

**ETHICS & PROFESSIONALISM COMMITTEE
OF THE CLEVELAND METROPOLITAN BAR ASSOCIATION
ADVISORY OPINION NO. 2011-1**

QUESTION PRESENTED

Do the Ohio Rules of Professional Conduct restrict a lawyer's ability to have a sexual relationship with clients or others?

SUMMARY

Yes. A lawyer may not commence soliciting or engaging in sexual activity with the lawyer's client during the course of representation without violating Rule 1.8(j) of the Ohio Rules of Professional Conduct. Client consent, even if the client initiated the sexual activity, does not constitute a defense. A lawyer may, if the Rules of Professional Conduct permit, withdraw from the representation *before* soliciting or engaging in sexual activity. Other lawyers in the lawyer's firm may, if they can do so without violating the Rules of Professional Conduct, continue to represent the client. Finally, even when the literal language of Rule 1.8(j) is not violated, lawyers need to abide by other Rules, most particularly Rules 1.7(a)(2) and 8.4(d), (g) and (h), that could reach sexually-related conduct by a lawyer with a client or with other individuals closely connected with the representation.

ANALYSIS

I. The Meaning of Rule 1.8(j) of the Ohio Rules of Professional Conduct

Rule 1.8(j) of the Ohio Rules of Professional Conduct provides:

A lawyer shall not *solicit or engage in sexual activity* with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. (Emphasis added.)

This Rule differs from ABA Model Rule 1.8(j), which provides:

A lawyer shall not *have sexual relations* with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. (Emphasis added.)

As highlighted by the emphasized portion of each Rule, Ohio's version of Rule 1.8(j) uses the phrase "solicit or engage in sexual activity" instead of the phrase "have sexual relations." According to the Summary of Post-Comment Revisions to the Proposed Ohio Rules of Professional Conduct, Ohio's use of "sexual activity" in its version of the Rule instead of "sexual relations" was to tie into the definition of "sexual activity" contained in the Ohio Revised Code. Ohio's version of the Rule also prohibits "soliciting," which is not mentioned in the ABA Model Rule.

A. *The Meaning of “Sexual Activity”*

R.C. 2907.01(C) defines “sexual activity” as “sexual conduct or sexual contact, or both.” Sexual conduct and sexual contact are each defined by the Revised Code. R.C. 2907.01(A) provides:

“Sexual conduct” means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

R.C. 2907.01(B) provides:

“Sexual contact” means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttocks, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

B. *The Meaning of “Soliciting” Sexual Activity*

As noted, Ohio Rule 1.8(j) expressly prohibits “soliciting” sexual activity. Although the Ohio Rules of Professional Conduct contain several references to “soliciting,” none of the references point to a definition of the word. Comment 17 to Rule 1.8 merely adds to its ABA Model Rule counterpart the sentence: “A lawyer also is prohibited from soliciting a sexual relationship with a client.” Based on the reference to the Revised Code’s criminal provisions on sexual activity, the most relevant definition for solicitation may be that contained in the Ohio Jury Instructions. OJI-CR 507.24(2) provides:

“Solicited” means to seek, to ask, to influence, to invite, to tempt, to lead on, or to bring pressure to bear.¹

This definition raises at least two issues. First, should “soliciting” be viewed subjectively or objectively? Is it enough that a reasonable client would understand the lawyer’s words or deeds to be a solicitation for sexual activity or is the particular client’s belief that his or her lawyer was soliciting sexual activity enough? Second, should “soliciting” be viewed from the standpoint of the lawyer or the client? The viewpoint is critical, as a client could misinterpret a lawyer’s actions as an invitation for a sexual activity, when that was not the lawyer’s intent.

The Committee could not find any legal authority on how a court would define “solicitation” as used in Rule 1.8(j), but believes that lawyers should consider that Rule 1.8(j) was adopted to protect clients and the public and not to protect lawyers. Based on that viewpoint, the Committee believes that for a “solicitation” under Rule 1.8(j) to be made, the client must have

¹ Courts use similar language. For example, the Hamilton County Court of Appeals stated: “Solicit is defined as to entice, urge, lure, or ask.” *State v. Swann*, 142 Ohio App.3d 88, 89, 2001-Ohio-42, 753 N.E.2d 984.

actually regarded the lawyer's words and actions as a solicitation *and* a reasonable person in the client's position would have also regarded them as a solicitation.² If a court or disciplinary authority would agree with the Committee's view, a lawyer who does not intend flirtatious or bawdy language to be construed as soliciting sexual activity could violate Rule 1.8(j) if a reasonable client would regard the lawyer's words as soliciting and the actual client did so.

The concerns regarding solicitation in Rule 1.8(j) are not affected by the method of communication. Whether in-person or by electronic or other means, solicitation of sexual activity can violate the high trust and confidence that must be encouraged in the attorney-client relationship. The unequal roles and potential vulnerability of the client are not removed simply because the interactions are not face-to-face. Indeed, the Ohio Supreme Court disciplined a lawyer for engaging in multiple instances of inappropriate sexual communication and behavior with clients—in person, through the Internet and via text messages.³ The Committee believes that the Court would also discipline lawyers involved in “sexting” with their clients.⁴

C. *Recent Ohio Supreme Court Decisions Involving Rule 1.8(j)*

Two recent Ohio Supreme Court cases illustrate the Court's attitude towards stipulated violations of Rule 1.8(j).⁵ In *Allen County Bar Association v. Bartels*, the Court applied Rule 1.8(j) in a straightforward manner and explained that lawyers may not engage in sexual activity during the attorney-client relationship unless it preceded the formation of the attorney-client relationship. *Bartels* involved post divorce decree custody and visitation issues. The sexual activity between the client and the lawyer began the day the court filed a judgment entry resolving the matter but

² In a pre-Rules case, *Disciplinary Counsel v. Moore*, 101 Ohio St.3d 261, 2004-Ohio-734, 804 N.E.2d 423, a lawyer told his client about the size of his penis and various sexual positions he felt women preferred. He also asked about the client's sexual preferences and past sexual experiences. Although the Court disciplined the lawyer for violating DR 5-101(A)(1) and DR 1-102(A)(6), this Committee believes that the lawyer's conduct could have been regarded by his client as a solicitation to have sex. If this conduct occurred now, the Committee believes that it would have violated Rule 1.8(j).

³ *Cleveland Metro. Bar Assn. v. Lockshin*, 125 Ohio St.3d 529, 2010-Ohio-2207, 929 N.E.2d 1028.

⁴ “Sexting” was defined in an attorney discipline case as “sexually suggestive electronic text messages.” *Attorney Grievance Commn. of Md. v. Marcalus*, 996 A.2d 350, 365 (Md. 2010). In a criminal case, “sexting” was defined as “the practice of sending nude photographs via text message.” *State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

⁵ *Allen Cty. Bar Assn. v. Bartels*, 124 Ohio St.3d 527, 2010-Ohio-1046, 924 N.E.2d 833 (public reprimand for consensual sexual activity that arose during attorney-client relationship); *Cincinnati Bar Assn. v. Schmalz*, 123 Ohio St.3d 130, 2009-Ohio-4159, 914 N.E.2d 1024 (public reprimand for the lawyer's engaging in telephonic sexual activity and having a conflict of interest because of the lawyer's personal romantic interest in the client). See, also, *Disciplinary Counsel v. Detweiler*, 127 Ohio St.3d 73, 2010-Ohio-5033. In *Detweiler*, a male lawyer who expressed his romantic and sexual feelings to and had a sexual encounter with his female domestic relations client during the representation received a public reprimand for violations of Rules 1.8(j), 1.7(a)(2) and 8.4(h).

continued for several months during which the lawyer provided to her client occasional legal services related to visitation, custody, and the payment of medical bills for her client's child. The client's ex-wife subsequently filed a grievance against the lawyer. The Supreme Court made it clear that sexual activity in this context is prohibited.

The relationship between the 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 the 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 engaging in sexual activity with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client, unless the sexual relationship predates the client-lawyer relationship. A lawyer is also prohibited from soliciting a sexual relationship with a client.⁶

The Court agreed a public reprimand was appropriate in light of the isolated violation of Rule 1.8(j), a previously unblemished legal career, and the fact the violation had no adverse impact on the lawyer's representation of the client. The central problem for the lawyer in this case was timing—the sexual activity commenced during the attorney-client relationship—and the lawyer did not take steps to sever that relationship.

In *Cincinnati Bar Association v. Schmalz*, the Court publicly reprimanded a lawyer for violating Rules 1.8(j) and 1.7(a)(2).⁷ In *Schmalz*, a court-appointed lawyer represented a serial criminal defendant accused of felonies. After the defendant went to jail, he filed a grievance against the lawyer claiming "that [the lawyer] had engaged in a romantic relationship with him, that the

⁶ *Allen Cty. Bar Assn.*, at ¶ 9, quoting Prof. Cond. R. 1.8, Comment 17.

⁷ Rule 1.7(a)(2) provides that "[a] lawyer's acceptance or continuation of representation of a client creates a conflict of interest if *** there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests."

relationship had left the defendant vulnerable and had created a conflict of interest, and that the relationship had motivated the [lawyer] to seek acquittal rather than a plea bargain so the two could be together.”⁸ The Hamilton County Sheriff’s Department had recorded 110 half-hour conversations between the lawyer and client. In some of the calls, the two explicitly described sexual acts and professed their love for the other. In at least three of the calls, the lawyer requested or engaged in telephonic sexual activity with her client. The lawyer “acknowledged the sexual component of the relationship and admitted that she had discussed with the defendant the possibility of pursuing the relationship following his release from custody.”⁹ She also admitted—upon being confronted with the tapes—that she “screwed up” and “got too close.”¹⁰

In determining the appropriate punishment, the Court considered prior cases dealing with sexual activity:

At one end of the spectrum, we disbarred a male lawyer who preyed upon the vulnerabilities of his clients in an egregious manner, engaged in sex with them, lied during the investigation, and showed little acceptance of responsibility for the wrongfulness of his acts. In other cases, a sexual relationship has been linked with other disciplinary violations or an actual adverse impact on the quality of the legal representation; in such cases we have ordered a suspension from the practice of law.¹¹

The Court found the facts in the case to “dwell at the end of the spectrum representing the least egregious cases of sexual misconduct.” The lawyer’s relative inexperience, the client’s sophistication as a career criminal, and the fact that the lawyer handled the defense ably were factors as well. Thus, the Court held a public reprimand was appropriate.¹²

In a future case, the Court might well further expand the zone of prohibited conduct beyond that found in *Schmalz*. Whether or not it does so, the Committee advises lawyers to avoid any type of sexually related conduct with clients that could be considered as soliciting or engaging in sexual activity during the attorney-client relationship.

Even if a lawyer does not violate Rule 1.8(j), the lawyer’s sexually related conduct with a client could violate other Rules. For example, if a lawyer started a sexual relationship with an individual just prior to the lawyer’s representation of the individual, the lawyer would have to determine whether the relationship caused a conflict of interest. Rule 1.7(a)(2) provides that conflict of interest can result from “a substantial risk that the lawyer’s ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by the lawyer’s own personal interests”). Other Rules that lawyers should consider include Rule 8.4(d)

⁸ *Schmalz*, at ¶ 4.

⁹ *Id.*, at ¶ 6.

¹⁰ *Id.*, at ¶¶ 4, 7.

¹¹ *Id.*, at ¶ 7. (Citations omitted.)

¹² *Id.*, at ¶ 9.

(“conduct that is prejudicial to the administration of justice”), Rule 8.4(g) (“conduct involving discrimination prohibited by law because of *** gender, sexual orientation ***”), and 8.4(h) (“any other conduct that adversely reflects on the lawyer’s fitness to practice law”).

D. *Client Consent Is Not Deemed Adequate Informed Consent*

In *Allen County Bar Assn. v. Bartels*, the Ohio Supreme Court held that client consent is not a defense to a violation of Rule 1.8(j).¹³

E. *A Conflict of Interest Under Rule 1.8(j) Is Not Necessarily Imputed to Other Lawyers in the Firm*

Although many conflicts of interest under Rules 1.7, 1.8 and 1.9 of the Rules of Professional Conduct are imputed to other lawyers in a lawyer’s firm, a conflict of interest under Rule 1.8(j), by itself, is not necessarily imputed to other lawyers in a lawyer’s firm under Rules 1.8(k) and 1.10. Under Rule 1.8(j), the lawyer must withdraw from representation before soliciting or engaging in sexual activity with a client, other lawyers in the lawyer’s firm may be able to continue representing the lawyer’s client. However, lawyers should consider not continuing the representation of the client in smaller firms or when the representation deals with a legal area where emotions can run high, such as domestic relations or criminal law. The reason is that Rule 1.7(a)(2) may come into play, and a conflict of interest under that Rule may or may not be imputed to other lawyers in the lawyer’s firm under Rule 1.10(a).¹⁴

II. Special Concerns With Corporate Clients

“[T]he client is no longer simply a person who walks into a law office.”¹⁵ Many lawyers represent corporate entities, unincorporated associations, governmental agencies, classes, and other non-individual clients. Moreover, many “in-house” and governmental lawyers are actually employed by their clients, which may have their own policies on dating or sexual relationships. At times, the “client” is not the person or entity paying the fees and may not even be the primary

¹³ Cf. *American Medical Association Code of Ethics Opinion 8.14* (“the relative position of the patient within the professional relationship is such that it is difficult for the patient to give meaningful consent to such behavior.”)

¹⁴ Comment 20 to Rule 1.7 provides, in pertinent part: “The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.” Comment 2 to Rule 1.10 provides, in pertinent part: “The [imputation rule in Rule 1.10(a)] does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where the usual concerns justifying imputation are not present, the rule eliminates imputation in the case of conflicts between the interests of a client and a lawyer’s own personal interest. Note that the specific personal conflicts governed by Rule 1.8 are imputed to the firm by Rule 1.8 (k).” Comment 20 to Rule 1.8, which explains Rule 1.8(k), provides, in pertinent part: “The prohibition set forth in [Rule 1.8(j)] is personal and is not applied to associated lawyers.”

¹⁵ *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir. 1978) (citation omitted).

contact in a representation.¹⁶ Comment 19 to Rule 1.8 explains that Rule 1.8(j) prohibits inside and outside counsel representing an organization 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.” Therefore, a lawyer representing an organization is prohibited from soliciting or engaging in sexual activity with anyone employed by the organization “who supervises, directs, or regularly consults with that lawyer concerning the organization’s legal matters” during the representation.

In addition to the personal conflict of interest that Rule 1.8(j) addresses, a lawyer’s sexual relationship with certain employees of an organizational client can result in other problems under the Rules of Professional Conduct. In Formal Opinion 92-364, the ABA Standing Committee on Ethics and Professionalism addressed the problems related to a corporate lawyer’s having a sexual relationship with a corporate employee and emphasized that these intra-company relationships can be problematic. The opinion warns of the potential conflict that arises when a lawyer engages in a sexual relationship with a corporate client’s representative (someone who, although not supervising, directing or consulting with the lawyer, is someone whose actions or statements would bind the corporation) and gains information that is not favorable to the sexual partner, but needs to be reported.¹⁷ Furthermore, information gained through a personal relationship rather than through the attorney-client relationship is not necessarily protected from disclosure by Rule 1.6 or the attorney-client privilege.

III. Sexual Relationships With Non-clients

Rule 1.8(j) prohibits a lawyer from soliciting or engaging in sexual activity with clients only. However, other Rules and legal precedent may also limit a lawyer’s sexually related conduct with others. Sexually-related conduct with persons tangential to the attorney-client relationship, such as guardians, spouses, other close relatives, witnesses, and employees of clients could adversely affect the lawyer’s ability to represent the client. Indeed, courts have held that lawyers’ sexually related conduct with non-clients may violate professional conduct rules dealing with impairment of professional judgment and conflicts of interest.¹⁸

For example, in *Cleveland Metropolitan Bar Association v. Lockshin*, the Ohio Supreme Court found that a lawyer’s interviewing a potential witness in a “flirtatious” manner violated former DR 1-102(A)(6) of Ohio Code of Professional Responsibility.¹⁹ The Court also found a violation of DR 1-102(A)(6) for that same lawyer’s discussing sexual matters with a female sergeant in a

¹⁶ Prof. Cond. R. 1.8(f).

¹⁷ Rule 1.13(b) requires an organization’s lawyer to report certain matters to a higher authority within the organization, “including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.”

¹⁸ Cf. *American Medical Association Code of Ethics Opinion 8.145* (physicians should refrain from sexual or romantic interactions with key third parties when it is based on the use or exploitation of trust, knowledge, influence, or emotions derived from a professional relationship).

¹⁹ *Lockshin*, supra, at ¶ 16.

sheriff's department.²⁰ Former DR 1-102(A)(6) corresponds to Rule 8.4(h), which provides that a lawyer must not "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."

Other states have dealt with this issue in a like manner. For example, in *Lawyer Disciplinary Board v. Artimez*,²¹ a lawyer had an inappropriate sexual relationship with his client's wife, and, upon learning of the affair, the client filed a grievance with the disciplinary board. The West Virginia Supreme Court emphasized the importance of loyalty and trust between lawyers and their clients. "When, however, a lawyer commences a sexual relationship with his/her client's spouse, it is not hard to imagine that the attorney-client relationship that has been built upon trust and an expectation of loyalty will come to an abrupt end, much like a gust of wind demolishes a stable, but nevertheless vulnerable, house of cards."²²

Like Ohio Rule 1.8(j), West Virginia Rule 8.4(g) prohibits sexual activity with the client only. Therefore, *Artimez* did not find a violation of West Virginia Rule 8.4(g). However, *Artimez* held that the lawyer had violated West Virginia Rule 1.7(b), which prohibits representation of a client if that representation may be "materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests."²³ West Virginia Rule 1.7(b) corresponds to Ohio Rule 1.7(a)(2).

Furthermore, *Artimez* noted that although West Virginia had never disciplined a lawyer for having a sexual relationship with a client's spouse, South Carolina had done so twice.²⁴ In those two cases, the lawyers were counseling their clients on "marital issues that were directly related to the affairs between the lawyers and their clients' spouses."²⁵

CONCLUSION

A lawyer may not commence soliciting or engaging in sexual activity with the lawyer's client during the course of representation without violating Rule 1.8(j) of the Ohio Rules of Professional Conduct. Client consent, even if the client initiated the sexual activity, does not constitute a defense. A lawyer may, if the Rules of Professional Conduct permit, withdraw from the representation *before* soliciting or engaging in sexual activity. Other lawyers in the lawyer's firm may, if they can do so without violating the Rules of Professional Conduct, continue to represent the client. Finally, even when the literal language of Rule 1.8(j) is not violated, lawyers need to abide by other Rules, most particularly Rules 1.7(a)(2) and 8.4(d), (g) and (h), that could reach sexually-related conduct by a lawyer with a client or with other individuals closely connected with the representation.

²⁰ Id., at ¶¶ 28-30.

²¹ *Lawyer Disciplinary Bd. v. Artimez* (2000), 208 W.Va. 288, 540 S.E.2d 156.

²² Id., 208 W.Va. at 300, 540 S.E.2d at 168.

²³ Id., 208 W.Va. at 301, 540 S.E.2d at 169.

²⁴ Id., 208 W.Va. at 300, 540 S.E.2d at 168, footnote 21, citing *In re Reynolds* (1999), 335 S.C. 165, 515 S.E.2d 927 and *In re Hawkins* (1995), 320 S.C. 57, 463 S.E.2d 9.

²⁵ Id.

Advisory Opinions of the Ethics and Professionalism Committee of the Cleveland Metropolitan Bar Association are informal, nonbinding opinions in response to prospective or hypothetical questions regarding a lawyer's ethical and professional obligations.