

27 NCAC 02 RULE 1.19 SEXUAL CONDUCT WITH CLIENTS PROHIBITED

(a) A lawyer shall not engage in sexual activity with a client. For purposes of this Rule, "sexual activity" means:

- (1) sexual intercourse; or
- (2) any touching of a person or causing such person to touch the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(b) A lawyer shall not engage in sexual communications with a client. For purposes of this Rule, "sexual communications" means:

- (1) requesting or actively participating in sexually explicit conversation; or
- (2) requesting or transmitting messages, images, audio, video, or other content that contain nudity or sexually explicit material.

Communications that contain nudity or sexually explicit content but are relevant to the client's legal matter and are made in furtherance of the representation are not "sexual communications" for purposes of this Rule.

(c) A lawyer shall not request, require, or demand sexual activity or sexual communications with a client incident to or as a condition of any professional representation.

(d) Scope.

- (1) The prohibitions in this Rule apply to:
 - (A) current clients;
 - (B) an individual or a representative of an organization who is consulting with a lawyer about the possibility of forming a client-lawyer relationship, until the lawyer declines the representation; and
 - (C) representatives of a current client with whom the lawyer is authorized to communicate regarding the representation.
- (2) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the person identified in (d)(1) before the legal representation or consultation commenced.
- (3) Paragraph (b) shall not apply if the lawyer and the person identified in (d)(1) consensually engaged in sexual communications before the legal representation or consultation commenced.
- (4) 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.

Comment

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability competently to represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that sexual conduct with a client is damaging to the client-lawyer relationship and creates an impermissible conflict of interest that cannot be ameliorated by the consent of the client.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that led the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

[3] Sexual conduct between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that sexual conduct with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for sexual conduct with a client, the lawyer violates one of the most basic ethical obligations; i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. See Rules 1.6 and 1.8.

Impairment of the Ability to Represent the Client Competently

[4] A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. Sexual conduct between lawyer and client, under the circumstances proscribed by this rule, presents a significant danger that the lawyer's ability to represent the

client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. Sexual conduct also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is sexually involved with his or her client risks becoming an adverse witness to his or her own client in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.

No Prejudice to Client

[5] The prohibition on sexual conduct with a client applies regardless of whether it prejudices the client and regardless of whether the conduct is consensual.

Prior Consensual Relationship

[6] Sexual conduct that predates the client-lawyer relationship is not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual conduct exists prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should be confident that his or her ability to represent the client competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has engaged in sexual conduct. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is engaging in sexual conduct is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

*History Note: Authority G.S. 84-23;
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