 *Alberta. L. Rev.* (No. 4) 821, at 838.

[61] Grant, *supra* note 2, at 123.

[62] *MacMaster* v. *Byrne*, [1952] 3 D.L.R. 337 (P.C.); *Bailey* v. *Ornheim* (1962), 40 W.W.R. (N.S.) 129 (B.C.S.C.).

[63] Manitoba Code, *supra* note 14.

[64] In *Wilson* v. *Lougheed* [1998] B.C.J. No. 1765 (B.C.S.C.).

[65] Manitoba Code, *supra* note 14.

[66] *Ibid.*

[67] *Davis*, *supra* note 23.

[68] *Ibid.*

[69] F. C. Zacharias, "Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics" (1993) 69 *Notre Dame L. Rev.* 223, at 231.

[70] *Legal Ethics*, *supra* note 40, at 13.

[71] Max Weber, *The Theory of Social and Economic Organization*, (New York: The Free Press of Glencoe, 1947).

[72] *Black's Law Dictionary*, *supra* note 58.

[73] Marilyn R. Peterson, *At Personal Risk: Boundary Violations in Professional-Client Relationships* (New York, N.Y.: Norton Professional Book, 1992), at 26-27 [hereinafter Peterson].

[74] *Legal Ethics*, *supra* note 36, at 120.

[75] *Steven* v. *Salt* (1995), 22 O.R. (3d) 675 (Gen. Div.); *Pierce* v. *Law Society of British Columbia* (1993), 103 D.L.R. (4th) 233 (B.C.S.C.) at 248.

[76] *The Reflective Practitioner: How Professionals Thinks Action* (U.S.A.: Basic Books, 1983), at 3.

[77] *Ibid.*

[78] Section 3(1) of the *Legal Profession Act*, *supra*, note 49.

[79] *Ibid.*, Section 3(2)

[80] *Ibid.*, Section 43.

[81] In *Everingham* v. *Ontario* (1992), 8 O.R. (3d) 121 (Div. Div.), the trial court held that all lawyers are subject to same high standards of professional conduct.

[82] *Ahrens* v. *A.T.A.,* (1994), 157 A.R. 378 (Alta.C.A.).

[83] *Black's Law Dictionary*, *supra* note 58, at 494.

[84] (1976), 13 O.R. (2d) 707 [hereinafter *Re Milstein*].

[85] *MacDonald*, *supra* note 39.

[86] *Adams*, *supra* note 21.

[87] [1991] 2 S.C.R. 869.

[88] *Ibid.*, at 888.

[89] (1980), 1 D.L.R. (4th) 285,at 292 (Man.C.A.), at 292 [hereinafter *Savino*].

[90] For an interpretation of the Act, see: A. Campbell and K. C. Glass, "The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research" (2001) 46 *McGill Law Journal* 473 [hereinafter Campbell and Glass]. See also: J. K. Lieberman, "Some Reflections on Self-Regulations" in P. Slayton, *et al.*, eds., *The Professional and Public Policy* (Toronto: University Press, 1978) 89 at 91; and M. H. Freedman, *Understanding Lawyers' Ethics* (New York: Matthew Bender and Co., 1990).

[91] *Ibid.*

[92] *Nova Scotia Barristers' Society* v. *Rose* [1996], L.S.D.D. No. 108; *Nova Scotia Barristers' Society v. Pavey*, *supra* note 33; *Law Society of Upper Canada* v. *French*, [1975] 2 S.C.R. 767 (S.C.C.); *Davis*, *supra* note 23.

[93] *Adams*, *supra* note 21; *Re Mehr and The Law Society of Upper Canada*, [1954] O.R. 337, rev'd on other grounds, [1955] 2 D.L.R. 289 (S.C.C.) [hereinafter *Re Mehr*]. According to O'Halloran, J. A., in *Brethour* v. *Law Society of British Columbia*, [1951] 2 D.L.R. 138 at 141, 1 W.W.R. 34, a member of the Law Society ought not be disbarred from practice so long as a reasonable probability remains on his side that the story may be true.

[94] *Szarfer* v. *Chodos*, *supra* note 56; *Ott* v. *Fleishman* [1983], B.C.J. No. 1808 (S.C.).

[95] *Supra* note 45.

[96] *Re Schumiatcher and Law Society of Saskatchewan* (1966), 58 W.W.R. 465, 60 D.L.R. (2d) 318; leave to appeal refused 61 D.L.R. (2d) 520n [hereinafter *Re Schumiatcher*].

[97] *Ibid.*

[98] In *Re Schumiatcher*, *supra* note 96, the court adopted the definition of professional misconduct, as set out in *Re G. (a solicitor); Ex parte Law Society*, [1912] 1 KB 302, at 476.

[99] (1979), 100 D.L.R. (3d) 639 a 650, 25 O.R. (2d) 257 (H.C.J.).

[100] *Savino*, *supra* note 89.

[101] *Re Achtem and Law Society of Alberta* (1981), 126 D.L.R. (3d) 364 (Alta.C.A.).

[102] *Re Pierce and the Law Society of British Columbia* (1993) 103 D.L.R. (4^{th}) 233 at 247.

[103] *Wilson* v. *Law Society of British Columbia* [1986], B.C.J. No. 2905 (B.C.C.A.) [hereinafter *Wilson v. Law Society of British Columbia*].

[104] *Re "A"* v. *Law Society of British Columbia* (1962), 36 D.L.R. (2d) 77 [hereinafter *Re "A"*].

[105] *Cwinn*, *supra* note 46.

[106] *Ibid.*, at 67.

[107] *Grant*, *supra* note 2, at 120.

[108] C. L. Campbell, *et al.* "Procedural Fairness in the Defence of Professionals Charged with Sexual Abuse" (1993) 15 *Advocates' Quarterly* 308.

[109] *Hirt* v. *College of Physicians and Surgeons of British Columbia* (1985), 63 B.C.L.R. 185 (S.C.), aff'd (1986), 10 B.C.L.R. (2d) 314 (C.A.) [hereinafter *Hirt*]; *J.C.* v. *College of Physicians and Surgeons of British Columbia* (1988), 31 B.C.L.R. (2d) 3838 (S.C.), aff'd (1990), 42 B.CL.R. (2d) 257 (C.A.).

[110] *Ojo* v. *College of Physicians and Surgeons of British Columbia*, [1995] B.C.J. No. 2313 (S.C.) [hreinafter *Ojo*].

[111] *Supra* note 90, at 475.

[112] Code of Conduct (Winnipeg, MB: College of Physicians and Surgeons of Manitoba, 2002) [hereinafter Code of Conduct].

[113] *Supra* note 90.

[114] *Ibid.*

[115] T.R. Leblang, "Medical Malpractice and Physician Accountability: Trends in the Courts and Legislative Responses", (1994) 3 Annual Health Law 106, at 118-20.

[116] Peterson, *supra* note 73, at 70.

[117] Most of the Canadian medical codes of conduct look very similar. It is to be noted that these extracts are taken from the Manitoba Code.

[118] Marilou McPhedran, "Investigating Sexual Abuse of Patients: The Ontario Experience", (1992) 1 *Health Law Review* 3, 3 [hereinafter *McPhedran*].

[119] *D.M.M.* v. *Pilo* [1996], O.J. No. 938 (Q.L.) [hereinafter *Pilo*].

[120] *De Gregory* v. *General Medical Council* (1961) A.C. 957 [hereinafter *De Gregory].*

[121] *Peterson*, *supra* note 73.

[122] *Ibid.*, at 74.

[123] *Ibid.*

[124] Scott M. Puglise, "Calling Dr. Love: The Physician-Patient Sexual Relationship as Grounds for Medical Malpractice – Society Pays While the Doctor and Patient Play," (2000) 14 Law and Health 321 [hereinafter Puglise].

[125] *Ibid.*

[126] (1996), 42 *Administrative Law Review* (2d) 233 (T.D.).

[127] Gary R. Schoener, "Sexual Exploitation: Historical Overview", in John C. Gonsiorek, *Breach of Trust* (Thousand Oaks, Calif.: Sage Press, 1994).

[128] W. A. N. Dorland, *Dorland's Illustrated Medical Dictionary*, 27th ed. (Philadelphia: Saunders, 1988), at 768.

[129] *Ibid.*

[130] This translation is found in Gary R. Schoener, "Filing Complaints Against Therapists Who Sexually Exploit Clients," in Schoener, *et al.*, ed., *Psychotherapists' Sexual Involvement With Clients: Intervention and Prevention.* (Minneapolis: Walk-In Counseling Center, 1989) 313, at 332.

[131] L. Edelstein, *Ancient Medicine*. (Baltimore, MD: Johns Hopkins Press, 1967), at 6.

[132] *Ibid.*

[133] (1996) 155 Canadian Medical Association Journal 8, 1176 A-B [hereinafter Canadian Medical Association].

[134] *Norberg* v. *Wynrib*, *supra* note 7.

[135] Canadian Medical Association, *supra* note 133, at 3.

[136] Some commentators have referred to sexual misconduct between physicians and patients in terms of "sexual exploitation of patients by health care professionals" and "sexual abuse": Sanda Rodgers, "Health Care Providers and Sexual Assault: Feminist Law Reform?" (1995) 8 *Canadian Journal Women and the Law* 158, at 159 [hereinafter Rogders]; and Anne L. Mactavish, "Mandatory Reporting of Sexual Abuse under the Regulated Health Professions Act" (1994) 14 *Health Law Review* 89. The terms "sexual exploitation of patients by health care professionals"are to be found in the *1991, Regulated Health Professions Act*, S .O. 1991, c. 18, as amended by S. O. 1993, c.37 [hereinafter *Regulated Health Professions Act, 1991*].

[137] This Task Report chaired by Marilou McPhedran had been commissioned by the College of Physicians and Surgeons of Ontario [hereinafter Task Report].

[138] *Ibid.,* at 73.

[139] *Ibid.,* at 120. A recent Ontario case, *Mussani* v. *College of Physicians and Surgeons* [2003], O.J. No. 1956 reiterated the "zero tolerance" policy with patient sexual abuse. The case concerned Dr. Mussani, a primary care physician whose certificate has been revoked after he engaged in a consensual sexual relationship with a patient. Mussani had provided care to the patient on approximately 170 occasions over 10 years. On reviewing the evidence, the Disciplinary Committee concluded that a power imbalance existed between the parties and that Mussani had breached his fiduciary duty by entering into the sexual relationship with his patient. The physician was convicted of professional misconduct on a finding of patient sexual abuse. The decision was appealed on the basis that such a penalty in this case was a constitutional breach under sections 7 and 12 of the Charter. That Mussani had an intimate relationship with a current patient was a crucial element in the decision of the Superior Court of Justice. The court stated that a physician must choose whether to pursue a physician-patient relationship or a sexual relationship, and cannot choose both. On this issue, see

summary of Lorraine E. Ferris, "Patient Protection Laws and the Issue of Consensual Sexual Relationships with Physicians", (2004) 170 *Canadian Medical Association Journal* 1, 34.

[140] Mary A. Marshall, "Civil Action for Damages for Sexual Abuse for Physicians", (1993) 1 *Health Law Journal* 85.

[141] Code of Conduct, *supra* note 112.

[142] The College of Physicians and Surgeons of Manitoba Report suggested that crossing of a professional boundary frequently precedes deliberate sexual impropriety and lists examples of warning signs, such as a physician gives a patient special status by scheduling appointment after hours; making appointments outside the office (when unusual for that physician to see that patient outside the office setting); inviting the patient to social engagements; inappropriate involvement such as sexual touching, and kissing; and, ending the physician-patient relationship in order to become romantically involved.

[143] *Ibid*, at 2.

[144] Jennifer A. Miller, "The Committee on Sexual Exploitation in Professional Relationship – Highlights from the Preliminary Report" (1992), 1 *Health Law Review* 3, 20.

[145] (Vancouver, B.C.: College of Physicians and Surgeons of British Columbia, 1992) [hereinafter *British Columbia Report*].

[146] *Branigan* v. *Yukon Medical Council* [1994] Y.J. No. 133 [hereinafter *Branigan*] refers to this *British Columbia Report*.

[147] *Supra* note 145.

[148] 1991, c. 18, Scheduled 2, s. 51(1); 1993, c. 37, s. 14(1).

[149] *Ibid.*

[150] *Ibid.*

[151] *Supra* note 145.

[152] Halifax, Nova Scotia: College of Physicians and Surgeons of Nova Scotia, December 1995.

[153] D. Gabbard, "Professional Boundaries in the Physician-Patient Relationship", (1995) 273 *Journal of the American Medical Association* 1445, 1449.

[154] *Supra* note 146.

[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.*

[158] *Takahashi* v. *College of Physicians and Surgeons (Ont.)* (1979), 102 D.L.R. (3d) 695 at 706.

[159] This term had been introduced in *Continental Insurance Company* v. *Dalton Cartage Company Limited and McPherson Warehousing Company Limited and St. Paul Fire & Marine Insurance Company*, [1982] 1 S.C.R. 164 at 169.

[160] The court reinforced that issue in *Re "D" and Council of College of Physicians and Surgeons (B.C.)* (1970), 11 D.L.R. (3d) 570, 73 W.W.R. 627.

[161] [1990] M.J. No. 95, aff'd [2000] M.J. No. 59 (C.A.), at para. 17.

[162] *De Gregory*, *supra* note 120.

[163] *Brooks* v. *Alker et al.* (1975), 60 D.L.R. (3d) 577.

[164] (1996), *Administrative Law Review* (2d) 233 (T.D.) [hereinafter *Jaswal*].

[165] The following is a non-exhaustive list of case law where physicians were found guilty of professional misconduct and therefore received public reprimands: *Boodoosingh* v. *College of Physicians and Surgeons (B.C.)* (1990), 73 O.R. (2d) 478 (Div. Ct.), aff'd (1993), 12 O.R. (3d) 385 (C.A.) [hereinafter *Boodoosingh*]; *College of Physicians and Surgeons (Ont.)* v. *Gillen* (1990), 1 O.R. (3d) 710 (Div.Ct.), aff'd (1993), 13 O.R. (3d) 707 Ont. C.A.) [hereinafter *Gillen*]; *College of Physicians and Surgeons (Ont.)* v. *Lambert* (1992), 11 O.R. (2d) 545 (Div.Ct.) [hereinafter *Lambert*]; and, *Roy* v. *Medical Board of Newfoundland* (1996), 448 A.P.R. 122 (C.A.).

[166] The following is a non-exhaustive list of case law where physicians were found guilty of professional misconduct and therefore suspended from the practice of medicine: *Ojo*, *supra* note 110; *Branigan*, *supra* note 146; *Boodoosingh*, *supra* note 165; *Patterson* v. *College of Physicians and Surgeons (B.C.)* [1988] 5 W.W.R 398 (B.C.S.C.) [hereinafter *Patterson*]; *Jaswal*, *supra* note 164; *College of Physicians and Surgeons of Ontario* v. *K.* (1987), 36 D.L.R. (4th) 707 (Ont.C.A.) [hereinafter *K*]; *Camgoz* v. *College of Physicians and Surgeons (Sask.)* (1993), 114 Sask. R. 161 (Q.B.) [hereinafter *Camgoz*]; *Elek* v. *College of Physicians and Surgeons (Sask.)* (1986), 51 Sask. R. 58 (Appeal Tribunal under Medical Profession Act) [hereinafter *Elek*]; *M.* v. *College of Physicians and Surgeons (B.C.)* [1997] B.C.J. No. 297 (B.C.S.C.); *Majid* v. *College of Physicians and Surgeons (Sask.)* (1983), 22 Sask. R. 57 (Sask.C.A.); *L.(G.)* v. *College of Physicians and Surgeons (Alta.)* (1993), 15 Alta L. R. (3d) 127 (Alta.C.A.); *MacDonald* v. *College of Physicians and Surgeons (N.B.)* (1992), 91 D.L.R. (4th) 190 (N.B.C.A.); *Vereshack* v. *College of Physicians and Surgeons (Ont.)* (1992), 61 O.A.C. 237 (Div.Ct.); *Miller* v. *College of Physicians and Surgeons (B.C.)* (1996), 59 D.L.R. (4th) 736 (S.C.); *X.* v. *College of Physicians and Surgeons (B.C.) No.1* (1991), B.C.J. No. 2410 (B.C.C.A.) [hereinafter *X.*]; *Hirt*, *supra* note 109; *Sandhu* v. *College of Physicians and Surgeons (Man.)*, [1999] M.J. No. 369 (Q.B.); *Porter* v. *College of Physicians and Surgeons (Ont.)*, [2001] O.J. No. 258 (Sup.C.J.) [hereinafter *Porter*]; *Achiume* v. *College of Physicians*

(Ont.) [1992] O.J. No. 2346 (Div.Ctr.); *Holder* v. *College of Physicians and Surgeons (Man.)* [2000] M.J. No. 404 (Q.B.); *Akuffo-Akoto* v. *College of Physicians and Surgeons (N.B.)* [1997] N.B.J. No. 332 (Q.B) [hereinafter *Akuffo-Akoto*]; *Re Berstein and College of Physicians and Surgeons (Ont.)* (1977), 15 O.R. (2d) 447; *Nwabueze* v. General Medical Council, [2000] J.C.J. No. 16; *Reza* v. *General Medical Council*, [1991] J.C.J. No. 8; *Kerster* v. *College of Physicians and Surgeons (Sask.)* [1970] S.J. No. 3 (S.C.); *Anchong* v. *College of Physicians and Surgeons (B.C.)* [1997] B.C.J. No. 1466 (B.C.C.A.); *Wakeford* v. *College of Physicians and Surgeons (B.C.)* [1993] B.C.J. No. 1767 (B.C.C.A.).

[167] The following is a non-exhaustive list of physicians who were found guilty of sexual misconduct: *McKee* v. *College of Physicians and Surgeons (B.C.)*, [1992] 4 W.W.R. 197 (S.C.); *Re Ringrose* v. *College of Physicians and Surgeons (Alta) (No.2)* (1978), 83 D.L.R. (3d) 680 (S.C.); *K.* v. *College of Physicians and Surgeons (B.C.)* (1997) B.C.J. No. 358 [hereinafter K]; *Warnes* v. *College of Physicians and Surgeons (Ont.)* (1993), 62 O.A.C. 258 (Div.Ct.); *Sood* v. *College of Physicians and Surgeons (Sask.)* [1996] 2 W.W.R. 668 (Q.B.).

[168] *G. L.* v. *College of Physicians and Surgeons (Alta)* [1993] A.J. No. 988 (Alta.C.A.).

[169] *Camgoz*, *supra* note 166.

[170] Such a practice is similar for lawyers, where a finding of guilt by the Law Society will cause the lawyer's name to be published.

[171] *Elek*, *supra* note 166.

[172] *Jory* v. *College of Physicians and Surgeons (B.C.)*, [1985] B.C.J. No. 320 (Q.L.) [hereinafter *Jory*].

[173] (1973), 44 D.L.R. (3d) 541 (B.C.S.C.) [hereinafter *Ahmad*].

[174] *Ibid.*

[175] *Akuffo-Akoto*, *supra* note 166.

[176] *Ibid.*

[177] *Supra* note 166.

[178] *Kenney* v. *College of Physicians and Surgeons (N.B.)* (1991), 85 D.L.R. (4th) 637 at 653 (N.B.C.A.); *Re Mehr*, *supra* note 93.

[179] (1982), 37 O.R. (2d) 737, 748 (Div.Ct.).

[180] *Supra* note 167.

[181] *Ibid.*

[182] *Supra* note 165.

[183] *Ibid.*, at 174.

[184] *Supra* note 109.

[185] (1985), 20 D.L.R. (4th) 765 (Div.Ct.).

[186] *Supra* note 146.

[187] *R.* v. *College of Physicians and Surgeons of the Province of Saskatchewan, Ex parte sen* (1960), 6 D.L.R. (3d) 520 (Sask.C.A.); *Sen* v. *College of Physicians and Surgeons (Sask.)* (1969), 6 D.L.R. (3d) 520, 69 W.W.R. 201 (Sask.C.A.).

[188] *Hirt*, *supra* note 109, at 206.

[189] *De Gregory*, *supra* note 120, at 965-956.

[190] *Jory*, *supra* note 172.

[191] *Bhandari* v. *Advocates Committee*, [1956] 1 W.L.R. 1422.

[192] The infamous conduct for physicians is the equivalent to conduct unbecoming to lawyers.

[193] [1964] 3 All E.R. 143 (P.C.), at 147.

[194] [1894] 1 Q.B. 752 (C.A.), at 760.

[195] *Ibid.*

[196] *Supra* note 166.

[197] *X*, *supra* note 166. Consult also: *Re Burns* (1962), 34 D.L.R. (2d) 167 (B.C.S.C.), at 174; *Dr "D"* (1970), 78 W.W.R. 627 (B.C.S.C.), at 634; *Wilson* v. *Law Society of British Columbia*, *supra* note 103, at 264; *Savino*, *supra* note 89 at 292-293; *Re Milstein*, *supra* note 84, at 707.

[198] In *N.* v. *College of Physicians and Surgeons (B.C.)* (1997), 143 D.L.R. (4th) 463 (B.C.C.A.), the *Patterson* judgment was judicially considered.

[199] [1988] B.C.J. No. 3052 (B.C.S.C.) [hereinafter *Charalambous*].

[200] *De Gregory*, *supra* note 120.

[201] [1994] B.C.J. No. 867 (B.C.S.C.) (Q.L.) [hereinafter *C.D.*].

[202] For instance, sections 264 (1), (2), (3) and 265 (1), (2), (3) (a), (b), (c), (d), 244 (3) of the *Criminal Code*, *supra* note 28, deal with criminal harassment and sexual assault.

[203] A. M. Linden, *Canadian Tort Law*, 5th ed. (Markman: Butterworths, 1993) [hereinafter *Linden*].

[204] (1956), 5 D.L.R. (2d) 113 (S.C.C).

[205] [1956] 1 D.L.R. (2d) 502 (Ont.C.A.), aff'd [1956] S.C.R. 991.

[206] *Puglise*, *supra* note 124.

[207] *Taylor* v. *McGillivray*, (1993) 110 D.L.R. (4th) 64 (N.B.Q.B.).

[208] [1980] 2 S.C.R. 880, at 890.

[209] Linden, *supra* note 203, at 40.

[210] *Norberg v. Wynrib, supra* note 7, at 303.

[211] *Ibid.*

[212] *Ibid.*

[213] Also referred to as the defendant.

[214] *Norberg* v. *Wynrib*, *supra* note 7.

[215] *Ibid.*, 457.

[216] *Supra* note 137, at 11.

[217] *Rodgers*, *supra* note 136, at 166.

[218] *Norberg v. Wynrib, supra* note 7, at 485.

[219] This is not always the case with the lawyer-client relationship. The presumption that a lawyer owes his client fiduciary obligations is, in law, rebuttable: *LAC Minerals*, *supra* note 14, at 631 and 646. The relationship, presumed to be fiduciary in nature, has an inherent vulnerability: *Hodgkinson* v. *Simms* (1992), 5 B.L.R. (2d) 236 (B.C.C.A.), rev'd in part [1994] 9 W.W.R. 609 [hereinafter *Hodgkinson*].

[220] (1956) 5 D.L.R. (2d) 524, aff'd 11 D.L.R. (2d) 19, 19 D.L.R. (2d) 201 [hereinafter *Henderson* v. *Johnston*].

[221] In discussing fiduciary duties and conflict of interest, Wilson J.A., in *Davey* v. *Woolley* (1982), 35 O.R. (2d) 599 (C.A.), 133 D.L.R. (3d) 647, leave to appeal to S.C.C. refused 37 O.R. (2d) 499n [hereinafter *Davey* v. *Woolley*], stated that a lawyer is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests.

[222] *Henderson* v. *Johnston*, *supra* note 221.

[223] *Davey* v. *Woolley*, *supra* note 220.

[224] Mischler I, *supra* note 16.

[225] Daniel Filipovic, "The Sex Police Cometh: Lawyer-Client Sexual Relationship", (1993) 31 *Alberta Law Review* (No. 2) 391 [hereinafter *Filipovic*].

[226] *Norberg v. Wynrib, supra* note 7.

[227] *Ibid.*, at 272.

[228] *Ibid.,* at 497-498.

[229] The Court here referred to Dean Patricia Hughes' article entitled, "Women, Sexual Abuse by Professionals, and the Law: Changing Parameters" (1996), 21 *Queen's Law Journal* 297.

[230] *Norberg v. Wynrib, supra* note 7, at 485.

[231] *Ojo*, *supra* note 110.

[232] The Supreme Court of Canada referred to Lambert, *supra* note 165, at 549. Consult also: Mark Vincent Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 2002), at 10-1.

[233] *Wynrib* v. *Norberg*, *supra* note 7, at 485.

[234] [1987] 2 S.C.R. 99, at 136.

[235] *Ibid.* at 137.

[236] *Norberg v. Wynrib, supra* note 7, at 491-492.

[237] Temi Firsten and Jeri Wine, "Sex Exploitation of Clients by Therapists: Breaking the Silence and Exploding the Myths", (1991) 12 *Canadian Women Studies* 1, 94 at 97.

[238] *Peterson*, *supra* note 73, at 44.

[239] Margit Livingston, "When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations", (1993) 62 *Fordham Law Review* 5 [hereinafter *Livingston*].

[240] Scholars, such as Phyllis Coleman, "Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex", (1988) 53 Albany Law Review 95 [hereinafter *Coleman*], Lawrence Dubin, "Sex and the Divorce Lawyer: Is the Client Off Limits?" (1988) 1 *Georgetown Journal of Legal Ethics* 585 [hereinafter *Dubin-1*], "Regulation of Lawyer-Client Sex: Codifying the "Cold Shower" or a "Fatal Attraction" Per Se?, (1993) 32 *Washburn Law Journal* 379, at 387 [hereinafter *Crumpacker*], Caroline Forell, "Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues", (1992) 22 *Golden Gate University Law Review* 611 [hereinafter *Forell-1*], Nancy E. Goldberg, "Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule", (1992) 26 *Akron Law Review* 45 [hereinafter *Goldberg*], Linda H. Jorgenson and

Pamela K. Sutherland, "Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact", (1992) 45 *Arkansas Law Review* 459 [hereinafter *Jorgenson and Sutherland*], Yael Levy and Thomas Lyon, "Note, Sexual Exploitation of Divorce Clients: The Lawyer's Prerogative?", (1987) 10 *Harvard Women's Law Journal* 159 [hereinafter Lyon], John M. O'Connell, "Note, Keeping Sex out of the Attorney-Client Relationship: A Proposed Rule", (1992) 92 *Columbia Law Review* 887 [hereinafter *O'Connell*], and Gerald L. Nissenbaum, "Chicago Sex Rule Doesn't Go Far Enough," (1992) *National Law Journal* 13 April, at 14, have all suggested that the bar should regulate lawyer-client sexual relationships more closely. Others, such as Geoffrey Hazard, "Lawyer-Client Sex Relation Are Taboo", (1991) *National Law Journal* 13 [hereinafter *Hazard*], Melissa A. Struzzi, "Sex Behind the Bar: Should Attorney-Client Sexual Relations Be Prohibited?" (1999) 37 *Duquesne Law Review* 637 [hereinafter *Struzzi*], and *Mischler I*, *supra* note 16, have all suggested that the prohibition is either necessary, unnecessary or is already dealt with by the existing rules of professional conduct.

[241] Myers *et al.*, *supra* note 17, at 768.

[242] Peter J. Riga, "Hands Off the Clients: The Bar Far Too Long Has been Winking at the Attorney-Client Relationships That Have Been Carried to an Unprofessional Extreme; We Must Address the Problem or Face Litigation" (1991) 13 *National Law Journal* 43.

[243] Hereinafter ABA.

[244] Abed Awad, "Attorney-Client Sexual Relationships", (1998) 22 *Journal Legal Profession* 131, at 187-188 [hereinafter *Awad*].

[245] Hereinafter, *the Committee*.

[246] (Illinois: Chicago, American Bar Association, 2001) [hereinafter *Formal Opinion*].

[247] *Ibid.* 407.

[248] *Formal Opinion*, *supra* note 246.

[249] Florence Vincent, "Regulating Intimacy of Lawyers: Why Is It Needed and How Should It Be Approached?", (2002) 33 *University of Toledo Law Review* 645 [hereinafter *Vincent*], at 645.

[250] *Crumpacker*, *supra* note 240.

[251] 52 U.S. (11 How.) 232, 247 (1850).

[252] *Ibid.*, at 407.

[253] *Ibid.*, at 409.

[254] *Ibid.*

[255] *Ibid.*

[256] *Ibid.*, at 412-413.

[257] It referred to the Illinois Attorney Registration and Disciplinary Commission that received approximately fifty complaints with respect to sexual misconduct in 1989 alone, as reported in the *1990 Report of the Illinois Task Force on Gender Bias in the Courts*.

[258] *Ibid.*, at 645.

[259] Struzzi, *supra* note 240.

[260] 963 P.2d 818 (Was. 1998), at 825 [hereinafter *Re Heard*].

[261] *Ibid.,* at 645, quoted the *ABA Report of the Commission on Evaluation of the Rules of Professional Conduct* (August 2000).

[262] *Ibid.*

[263] Vincent, *supra* note 249.

[264] Jorgenson and Sutherland, *supra* note 240, at 469.

[265] 415 S.E.2d 173 (Ga. 1992).

[266] *Ibid.*, at 175.

[267] Under Model Rule 8.4 (a) and (d) of the ABA Model Rules of Professional Conduct (2002). See: *Re Goldsborough* 654 A.2d. 1285 (D.C. 1995).

[268] *Supra* note 240, at 402.

[269] The ABA Model Rule 1.6 stated that a lawyer owes the client a fiduciary obligation to maintain confidence and secrets.

[270] 369 N.W.2d 695, at 699-700 (Wis. 1985).

[271] *Supra* note 240.

[272] *Ibid.*

[273] *Supra* note 10, at 784-785.

[274] *Ibid.*

[275] 453 S.E. 2d 686 (Ga. 1994).

[276] 577 A.2d 1198 (N.H. 1990).

[277] 369 N.E.2d 475 (Ill.App.1999).

[278] 565 N.E.2d 101 (Ill.App.1990) [hereinafter *Suppressed*].

[279] Robert H. Murial: "Suppressed v. Suppressed: A Court's Refusal to Remedy the Legal Profession's Dirty Little Secret: Attorney-Client Sexual Exploitation", (1992) 23 *Loyola University Chicago Law Journal* 309.

[280] *Supra* note 240, at 388.

[281] "Lawyers and Clients", (1987) 34 *University of California Los Angeles Law Review* 717 (hereinafter *Ellman*].

[282] *Ibid.*, at 727-728.

[283] See also, William K. Shirey, "Dealing With The Profession's "Dirty Little Secret:" A Proposal For Regulating Attorney-Client Sexual Relations", (1999) *13 Georgetown Journal of Legal Ethics* 131, at 131.

[284] 193 Cal. Rptr. 422, at 432 (Cal. Ct. App. 1983) [hereinafter *Barbara A.*].

[285] ABA Model Rules of Professional Conduct Responsibility 1.7 (b) (1987).

[286] 998 P.2d 833 (Wash. 2000) [hereinafter *Halverson*].

[287] *In the Matter of Disciplinary Proceedings against Ridgeway*, 462 N.W. 2d 671 (Wisc. S.C.)

[288] 547 N.W.2d 186, at 187 (Wisc. 1996).

[289] *Supra* note 239, at 52.

[290] 805 F.2d 1363 (9th Cir.1986).

[291] *Ibid.,* at 56.

[292] *Ibid.,* at 54.

[293] *Ibid.,* at 55.

[294] *Filipovic*, *supra* note 225.

[295] *Mischler* I, *supra* note 16, at 778.

[296] *Livingston*, *supra* note 239, at 55.

[297] *Ibid.*

[298] *Ibid.*, at 221.

[299] Linda Fitts Mischler, "Personal Morals Masquerading as Professional Ethics: Regulations Banning Between Domestic Relations Attorneys and their Clients," (2000) 23 *Harvard Women's Law Journal* 1 [hereinafter *Mischler II*].

[300] *Ibid.*, at 227.

[301] *Crumpacker*, *supra* note 240, at 398.

[302] *Supra* note 240, at 644.

[303] 712 N.E.2d 119 (Oh. 1999).

[304] *Supra* note 260.

[305] *Ibid.,* at 821-822.

[306] *Supra* note 240.

[307] Stephen G. Hirsch, "Enforcement of Sex Rule Falls to Bar Counsel: Prosecutors Must Prove Sexual Relationship Exists," (1991) *The Recorder*, 23 April, at 1.

[308] *Jorgenson and Sutherland*, *supra* note 240, at 467.

[309] *Ibid.*

[310] *Crumpacker*, *supra* note 240, 395.

[311] *Ibid.,* at 396.

[312] 381 U.S. 479 (1965).

[313] 405 U.S. 438 (1972).

[314] For more information, consult: Joanna P. Pitulla, "Lawyer-Client Sex-Incompatible Roles?" (1995) 6 *Professional Law Journal* 14.

[315] *Supra* note 285.

[316] *Ibid.*

[317] 436 N.W.2d 57 (Iowa, 1989).

[318] *Ibid.*

[319] *Supra* note 239, at 56-63.

[320] *Supra* note 240, at 395-398.

[321] *Supra* note 240, at 649.

[322] *Supra* note 244, at 183-189.

[323] *Myers et al.*, *supra* note 17, at 756.

[324] *California Business Rules and Professional Conduct*, National Report On Legal Ethics, no. 3, 2000. It reflected the amendments effective through 1 July 1998.

[325] *California Business and Professional Code* (West Supp. 1993) para. 6106.8 (6) (West 1990).

[326] *Supra* note 324.

[327] *Greenbaum* v. *State Bar*, 15 Cal.3d 893, 903 (California, 1976).

[328] *Giovanazzi* v. *State Bar*, 28 Cal.3d 581 (Caifornia, 1980).

[329] *Oregon National Report* On *Legal Ethics*, no. 1, 2000 was approved by the Oregon Supreme Court through 29 January 1997.

[330] *Re Hassenstab*, 934 P.2d 1110 (Oregon, 1997).

[331] *Ibid.*

[332] *New York National Report On Legal Ethics,* no. 6, 1998, as amended effective 1 January, 2002.

[333] *Re Rudnick*, 581 N.Y.2d 20 (New York, 1992).

[334] *Ibid.*

[335] *Awad*, *supra* note 244.

[336] *Minnesota National Report On Legal Ethics*, no. 6, 2001 is current through August 2000.

[337] *Ibid.* The Rule was amended effective 1 July 1994 and further amendment effective for all lawyer conduct occurring on or after August 1, 1999.

[338] *Wisconsin National Report On Legal Ethics*, no. 8, 2001.

[339] *Kraemer*, *supra* note 288.

[340] *Ibid.*

[341] *Florida National Report On Legal Ethics* no. 7, 1998.

[342] *Ibid.*

[343] *Iowa National Report on Legal Ethics*, 2000.

[344] *Iowa Supreme Court Board of Profession Ethics and Conduct* v. *Hill*, 540 N.W.2d 43 (Iowa, 1995).

[345] *Ibid.*

[346] *West Virginia National Report On Legal Ethics*, no. 2, 1999 reflects changes received through October 1997.

[347] The Rule was amended by order entered July 12, 1995, effective 1 September 1995.

[348] In *Musick* v. *Musick* 453 S.E.2d 361 (West Virginia, 1994), the court found that a lawyer-client sexual relationship may violate rules of conduct.

[349] *Utah National Report On Legal Ethics*, no. 9, 1998, including revisions current as of 1 November 1988.

[350] Such a Rule was amended effective 1 April 1997: Amendment Notes. The 1997 amendment, added Subdivision (g).

[351] *North Carolina National Report On Legal Ethics*, no. 5, 2001, reflecting changes received through 1 November, 2000.

[352] *Ibid.*

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