July 4, 2018

Regulating Lawyer-Client Sex

By: Alice Woolley

In Canada we allow lawyers to have sex with their clients. Or, to be precise: we do not prohibit lawyers from having sex with their clients.

Canadian law societies do regulate lawyer-client sex in a limited way. Almost all law societies prohibit sexual harassment. And most law societies also identify lawyer-client sex as potentially creating conflicts of interest. They identify sexual relationships with clients as the sort of thing that may "conflict with the lawyer's duty to provide objective, disinterested professional advice to the client" and which may "permit exploitation of the client" (FLS Model Code Rule 3.4-1, Commentary 11(d), adopted in BC, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Newfoundland, PEI and the territories). Ontario has not adopted the FLS Commentary. The Commentary in Ontario says instead "the judgment of a lawyer who has a close personal relationship, sexual or otherwise, with a client who is in a family law dispute is likely to be compromised" (Rule 3.4-1, Commentary 4). Alberta has also not adopted the FLS Commentary. Alberta's Code does not reference sexual relationships anywhere in its conflicts rules. Indeed, apart from its harassment rules, Alberta's Code does not mention sex at all.

So Canadian law societies (barely) regulate lawyer-client sex, but they don't prohibit it. Should they? I asked my students this question last fall, and reading their policy papers inspired me to think more about it.

To start, American regulators do regulate lawyer-client sex, to a significant extent. Under the American Bar Association (ABA) Model Code of Professional Responsibility, most sex between lawyers and clients is prohibited. Rule 1.8(j), adopted by the ABA in 2002 (and), states:

> A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced
>
> [Note: As of 2006 this rule had been adopted or proposed in a majority of states - Craig Feiser "Strange Bedfellows: The Effectiveness of Per Se Bans on Attorney-Client Sexual Relations" (2008) 33 J Legal Prof 53 at 59-60].

The Commentary to the ABA Rule goes on to explain that the Rule exists to prevent "unfair exploitation" and to ensure the lawyer does not violate the "basic ethical obligation not to use the trust of the client to the client's disadvantage" (Comm'y 17). The Commentary also notes the risk of "impairment of the exercise of independent professional judgment", and the difficulty in discerning what is and is not a confidential and privileged communication where a relationship becomes sexual (Comm'y 17). It clarifies that "***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***" (Comm'y 17, emphasis added). The Commentary notes that pre-existing sexual relationships are not prohibited but must be managed in accordance with the rules on conflicts of interest (Comm'y 18). It also clarifies that the Rule applies to prohibit a

lawyer for an "organization (whether inside or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters" (Comm'y 19).

The arguments against adopting a rule like the ABA's would, I think, run along these sorts of lines:

- Absent some demonstrated risk of harm, people should not be prohibited from having consensual sex with each other;
- There is no reason to presume lawyer-client sex is inherently harmful;
- Any harms that do arise from lawyer-client sex can be addressed by other provisions in the codes of conduct—e.g., the rules on competence, conflicts of interest, and confidentiality and privilege;
- Lawyers and clients can identify and address the risks that may arise from mixing their sexual and professional relationships—they have the capacity to make a reasoned assessment of their own interests and regulatory obligations;
- In addition, if a lawyer fails to properly represent a client's interests because of the lawyer-client sexual relationship, the lawyer can be held liable for breach of fiduciary duty;
- As a result, further regulation of lawyer-client sex inhibits freedom of choice for no pressing or substantial reason.

The arguments in favour of adopting a rule like the ABA's would be something like this:

- Restricting lawyers from having sex with clients during the course of a retainer does not meaningfully restrict sexual freedom;
- Having sex with clients *is* inherently harmful, at least insofar as it always creates material risks for a client. A lawyer who commences a sexual relationship necessarily creates "a substantial *risk* that the lawyer's representation of the client would be materially and adversely affected" [emphasis added] (FLS Model Code, Rule 3.4-1, Comm'y 2 – also *R v Neil* 2002 SCC 70 et al). In addition, there is a risk that a lawyer may not provide the independent advice and representation necessary to ensure the proper administration of justice (See, e.g., *Regular v Law Society of Newfoundland and Labrador* 2011 NLCA 54). Clients may also not ask the hard questions they ought to ask when they are having a sexual relationship with a lawyer—they may not want to disrupt the personal relationship by being "difficult" in the professional relationship (see, e.g., *Law Society of Upper Canada v. Hunter* [2007] LSDD No 8). And as the ABA notes, it may become difficult to discern what is (and what is not) a confidential and privileged communication;
- Risks may also arise simply from a lawyer pursuing a sexual relationship with the client. Even if the lawyer does not commit sexual harassment, the client may feel awkward and uncomfortable if their professional advisor suggests sex. As one of my students noted, the client may simply not want to have a personal and sexual conversation in circumstances where they are seeking legal advice or representation;
- Lawyers and clients cannot reliably assess the risks of mixing a sexual and professional relationship. A client may not understand the risks, and the fact of a desired or current sexual relationship will undermine the lawyer's ability to dispassionately assess the

nature and extent of the risks arising from mixing the sexual and professional relationships;

- The current law society rules address harms arising from sexual relationships indirectly, but they do not address those harms directly. Fiduciary law provides a remedy, but only in severe cases and only where a client is willing and able to pursue legal action. Neither fiduciary duties nor the rules as drafted provide clear guidance to lawyers or clients about what constitutes appropriate behaviour, or what a client is entitled to expect from their lawyer. That lack of clarity can confuse lawyers and inhibit regulation (see, e.g., here).
- As a result, a rule like the ABA's does not meaningfully restrict sexual freedom, it better protects clients from the risks that naturally arise from lawyer-client sexual relationships, and it provides better clarity to lawyers and clients about appropriate behaviour.

I am persuaded by the arguments in favour of the ABA rule, largely for the reasons just noted. Sex—especially new sex—pretty reliably makes people stupid. At the very least having sex with a client risks undermining the independence and professional usefulness of the advice that a lawyer provides. It's not certain to undermine the lawyer's representation of the client, but the risk that it will do so can fairly be described as substantial. A substantial risk of impairment is all that is needed to give rise to a conflict of interest. Even with organizational clients conflicts are a concern. When a lawyer has sex with the person who instructs them there is a substantial risk that the lawyer will prefer the interest of that person to the interests of the actual client, the organization.

A rule like the ABA's also reinforces the rule against sexual harassment; it prevents a lawyer accused of sexual harassment from characterizing the impugned behaviour as a harmless and permitted attempt to initiate a consensual sexual relationship with a client. It also permits a lawyer who is being harassed by a client to use the rule as a shield—they can point out that sex with a client is prohibited. The ABA's rule is essentially preventative—it prohibits sexual interactions that, while perfectly acceptable in other circumstances, carry inherent risks of harm in the context of a lawyer-client relationship, and in relation to the lawyer's legal and ethical duties to the client and the administration of justice.

The thought of being a client and having to navigate a lawyer's sexual advances feels exhausting. If it were me, I would want going to a lawyer and going to the doctor to be the same—an interaction where no one expects or hopes for sexual attention. Plus there's a whole world of people out there to have sex with—requiring lawyers and clients to find other people to have sex with doesn't strike me as a soul crushing restriction. Especially since if the lawyer and client do feel an irresistible attraction there is a pretty easy solution: refer the file.

I also frankly do not understand the decision of Ontario and Alberta not to adopt the Federation's rule. With respect to Ontario, I agree that sex with a family law client is very likely to be problematic. But why would we not be equally concerned about the risks where lawyers have sex with clients in criminal jeopardy, or who have suffered a serious personal injury? What about a client seeking advice after being sexually assaulted? Clients can be vulnerable across a range of matters, and restricting the commentary to family law seems hard to justify. And as for Alberta, I think it is unconscionable to have a code that makes no mention whatsoever of the general risks that arise from lawyer-client sex.

As I read the Canadian rules, and in particular Ontario and Alberta's, I can't help but feel that they are rules written by and for lawyers, not rules written by and for clients. Because here's the thing: absent regulation the risks arising from a lawyer-client sexual relationship lie entirely with the client. It's the client who needs representation. It's the client whose legal interests are at stake. And it's the client who, if the representation goes sideways, will suffer harm. And for what benefit? The freedom to have sex with their lawyer? Some people in the legal profession may think that benefit considerable enough to offset the risks. But I can't see it.

This post originally appeared on Slaw.
