

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2017

**Order Promulgating Amendments to Rules 1.7 and 1.8 of the
Vermont Rules of Professional Conduct**

Pursuant to the Vermont Constitution, Chapter II, Section 37, it is hereby ordered:

1. That Comment 12 to Rule 1.7 of the Vermont Rules of Professional Conduct be deleted as follows (new matter underlined; deleted matter struck through):

Rule 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

* * * * *

Comment

Personal Interest Conflicts

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~~[12] These rules do not expressly prohibit a lawyer from engaging in a sexual relationship with a client, but such relationships give rise to a variety of violations of specific provisions of the rules. See Rule 1.8, Comment [17]. Removed.~~

Board Notes—2018 Amendment

Comment 12 to Rule 1.7 is deleted due to the promulgation of Rule 1.8(j) which explicitly precludes a lawyer from having a sexual relationship with a client unless a consensual sexual relationship existed when the client-lawyer relationship began.

2. That Rule 1.8 of the Vermont Rules of Professional Conduct and Comments 17, 18 and 19 be amended to read as follows (new matter underlined; deleted matter struck through):

Rule 1.8. CONFLICT OF INTEREST: 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.

(~~j~~ k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

* * * * *

Client-Lawyer Sexual Relationship

[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. 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. ~~For all of these reasons, lawyers are cautioned that sexual relations with a current client could give rise to claims of incompetence under Rule 1.1, of lack of diligence under Rule 1.3, of a conflict with the lawyer's personal interests under Rule 1.7(a)(2), of using client information to the client's disadvantage under Rule 1.8(b), of conduct involving dishonesty or the like under Rule 8.4(c), or of conduct prejudicial to the administration of justice under Rule 8.4(d).~~

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

Imputation of Prohibitions

[18 19] Under paragraph (j)(k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers. See Rule 1.10(a).

Board Notes—2018 Amendment

Rule 1.8(j) is added to prohibit sexual relations between a lawyer and client unless a consensual sexual relationship existed when the client-lawyer relationship commenced. Comment 17 is amended to clarify that the rule applies to all sexual relationships formed after the commencement of the professional client-lawyer relationship, including consensual sexual relationships and sexual relationships in which there

is no prejudice to the client’s interests in the matter that is the subject of the professional relationship. In such instances, a lawyer must withdraw from continued representation. See V.R.Pr.C. 1.16(a)(1). Comment [18] is added to provide guidance on sexual relationships that pre-date the commencement of the client-lawyer relationship. Former Comment [18] is renumbered as Comment [19] and amended to clarify that the conflict created by Rule 1.8(j) is personal for purposes of imputation. See V.R.Pr.C. 1.10.

The new rule 1.8(j) tracks Rule 1.8(j) of the ABA Model Rules of Professional Conduct. Vermont joins 31 other states in adopting a specific prohibition on client-lawyer sexual relationships. The amendment is a “bright-line” rule that recognizes the serious risk to a client’s interest in receiving candid, competent, and conflict-free legal advice that is presented when the professional relationship turns sexual. Further, the amendment is consistent with the fact that at least 18 of Vermont’s other licensed professions have adopted rules that specifically ban sexual relationships between a licensee and a client, patient, or person with whom the licensee has a professional relationship.

3. That these rule and comments, as amended, are prescribed and promulgated effective _____ . The Reporter’s Notes are advisory.

Dated in Chambers at Montpelier, Vermont, this ____ day of _____ 2018.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice