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1. Sexual exploitation of divorce clients: The lawyer's prerogative

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SEXUAL EXPLOITATION OF DIVORCE CLIENTS: THE LAWYER'S PREROGATIVE?

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Melvin Belli has suggested, relying on his own experience as an attorney, that sex between a lawyer and his client is the "lawyer's prerogative."[1] This statement stresses the power imbalance implicit in many attorney-client relationships, and implies that sexuality is up to the lawyer as the more powerful member of the dyad. Belli's position is also characteristic of the unique perspective through which lawyers commonly view their practice. Many attorneys believe that as long as the lawyer performs adequately in the courtroom, his indiscriminate behavior in the bedroom does no wrong, nor, in technical terms, breaches any fiduciary duty.

To say the least, this position is problematic, especially when one considers the special role of the lawyer in a divorce action. It becomes difficult for the attorney in such a case to separate his client's emotional reactions from the legal issues involved. A divorce lawyer loses some of his detached, lawyerly air and tends to become involved in the personal trauma of the situation. Sexuality between the attorney and the divorce client therefore takes on new meaning.

The job of the divorce lawyer can thus be compared to that of a psychotherapist. The divorce client is often emotionally distraught, much like an unstable individual who seeks the help of a mental health professional. Such a comparison is fruitful, be-

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[1] *State Bar Struggles with Ethics of Lawyer-Client Sex*, San Francisco Examiner, Aug. 4, 1986, at A-4, col. 1 [hereinafter *State Bar Struggles*]. Unless otherwise indicated, this Note will use masculine pronouns to describe attorneys and therapists, and feminine pronouns to describe clients and patients. This simply reflects the relative proportions of professionals and clients, and does not imply that female professionals never exploit their clients nor that male clients are undeserving of protection. *See infra* notes 37–39 and accompanying text.

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cause psychotherapists have been interested in the sexual dynamics of therapy for a long time. The "magnetizers" of the 18th century were cognizant of the risks of sexual seduction;[2] Freud first became concerned about the sexual feelings between doctors and their patients when a hypnosis patient threw her arms around his neck.[3] Systematic study of sexual contact between therapists and their patients became popular in the 1970's.[4] Surveys of psychiatrists and psychologists have consistently found that from five to seven percent report having had sexual intercourse with one or more patients.[5] Extrapolating these figures to the national level would mean that "as many as 2,000 psychotherapists have had sexual intercourse with patients at some time."[6]

Unlike the therapeutic professions, the legal profession is relatively uninterested in the sexual relations between its members and their clients. This is not due to the infrequency of such relations, however. Alan Stone, a psychiatrist and professor of law and psychiatry, has conjectured that sexual exploitation is "at least as common [between lawyers and clients] as it is in psychotherapy."[7] As we shall see, the dynamics of the divorce lawyer-client relationship are much like those of the therapist-

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[2] Davidson, *Psychiatry's Problem with No Name: Therapist-Patient Sex*, 37 AM. J. PSYCHOANALYSIS 43, 43 (1977).

[3] S. FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS 450 (J. Strachey trans. 1977).

[4] Pope, Keith-Spiegel & Tabachnick, *Sexual Attraction to Clients: The Human Therapist and the (Sometimes) Inhuman Training System*, 41 AM. PSYCHOLOGIST 147, 147 (1986).

[5] *See* Gartrell, Herman, Olarte, Feldstein & Localio, *Psychiatrist-Patient Sexual Contact: Results of a National Survey, I: Prevalence*, 143 AM. J. PSYCHIATRY 1126 (1986) (7.1% of men and 3.1% of women); Pope, Keith-Spiegel & Tabachnick, *supra* note 4, at 152 (national survey of 1,000 psychologists (585 responded) found that 6.5% had had sexual relations with patients); Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *Sexual Intimacy Between Psychotherapists and Patients*, 14 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 185, 187 (1983) [hereinafter Bouhoutsos] (licensed psychologists in California; 4.8% of men and 0.8% of women); Pope, Levenson & Schover, *Sexual Intimacy in Psychology Training: Results and Implications of a National Survey*, 34 AM. PSYCHOLOGIST 682, 685 (1979) (psychologists conducting psychotherapy; 7%); Holroyd & Brodsky, *Psychologists' Attitudes and Practices Regarding Erotic and Nonerotic Physical Contact with Patients*, 32 AM. PSYCHOLOGIST 843 (1977) (nationwide survey of psychologists; 5.5% of men and 0.6% of women); Kardener, Fuller & Mensh, *A Survey of Physicians' Attitudes and Practices Regarding Erotic and Nonerotic Contact with Patients*, 130 AM. J. PSYCHIATRY 1077, 1079–80 (1973) (male members of Los Angeles County Medical Society; 5%).

[6] Hays, *Sexual Contact Between Psychotherapist and Patient: Legal Remedies*, 47 PSYCHOLOGICAL REPORTS 1247, 1248 (1980) (assuming a 7.7% rate).

[7] A. STONE, LAW, PSYCHIATRY, AND MORALITY 199 (1984).

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client relationship.[8] Moreover, there is no reason to believe that psychotherapists and their patients are inordinately promiscuous. One study of doctors from various disciplines found that obstetricians, gynecologists, surgeons, internists, and general practitioners were as sexually active with their patients as the psychiatrists surveyed.[9] It seems reasonable to assume that sexuality occurs as frequently in the lawyer-client relationship.

The fact that lawyer-client sexuality has been neither surveyed nor frequently mentioned in the legal literature highlights a number of characteristics of the legal profession. First, there is a reluctance to air the improprieties of errant attorneys. Geoffrey Hazard, one of the drafters of the ABA Model Code of Professional Responsibility, has admitted that lawyer-client sexuality "has been recognized within the Bar and talked about in kind of a hushed way for 25 years."[10] Unfortunately, the issue has not been raised as part of the growing interest in more active attorney discipline.[11]

Second, the profession's neglect of the issue reflects the belief that the personal relationship between attorney and client is separable from the professional one. When courts do recognize the wrongfulness of sexual relations, they limit their criticism to the quality of the legal representation, and ignore the emotional harms to the client. Even in cases involving divorce, in which the client is emotionally unstable and vulnerable to abuse and consequent trauma, the courts focus on the lawyer's inability to simultaneously carry on an affair and determine the best interests of his client, as if an "objective" lover would do no harm.

This Note explores the causes and effects of sexual relations between divorce lawyers and their clients in light of similar relationships between therapists and patients. Section I examines the dynamics of the attorney-client relationship in divorce cases. First, the phenomenon of transference is discussed. The Section describes how transference has been misunderstood and misused by the courts in psychotherapy malpractice cases, and how its implications concern feminists who fear the perpetuation of ste-

[8] *See infra* text accompanying notes 46–54, 61–67.
[9] Kardener, Fuller & Mensh, *supra* note 5, at 1080.
[10] *State Bar Struggles*, *supra* note 1, at A-4.
[11] Experts working with the American Bar Association to produce the 1983 model rules decided not to address the lawyer-client sex issue. *Id.*

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reotypes about women. An alternative perspective which would allow feminists to support the prohibition of sexual exploitation is presented. Section I also describes the unequal power of lawyer and client, and the emotional instability of the individual seeking a divorce. Section II outlines the harms of sexual exploitation to both patients and clients. Section III discusses the possibility of redress through disciplinary actions and tort suits. The Note reveals that malpractice suits against sexually exploitative psychotherapists are in fact cases about the therapists' breach of their fiduciary duty to their patients, and argues that divorce lawyers have a similar duty to avoid inflicting harm. Finally, the Note concludes with proposals as to how divorce representation could be improved through an understanding of the emotionally-charged process of divorce.

I. THE DYNAMICS OF THE LAWYER-CLIENT RELATIONSHIP IN DIVORCE REPRESENTATION

In order to understand the justification for punishing a divorce lawyer who sexually exploits his client, it is necessary to comprehend the dynamics of the lawyer-client relationship in divorce. This Section will explore that relationship, beginning with a discussion of the concept of transference. Since this concept is troublesome both for courts to understand and for feminists to accept, this Section also describes the more conscious imbalance of power between lawyer and client, and the emotional instability of the individual seeking a divorce.

A. Transference and the Courts

> And then I had a dream about going to bed with him. And he said, "Ah, transference at last"—in his accent. The week before he'd made me put my head on his lap just like I used to with my father when I had a bad headache, and he'd stroked my hair. It was very warm; I was a little girl and he was my father. Then his hand slipped . . . .[12]

[12] P. CHESLER, WOMEN AND MADNESS 152 (1972) (quoting Joyce).

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In psychoanalysis, transference occurs when the patient "directs towards the physician a degree of affectionate feeling . . . which is based on no real relation between them and which—as is shown by every detail of its emergence—can only be traced back to old wishful phantasies of the patient's which have become unconscious."[13] Patients under the influence of transference will frequently compare their therapists to God.[14] One legal commentator has likened transference to a "Svengali-like hold on the patient," which "may cause a total dependency which deprives the patient of the capacity to see clearly what he is doing, or what is, or is about to be done to him."[15] Indeed, plaintiffs in malpractice actions against sexually exploitative psychotherapists have successfully used the transference phenomenon to vitiate consent defenses.[16]

Courts view transference as the product of an active and somewhat mysterious technique mastered by the therapist. The skills of the modern-day Svengali are mistakenly believed to be unique to the psychiatric profession. One attorney who has handled a number of sexual malpractice cases has described transference as a "method" in which "the therapist has women transfer all feelings concerning husbands and family to him."[17] Similarly, in

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[13] S. FREUD, *Five Lectures on Psychoanalysis* (1909), in 11 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 51 (J. Strachey trans. 1977) [hereinafter STANDARD EDITION]. *See also* A. WATSON, PSYCHIATRY FOR LAWYERS 4 (1968). As will be discussed below, transference is not accepted by all therapists. *See infra* text accompanying note 180.

[14] *See, e.g.*, P. CHESLER, *supra* note 12, at 155; M. SHEPARD, THE LOVE TREATMENT: SEXUAL INTIMACY BETWEEN PATIENTS AND PSYCHOTHERAPISTS 74 (1971) ("like a Catholic with the Pope"); *id.* at 39.

[15] Dawidoff, *Insanity, intimacy and infidelity: trends in psychiatric malpractice*, 13 TRIAL 27, 29 (June 1977).

[16] *See* Decker v. Fink, 47 Md. App. 202, 422 A.2d 389, 391 (1980) ("deprive the patient of her independent judgment"); St. Paul Fire & Marine Ins. Co. v. Mitchell, 164 Ga. App. 215, 221, 296 S.E.2d 126, 130 (1982) (Deen, J., dissenting in part) (complaint alleged that "defendant robbed plaintiff of her ability to control her feelings"); *Ex parte* Abell, 613 S.W.2d 255, 256 (Tex. 1981) (plaintiff alleged she was "psychologically powerless to resist"). In Greenberg v. McCabe, 453 F. Supp. 765 (E.D. Pa. 1978), the court found that the statute of limitations was tolled by the patient's transference; specifically, "the scientific 'laws of nature' intensified the impact of the defendant's conduct on the plaintiff's ability to perceive the consequences of that conduct." *Id.* at 772. The plaintiff had testified that the defendant "became a God" to her and that she "was dependent on him," *Id.* at 771. *But see* Roy v. Hartogs, 85 Misc. 2d 891, _____, 381 N.Y.S.2d 587, 591 (N.Y. Sup. Ct. 1976) (Riccobono, J., dissenting) (plaintiff did not complain during one-and-one-half year relationship).

[17] Appleson, *More Patients Suing Their Psychiatrists*, 68 A.B.A. J. 1353, 1354. *See also* Note, *Mazza v. Huffaker: Sex with the Patient's Spouse is Negligent Psychiatric*

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Zipkin v. Freeman, the doctor allegedly "caused" Mrs. Zipkin to "transfer love and affection for others to him."[18]

The courts misunderstand both the passive role of the therapist to whom a transference attaches and the related fact that transference occurs in all relationships. The therapist "does nothing to provoke" transference;[19] on the contrary, some analysts limit their behavior in an attempt to make transference stand out more strongly.[20] Ironically, even those analysts often fail to realize that emotional unresponsiveness as well as the "very existence of the analytic situation" influence the patient.[21] Even doing nothing does something to encourage transference.

The lack of action necessary to "create" transferences makes it less surprising that transference is a natural product of any professional relationship involving trust.[22] As Freud stressed,

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Treatment, 62 N.C.L. REV. 1437, 1441 (1984) (describing case in which the psychiatrist "had" the patient transfer her feelings).

[18] Zipkin v. Freeman, 436 S.W.2d 753, 760 (Mo. 1968). In *Zipkin*, the plaintiff also argued that the doctor manipulated her feelings so as to turn her "transferred feelings of love for the psychiatrist" to "direct feelings of love for him as a person." *Id.* at 755. *See also* St. Paul Fire & Marine Ins. Co. v. Mitchell, 164 Ga. App. 215, 216, 296 S.E.2d 126, 127 (1982) (same). While the plaintiff may simply be restating the fact that Dr. Freeman let her know him as a person rather than as a psychiatrist, there is the implication that transference love is distinguishable from genuine love. Freud grappled with the distinction, acknowledged that true love similarly reproduced infantile reactions and was equally compulsive, and concluded that "the state of being in love which makes its appearance in the course of analytic treatment has the character of a 'genuine' love." S. FREUD, *Observations on Transference-Love* (1915), in 12 STANDARD EDITION, *supra* note 13, at 168; *see also* S. FREUD, *The Question of Lay Analysis* (1926), in 20 STANDARD EDITION, *supra* note 13, at 225; Van Emde Boas, *Some Reflections on Sex Relations Between Physician and Patient*, 2 J. SEX RESEARCH 215, 217 (1966) ("ordinary love" often based on transference). It is therefore more difficult to be cynical about the 55% of the therapists in one study who "reported having loved the patients" with whom they shared intimacies. Butler & Zelen, *Sexual Intimacies Between Therapists and Patients*, 14 PSYCHOTHERAPY: THEORY, RESEARCH & PRACTICE 139, 142 (1977).

[19] S. FREUD, *The Question of Lay Analysis* (1926), in 20 STANDARD EDITION, *supra* note 13, at 225.

[20] M. GILL, 1 ANALYSIS OF TRANSFERENCE: THEORY AND TECHNIQUE 86 (1982). Freud admonishes doctors against encouraging the patient's feelings of love on the grounds that doing so makes the transference less convincing to the patient and makes future resolution of the transference more difficult. S. FREUD, *Observations on Transference-Love* (1915), in 12 STANDARD EDITION, *supra* note 13, at 161–62.

[21] M. GILL, *supra* note 20, at 2, 86, 87. An unresponsive analyst may remind the patient of an uncaring parent, leading that patient to respond to the analyst as such. *See* S. FISHER & R. GREENBERG, THE SCIENTIFIC CREDIBILITY OF FREUD'S THEORIES AND THERAPY 391 n.7 (1985).

[22] S. FREUD, *The Dynamics of Transference* (1912), in 12 STANDARD EDITION, *supra* note 13, at 106; S. FREUD, *Observations on Transference-Love* (1915), in 12 STANDARD EDITION, *supra* note 13, at 161; Shaffer, *Undue Influence, Confidential Relationships, and the Psychology of Transference*, 45 NOTRE DAME L. REV. 197, 214 (1970).

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> It must not be supposed . . . that transference is created by analysis and does not occur apart from it. Transference is merely uncovered and isolated by analysis. It is a universal phenomenon of the human mind, it decides the success of all medical influence, and in fact dominates the whole of each person's relations to his human environment.[23]

Indeed, a number of commentators have noted that transferences are common in the divorce lawyer-client relationship.[24]

The courts' misunderstanding of transference is due to a number of factors. The first is the simplistic way in which malpractice plaintiffs argue their cases.[25] They stress the "hypnotic-like" effects of transference to preclude the finding that they had freely consented to sex. If plaintiffs were to admit that transferences are quite natural and occur in all professional relationships, the courts would conclude that the plaintiff was not deprived of free will. Blaming the victim, they might stop there and deny liability.

This suggests the second factor, which is the fundamentally different way in which law and psychiatry view causality in human behavior. For the law, where all individuals are presumed to choose their behavior freely, transference is a mysterious phenomenon whereby the patient's affection can be said to be irrational and "caused" by prior relationships. For psychiatry, and psychoanalysis in particular, however, transference is merely one of many phenomena which are founded on the assumption that behavior can be traced back to original causes.[26] To say that

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[23] S. FREUD, *An Autobiographical Study* (1920), in 20 STANDARD EDITION, *supra* note 13, at 42; *see* S. FREUD, *Five Lectures on Psychoanalysis* (1909), in 11 STANDARD EDITION, *supra* note 13, at 51.

[24] *See* R. WEISS, MARITAL SEPARATION 259 (1975); Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME L. REV. 229, 253–54 (1977); A. STONE, *supra* note 7, at 199. One should not assume that transference does not occur in attorney-client relations other than divorce situations; that is simply beyond the scope of this Note. *See* Elkins, *supra*, at 245 n.82; Diamond & Simborg, *Psychological Aspects of Marital Dissolutions*, 5 CAL. L. REV. 14, 15–16 (May 1985). Sometimes a transference reaction will be described but not recognized as such. *See, e.g.*, Mussehl, *From Advocate to Counselor: The Emerging Role of the Family Law Practitioner*, 12 GONZ. L. REV. 443, 448–49 (1977) ("Often a client who feels powerless and victimized, subsequently turns his anger against the attorney;" this is an example of negative transference). *See infra* text accompanying notes 172–73.

[25] *See supra* notes 16–18.

[26] *See, e.g.*, S. FREUD, *Five Lectures on Psychoanalysis* (1909), in 11 STANDARD EDITION, *supra* note 13, at 38 ("psycho-analysts are marked by a particularly strict belief in the determination of mental life"). Schaffer tells the story of Dr. Eissler, who felt that

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transference deprives the patient of free will mixes a deterministic concept with a legal one, and thus guarantees confusion.[27]

The irreconcilable lack of fit between legal and psychiatric thinking suggests the final reason for the courts' misunderstanding of transference. Since the courts are uncomfortable with the concept, they seek to limit its application.[28] Full acceptance and understanding of transference would require courts to recognize its effects in the attorney-client relationship, and prevent them from emphasizing the client's "willingness" in disciplinary cases involving sexually exploitative attorneys.[29]

B. Transference and Feminist Concerns

Transference and its implications for consent are also of concern to some feminists, who believe the emphasis on patients'

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a transference experienced by one of his patients constituted undue influence, but concluded, "after reading a book on psychiatry and law, that [the] situation probably does not constitute undue influence in the legal sense." Shaffer, *supra* note 22, at 203.

[27] Acceptance of transference in all areas of the law would do violence to a number of cherished legal doctrines. The best example is that of informed consent. In New York, for example, even psychotics are presumed capable of making informed judgments about psychiatric treatment. Serban, *Sexual Activity in Therapy: Legal And Ethical Issues*, 35 AM. J. PSYCHOTHERAPY 76, 83 (1981). How can this be so, if the patient is under the care of a psychiatrist (or any professional, for that matter), and a transference presumably exists? A law review note has recognized the troubling effects of transference on informed consent in psychotherapy, and recommends that the patient be warned that "the transference phenomenon may preclude [him] from objectively deciding whether or not to remain in or alter the therapy during treatment." Note, *The Doctrine of Informed Consent Applied to Psychotherapy*, 72 GEO. L.J. 1637, 1652 (1984). The note recognizes but does not deal with the fact that transference immediately surfaces in the therapeutic relationship, *id.* at 1657, and assumes that psychotherapy is "uniquely susceptible" to the transference. *Id.* at 1648.

[28] The assumption that transference trumps consent is simply rejected by the courts when it serves their purposes to do so. For example, in Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1982), a sexual malpractice action, the court in the facts of the case stressed the vulnerability and dependence of the patients, as well as their requests that the sexual contact cease. *Id.* at 308. The court went on to hold, however, that the doctor's advances "were not unconsented to and [that] there is no evidence the doctor persisted in his conduct over any explicit objections or resistance." *Id.* at 310.

[29] In Disciplinary Proceedings Against Wood, 265 Ind. 616, 358 N.E.2d 128 (1976), for example, a mitigating factor was the fact that the "female clients freely consented to the acts" of sex and nude photography exchanged for legal services. 358 N.E.2d at 133. In Disciplinary Proceedings Against Gibson, 124 Wis. 2d 466, 369 N.W.2d 695 (1985), the court stressed that Gibson's attempts to take advantage of his female clients were "without force and subject to their rejection of his suggestions and advances." *Id.* at 471, 369 N.W.2d at 698.

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inability to resist sexual advances portrays women as not knowing their own minds.[30] If "yes" means "no" in therapeutic relationships, couldn't "no" mean "yes" in other situations? Feminists worry that such paternalistic reasoning could ultimately deprive women of the power to order their own lives.

This Note, however, does not argue that transference eliminates the patient's ability to consent. Recognizing the irreconcilability of transference and legal thought, it merely views transference as one element of the power imbalance between therapists and patients. This imbalance places the responsibility for avoiding sexuality on the therapist.

It *is* sexist to emphasize the patient's or client's transference to the extent that it shifts the focus from the professional to the victim. Like the doctrine of rape, which is preoccupied with the victim's resistance, the literature on therapist-patient sex emphasizes the compliance of the patient and thereby ignores the illness of the therapist.[31]

Regardless of arguments over consent, some feminists feel that because exploitation almost always involves male therapists and female patients,[32] any move to protect sexually exploited patients would perpetuate stereotypes of women.[33] Admittedly, stereotypical sex roles frequently appear in cases of therapeutic sexual abuse. Clinical surveys of abuse repeatedly note the femininity, attractiveness, and dependency of the patients,[34] who become involved with older, more powerful, and authoritarian thera-

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[30] *See* A. STONE, *supra* note 7, at 198.

[31] Davidson, *supra* note 2, at 44–45. Fortunately, that sickness has not been totally ignored. Ninety percent of the therapists in one survey who had engaged in intimacies with patients admitted that they themselves were vulnerable, needy, or lonely when they initiated the sexual relationship with their patient. The study concluded that the "therapist's own personal needs and motivations overwhelmingly contributed to the sexual contact." Butler & Zelen, *supra* note 18, at 144; *cf.* Dahlberg, *Sexual Contact Between Patient and Therapist*, 6 CONTEMPORARY PSYCHOANALYSIS 107, 118 (1970) (exploitative therapists had "unfulfilled need"); Pope, Levenson & Schover, *supra* note 5, at 687 (citing other studies).

[32] In one survey of sexual exploitation by psychotherapists, 92% of the affairs involved male therapists and female patients. Bouhoutsos, *supra* note 5, at 188.

[33] *See* Bouhoutsos, *Therapist-Client Sexual Involvement: A Challenge for Mental Health Professionals and Educators*, 55 AM. J. ORTHOPSYCHIATRY 177, 180 (1985).

[34] *See, e.g.*, P. CHESLER, *supra* note 12, at 149; Bouhoutsos, *supra* note 33, at 178; Sonne, Meyer, Borys & Marshall, *Clients' Reactions to Sexual Intimacy in Therapy*, 55 AM. J. ORTHOPSYCHIATRY 183, 186 (1985); *Report of the Task Force on Sex Bias and Sex-Role Stereotyping in Psychotherapeutic Practice*, 30 AM. PSYCHOLOGIST 1169, 1170 (1975).

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pists.[35] Stereotypes are equally common in the legal literature. An article entitled "The Difficult Female" was one of the first law articles to recognize transference in the lawyer-client relationship. Its description of the female client who exhibits a positive transference is the caricature of a coquette:

> She may begin by informing the lawyer that she is very helpless and that she is going to "let him take care of everything." She may even express awe over the diplomas and certificates displayed in his office and may even ask, "Do you mean that you read all of those big books?"[36]

While it is unfortunate that many still play such stereotypical roles, it does not perpetuate the stereotype to conclude that clients tend to idolize those from whom they seek help. Men as well as women are susceptible to the influence of helping professionals.[37] Cases involving female therapists and male patients do occur, but have been suppressed due to stereotypical assumptions about male-female relationships.[38] And at least one female attorney has been disciplined for sexual improprieties with a male client.[39]

A final answer to the concern over the perpetuation of stereotypes argues that those patients who welcome sex with their

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[35] *See, e.g.*, P. CHESLER, *supra* note 12, at 150–51; Bouhoutsos, *supra* note 5, at 194; Pope, Levenson & Schover, *supra* note 5, at 682–83. Phyllis Chesler, in her book on women and madness, noted that the dynamics of the relationship are often aped in the intimate act; nine of the ten therapists in her survey assumed the missionary position. P. CHESLER, *supra* note 12, at 143–44. The therapists who openly advocate intimacies with patients are as conventional as they are liberated. McCartney warned against "overt transference" of the homosexual variety, because "a homosexual response is immature, neurotic and adolescent." McCartney, *Overt Transference*, 2 J. SEX RESEARCH 227, 230 (1966). *See also* P. CHESLER, *supra* note 12, at 141 (criticizing McCartney for measuring success in therapy by the patient's acceptance of the conventional role). Shepard's review of eleven patients who slept with their therapists was the most critical when it considered the actions of a female therapist with a male patient. *See* M. SHEPARD, *supra* note 14, at 86–87.

[36] Finch & Smith, *The Difficult Female*, 32 TEX. BAR J. 660, 660 (1969).

[37] The main reason why sexual affairs almost always occur between male therapists and female patients may be the disproportionate number of therapists who are males and patients who are females. For example, 89% of the American Psychiatric Association are men and 80% of their patients are women. Felton, *The Unanalyzed Positive Transference*, in CONTROVERSY IN PSYCHOTHERAPY 189 (H. Strean ed. 1982).

[38] *See* Pope, Keith-Spiegel & Tabachnick, *supra* note 4, at 156.

[39] *See* Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Durham, 279 N.W.2d 280 (1979).

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therapists may not be displaying their weakness so much as they are attempting to gain strength. Since a patient under the influence of transference sees the therapist as a god, sexual relations bring the therapist down to the patient's level. Because the strength that the patient obtains from the sexual activity destroys the therapeutic relationship and compounds her emotional difficulties, however, the therapist must be prevented from engaging in sexual relations.

That the sexual act may empower the patient, albeit in a distorted and unsatisfying fashion, helps to explain why the therapeutic professions have always frowned on sex in therapy. The traditional prohibition of therapist-patient sex is grounded in self-preservation rather than paternalism, and exemplifies a conventional fear of women. "In the psychology of sexism, contempt is always mixed with fear."[40] Rape doctrine presents an example of how men fear women's power. The traditional requirements of resistance, corroboration, and unfamiliarity are justified as protection against the vindictive seductress, the woman who first captures and then castrates. The false accusation, spoken behind a tissue of lies and tears, makes available to women the vengeance of the law, the "naked power organ"[41] that she so enviously lacks.

The theme of the seductive and dangerous patient appears quite frequently in the literature on therapist-patient sex. Freud warned of the patient who falls in love with her therapist in order to "destroy the doctor's authority by bringing him down to the level of a lover."[42] McCartney, one of the few proponents of therapeutic sexuality, advocates sex for precisely this reason, arguing that the patient grows as the doctor shrinks from a god to a sexually mature individual.[43]

Part of the patient's motivation in sleeping with her therapist is to resist the effectiveness of therapy. Mental illness itself is a

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[40] B. EHRENREICH & D. ENGLISH, COMPLAINTS AND DISORDERS: THE SEXUAL POLITICS OF SICKNESS 6 (1973).

[41] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

[42] S. FREUD, *Observations on Transference-Love* (1915), in 12 STANDARD EDITION, *supra* note 13, at 165.

[43] McCartney, *supra* note 35, at 233. Ironically, Chesler characterizes McCartney's attitude as that of a "Playboy stereotype," because he maintains that during the intimacy the doctor should remain emotionally uninvolved. P. CHESLER, *supra* note 12, at 141.

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distorted form of empowerment. Hysteria, which gave birth to the psychoanalysis of repressed desire, was diagnosed by doctors in the nineteenth century as women's means of exploiting men, and is currently portrayed as "the only acceptable outburst—of rage, of despair, or simply of energy—possible."[44] Resistance to cure is a natural extension of the anger of oppression, especially when the cure consists of a return to the conventional role.[45]

Given this perspective, it is easy to see why both conservative mental health professionals and feminists oppose sexuality in the therapeutic relationship. Therapists who fear the power of the difficult female consider sexuality to be the patient's exposure of her therapist's weakness, and bemoan the therapy's loss of effectiveness. Feminists, on the other hand, emphasize the abuse of power by the therapist, and envision the possibility of therapy which cures without conventionalizing.

Feminists can safely oppose sex between therapists and patients without fear of perpetuating harmful stereotypes. They may stress the therapist's responsibility to avoid sexuality without accepting the theory that transference vitiates consent. Courts, on the other hand, are unlikely to apply their limited understanding of transference to the attorney-client relationship. Considering the inconsistency of the concept of transference with much of what the law accepts, this Note will consider the more overt imbalances between lawyer and client.

C. The Unequal Power of the Lawyer as Both Legal Advisor and Therapist

Transference is difficult both to explain and to grasp. It is simpler and more persuasive to consider the conscious feelings of the client towards his or her attorney, and how these feelings are influenced by the unequal power of the client and the professional.

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[44] B. EHRENREICH & D. ENGLISH, *supra* note 40, at 40–41.

[45] Some research suggests that marital and family therapy encourage stereotypical sex roles. Margolin, *Ethical and Legal Considerations in Marital and Family Therapy*, 37 AM. PSYCHOLOGIST 788, 798 (1982).

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No matter how competent a client might be in conducting her own affairs, once she enters her lawyer's office, she becomes the layman. Ignorance of the law makes clients anxious; it also makes it difficult for them to question their attorneys' decisionmaking abilities.[46] "The divorce client's interaction with the attorney . . . [is often her] first close hand introduction to the legal system."[47]

Other factors which make clients overly dependent on their attorneys include:

> . . . the client's expectation that the lawyer will "step in and straighten things out;" the client's attempt to avoid responsibility for making a decision; the client's "magical expectation . . . that the lawyer is able to accomplish any manipulation or transaction which the client desires;" the client's inflated view of the legal profession; the client's low self-esteem; and, finally, the attorney's psychological need to occupy a dominant role in the interaction.[48]

As the sole representatives of their client's interests before the court, lawyers increase their authority by shielding their clients from involvement in the proceedings. A client may thus feel helpless in addition to feeling (and being) ignorant.

The "childlike posture of dependency"[49] in which therapy places psychotherapeutic patients has been advanced as one of the reasons why therapists should not sexually exploit their clients.[50] The imbalance of power is based upon the fact that the patient is seeking help, and is accentuated by the requisite openness with which the patient communicates with her therapist; inevitably, the therapist learns much more about the patient than the patient learns about the therapist.[51]

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[46] Elkins, *supra* note 24, at 236. Halem's study of middle class suburban divorced women found that although they were articulate and well-educated, they knew little about the legal system and were even willing to accept their ignorance as natural. L.C. HALEM, SEPARATED AND DIVORCED WOMEN 22, 23 (1982).

[47] L.C. HALEM, *supra* note 46, at 23.

[48] Elkins, *supra* note 24, at 236.

[49] Kardener, *Sex and the Physician-Patient Relationship*, 131 AM. J. PSYCHIATRY 1134, 1135 (1974).

[50] *Id.*

[51] In psychoanalysis, the patient free associates, telling the doctor every thought that comes to mind. H. RACKER, TRANSFERENCE AND COUNTER-TRANSFERENCE 9 (1968). In any kind of psychotherapy, the patient describes his problems, while the doctor listens and reacts, but with questions and comments rather than his own concerns. Taylor &

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The divorce lawyer is similarly empowered through the professional relationship. The client seeks his help with a problem that is as emotional as it is legal. As in the therapeutic relationship, the nature of the information revealed by the client requires that she place complete trust in her lawyer. Finally, there is an imbalance of information since the lawyer does not reciprocate his client's stories and speak of his own failed relationships.

Most importantly, divorce attorneys often play the role of a therapist. One writer has estimated that the average lawyer spends one-third of his time counseling clients.[52] No matter how much the divorce lawyer may wish to emulate the reserved, detached approach of a tax lawyer, he is helpless in the face of the irrational and depressed divorce client.[53]

Most people who are contemplating a divorce do not know where to turn for help. For various reasons, including the stigma and fear of mental health counseling, not all will seek psychotherapy; some see a lawyer.[54] Given the emotional strain divorce entails, it is not surprising that a lawyer's personality and attitude toward the client influence the selection, evaluation, and retention of legal help by divorcing individuals.[55]

It is not only clients who view divorce representation in terms of the emotional ties between themselves and their attorneys. Divorce lawyers recognize that their primary goal in representation is to create a relationship founded on trust and empathy.[56]

Wagner, *Sex Between Therapists and Clients: A Review and Analysis*, 7 PROFESSIONAL PSYCHOLOGY 593, 597 (1976).

[52] Mussehl, *supra* note 21, at 446. The general legal practitioner has been noted for his role as counselor in many situations. A. WATSON, *supra* note 13, at 14.

[53] *See* Elkins, *supra* note 24, at 232 & n.14.

[54] *Cf.* J. MARIANO, THE USE OF PSYCHOTHERAPY IN DIVORCE AND SEPARATION CASES 8 (1958) (arguing that lack of knowledge about specialties in psychotherapy lead unhappy spouses to lawyers). Many of the therapist sexual malpractice cases involve plaintiffs who might have fared better had they visited a lawyer with their problems. *See, e.g.*, *Greenberg*, 453 F. Supp. at 770 (plaintiff suffering from "harried housewife syndrome"); Nicholson v. Han, 12 Mich. App. 35, 162 N.W.2d 313 (1968) (marital problems); Horak v. Biris, 130 Ill. App. 3d 140, 474 N.E.2d 13 (1985) (same).

[55] *See* L. C. HALEM, *supra* note 46, at 29 (women looking "for more than legal counsel . . . a friend, even a therapist"). *See also id.* at 30 (women and men "emphasize the interpersonal aspects of their relationship with their lawyers," and "[p]ersonal characteristics such as warmth, interest, compatibility, and availability were at least equally as important [as competence in the decision to hire or retain counsel]").

[56] Kressel, Lopez-Morillas, Weinglass & Deutsch, *Professional Intervention in Divorce: The Views of Lawyers, Psychotherapists, and Clergy*, in DIVORCE AND SEPARATION: CONTEXT, CAUSES AND CONSEQUENCES 253, 260 (G. Levinger & O. Moles eds. 1979) [hereinafter DIVORCE AND SEPARATION].

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With trust well-established, transference is not far behind: one psychiatrist has argued that transference is an essential tool in the attorney-client relationship.[57] Again, many individuals who should see a therapist to discuss their marital problems choose to see a lawyer instead.[58] And, unlike clients who seek attorneys' advice with desired solutions in mind, the divorce client is often unsure as to what outcome she desires.[59] The divorce attorney faces a client whose ambivalence about her case often results in unreliability about the facts of the relationship.[60] Facts as well as emotional factors are important in determining the details of the settlement; the individuals involved might not view possessions in strictly economic terms. Finally, issues involving children are laden with emotion.

The client's ambivalence and inabilility to objectively assess facts increase the power of the attorney as a therapist-like figure. He must determine what will make the client happy, and that determination necessitates a probing inquiry into both the marriage and the client's expectations.

The divorce lawyer thus has power over his client as both legal expert and personal counselor. Given the great amount of trust that a client necessarily puts in her divorce lawyer, it is helpful to complete the dynamic by examining the emotional state of an individual seeking a divorce, for emotional instability compounds the imbalance we have demonstrated, and suggests the harm that a sexually exploitative relationship could cause.

D. The Emotional Instability of the Divorce Client

It is not surprising that reports in the psychological literature describe divorce as a stressful event. What is surprising, however, is the magnitude of the effect divorce may have on the individuals involved. One review of the literature concluded that

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[57] A. WATSON, *supra* note 13, at 4; *see also* Shaffer, *supra* note 22, at 237; J. MARIANO, *supra* note 54, at 521 (recommends transference as means of reducing malpractice problems).

[58] *See supra* note 54.

[59] *See* Callner, *Boundaries of the Divorce Lawyer's Role*, 10 FAMILY L.Q. 389, 390 (1977); Hancock, *The Power of the Attorney in Divorce*, 19 J. FAMILY L. 235, 245 (1980–81); A. WATSON, *supra* note 13, at 15; R. WEISS, *supra* note 24, at 258.

[60] *See* Kressel, Lopez-Morillas, Weinglass & Deutsch, *supra* note 56, at 262.

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"[o]f all the social variables relating to the distribution of psychopathology in the population, none has been more consistently found to be so crucial for the population than marital status."[61] Several surveys have found that approximately forty percent of divorced individuals could be characterized as psychiatrically impaired.[62]

It is not clear whether divorce is a cause or effect of psychological problems.[63] The consensus seems to be that once the divorce is complete, much of the divorcing individual's stress is alleviated, and a worsening of symptoms does not occur.[64] Hence, surveys of divorced people probably detect preexisting illness.

The question of whether mental illness predates the divorce process does not, however, alter the fact that the divorce client is likely to be disturbed. In fact, many people going through a divorce consult a psychotherapist.[65] Research indicates that the number of individuals who seek psychotherapy is far smaller than the number who would be diagnosed as needing therapy.[66]

A number of changes in the individual's life due to separation and divorce can cause psychological disruption. The loss of a spouse has been described by sociologist Robert Weiss as causing "separation distress," a feeling akin to a child's reaction to losing

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[61] Bloom, White & Asher, *Marital Disruption as a Stressful Life Event*, in DIVORCE AND SEPARATION, *supra* note 56, at 184, 185.

[62] *Id.* at 187. As one divorce lawyer put it,

> All of my clients are neurotic, some of them actually psychotic. If mine aren't the other side is. The ideal client would not be in a lawyer's office. In other words, the ideal client is someone well-adjusted, able to cope with reality, cope with their problems, who can enter a relationship with a lawyer where they could be helpful. They're not the kind of people who get involved in divorces.

Kressel, Lopez-Morillas, Weinglass & Deutsch, *supra* note 56, at 253.

[63] Bloom, White & Asher, *supra* note 61, at 197.

[64] *Id.* at 197, 198.

[65] *See* Kressel, Lopez-Morillas, Weinglass & Deutsch, *supra* note 56, at 248 (psychotherapy sought by 20–30% of middle class divorces). *See also id.* at 249 n.2 (60% of group belonging to Parents Without Partners sought psychotherapy). Separation is generally considered the most stressful phase of the divorce process. L.C. HALEM, *supra* note 46, at 10. During the "acute stages of coping" individuals "may give a misleading appearance of psychopathology." Kressel, Lopez-Morillas, Weinglass & Deutsch, *supra* note 56, at 258.

[66] A survey of divorced mothers found that although most were suffering from serious psychological distress, they were not seeing psychotherapists and did not believe that they needed help. S. ALBRECHT, H. BAHR & K. GOODMAN, DIVORCE AND REMARRIAGE: PROBLEMS, ADAPTATIONS, AND ADJUSTMENTS 122 (1983).

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a parent. The individual is likely to focus his or her attention on the spouse, feel "intense discomfort" due to the spouse's inaccessibility, and suffer from "apprehensiveness, anxiety, or panic."[67] The individual suffers not only the loss of a spouse, but also the loss of a relationship. The primary emotional response to this loss is a sense of personal failure,[68] which is often sexual since infidelity is the most common cause of divorce.[69]

Given separation distress, a sense of failure, and feelings of isolation, it is not surprising that the divorcing individual is susceptible to sexual involvement as a means of alleviating her pain.[70] Clearly, the pressures leading to such an involvement do not portend a fulfilling sexual relationship.

II. THE HARM OF SEXUAL MISCONDUCT

Given the dynamics of the divorce lawyer-client relationship, it seems intuitively clear that sexual relations could easily destroy the relationship as well as emotionally damage the client. Since no studies have investigated the effects of such relationships, however, they can be explored only through anecdotes and analogy.

The fact that the client has recently been damaged by an unhappy intimate relationship surely increases the potential harm of sexual relations between the attorney and his client.[71] The case *In Disciplinary Proceedings Against Gibson* illustrates the kind

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[67] Weiss, *The Emotional Impact of Marital Separation*, in DIVORCE AND SEPARATION, *supra* note 56, at 48.

[68] S. ALBRECHT, H. BAHR & K. GOODMAN, *supra* note 66, at 123.

[69] *See id.* at 100, 115 (reviewing other studies). Changes in the divorcing individual's social life may also compound the pain of separation and divorce; her relationships with her children may change, friends may be lost, and she may leave her job and home. *See id.* at 126; Weiss, *supra* note 67, at 205; Kressel, Lopez-Morillas, Weinglass & Deutsch, *supra* note 56, at 256.

[70] *See* R. WEISS, *supra* note 23, at 57; Bloom, White & Asher, *supra* note 61, at 195 (divorced women feel unattractive and helpless: heterosexual relationships are seen as the most important factor in reestablishing a positive self-concept). *Cf.* Dahlberg, *supra* note 31, at 119–20 (psychotherapists are likely to engage in sexual intimacy with clients when the therapists are in the process of divorce, reacting to deprivation, and have decreased tolerance to frustration and disappointment).

[71] *See* Spanier & Casto, *Adjustment to Separation and Divorce: A Qualitative Analysis*, in DIVORCE AND SEPARATION, *supra* note 56, at 225.

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of harm that an attorney's sexual misconduct can cause.[72] Gibson was the family lawyer for Mrs. Slane and her husband.[73] The incident leading to the disciplinary action arose when Mrs. Slane sought a temporary restraining order to keep her abusive husband out of her home.[74] Mrs. Slane visited Gibson in his office to discuss the work the order would entail.[75] At this meeting, Gibson expressed his belief that one could love more than one person, at one point told her to remove her clothes, and on a trip to make some tea,

> . . . turned the office lights off, knelt beside Mrs. Slane's chair, began kissing her, put his hands inside her blouse and fondled her breasts, and moved his hands over her pelvic area outside of her clothing. In order to stop him, Mrs. Slane told him she was visualizing being beaten and was frightened.[76]

Mrs. Slane arrived at the courthouse the morning of the hearing on the restraining order "visibly upset, and she was approached and counseled by a social worker whom she had been seeing."[77] Later, at Gibson's disciplinary hearing, Mrs. Slane testified that she suffered from recurring nightmares due to the incident.[78]

Sexual relations between doctor and patient have been extensively studied in the psychotherapeutic literature. The consensus of the research is that patients are severely harmed by sexual relations with their psychotherapists. One study of 559 cases of psychiatrist-patient sex found that ninety percent of the patients were adversely affected.[79] The individual's personality was damaged in thirty-four percent of the cases; patients suffered from depression, loss of motivation, impaired social adjustment, significant emotional disturbance, suicidal feelings or behavior, and increased substance abuse; eleven percent were subsequently

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[72] Disciplinary Proceedings Against Gibson, 124 Wis. 2d 466, 369 N.W.2d 695 (Wis. 1985).
[73] *Id.* at 468, 369 N.W.2d at 696.
[74] *Id.* at 468, 369 N.W.2d at 697.
[75] *Id.* at 468–69, 369 N.W.2d at 697.
[76] *Id.* at 469, 369 N.W.2d at 697.
[77] *Id.* at 470, 369 N.W.2d at 697–98.
[78] *Id.* at 470, 369 N.W.2d at 697.
[79] Bouhoutsos, *supra* note 5, at 191.

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hospitalized.[80] In twenty-six percent of the cases, the patient's sexual, marital or intimate relationship worsened.[81] Even Martin Shepard, whose book *The Love Treatment* argues that sex between therapists and patients can be therapeutic,[82] has been reluctant to recommend such therapy "because of the equal possibility that intimacy can be harmful."[83]

That attorney-client sexuality could lead to similar harm is supported by the similarities between attorney-client and therapist-patient relationships. One study that compared the effects of therapist-patient contact to contact between other kinds of health care practitioners and their patients observed "[n]o significant differences between the two groups in terms of psychological impacts."[84] The researchers conjectured that the effects were similar because in all cases the patient places her welfare in the hands of the practitioner, who thereby occupies a position of trust.[85] Surely the divorce client who places her trust in her attorney is as susceptible to harm as the patient who trusts her doctor.

One problem with studies of the effects of sexual exploitation in therapy is that patients begin therapy with preexisting emotional problems or illness; it is hard to distinguish the effects of the affair from those of the illness. In order to measure only the effects of sexual exploitation, one study compared patients who had had sexual contact with their therapists to patients who had not, and found that the sexually involved patients reported significantly more symptoms after the termination of treatment than the uninvolved patients.[86] Twenty of the twenty-one women sur-

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[80] *Id.* at 190.

[81] *Id.* In an original study which also reviewed the literature, Durre found that sexual interaction "is detrimental if not devastating to the client," and cited "many instances of suicide attempts, severe depressions (some lasting months), mental hospitalizations or divorces." Pope, Keith-Spiegel & Tabachnick, *supra* note 4, at 148 (quoting Durre, *Comparing Romantic and Therapeutic Relationships*, in ON LOVE AND LOVING: PSYCHOLOGICAL PERSPECTIVES ON THE NATURE AND EXPERIENCE OF ROMANTIC LOVE 242, 243 (Pope ed. 1980)). *See also* P. CHESLER, *supra* note 12, at 146–47.

[82] M. SHEPARD, *supra* note 14, at 200.

[83] *Id.* at 200–01.

[84] Feldman-Summers & Jones, *Psychological Impacts of Sexual Contact Between Therapists or Other Health Care Practitioners and Their Clients*, 52 J. COUNSELING CLINICAL PSYCHOLOGY 1054, 1058 (1984).

[85] *Id.* at 1060. *Cf.* Siassi & Thomas, *Physicians and the New Sexual Freedom*, 130 AM. J. PSYCHIATRY 1256, 1257 (1973) (discussing proscription of physician-patient sex in terms applicable to all professional relationships that require "empathy and objectivity").

[86] Feldman-Summers & Jones, *supra* note 84, at 1058. Symptoms investigated included

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veyed reported that the effects of the sexual relationship "were entirely negative."[87]

Some have suggested that the harms to patients who are exploited by their therapists are no different than the harms to any woman who is seduced and later deserted.[88] This comparison ignores the fact that a professional relationship implies responsibilities on the part of the professional that do not attach to purely private affairs. The fact that people in the real world may be insensitive to the feelings of others does not necessitate that professionals follow suit. Furthermore, the harm is intensified by the positions of the parties involved; while the professional is immunized by power and authority, the patient is vulnerable and dependent.

Given the potential harm of attorney-client sexuality, divorce lawyers ought to be both ethically and legally obligated to resist the temptation to satisfy their personal desires in their professional capacity. Clients who have been so exploited should have the opportunity to complain, and their complaints should form the basis for disciplinary actions against errant attorneys. The next Section of this Note examines the actual and potential use of professional discipline against sexually exploitative attorneys.

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self-esteem, depression, anger, mistrust, guilt, sexual attitudes, psychosomatic and other psychological complaints. *Id.* at 1057.

[87] *Id.* at 1060. While the elements necessary for a successful tort action against a sexually errant psychologist are discussed below, it is important to note here that the harms documented in this section are sufficient for liability, and that the causality requirement is not difficult to meet. One commentator has asserted that "negligence claims are brought only in those cases that . . . [involve] facts so extreme as to enable the plaintiff easily to prove causation and damages." Riskin, *Sexual Relations Between Psychotherapists and Their Patients: Toward Research or Restraint*, 67 CAL. L. REV. 1000, 1011 (1979); *see, e.g.*, *Greenberg*, 453 F. Supp. at 770 (plaintiff suffered permanent psychosis and minimal to moderate organic brain damage as result of doctor's negligent treatment). Yet several sexual exploitation cases have involved—and allowed—competing causalities. In Andrews v. United States, 548 F. Supp. 603 (D.S.C. 1982), the court was satisfied with testimony that the sexual encounters were "a contributing cause [of the plaintiff's problems] and continued to impair her psychological health." *Id.* at 609. In Anclote Manor Foundation v. Wilkinson, 263 So. 2d 256 (Fla. 1972), the court held that a doctor who told his patient that he loved her and would divorce his wife to marry her was responsible for her suicide, despite the fact that "[b]etween the date of her discharge and her death by suicide [her] only brother was killed in Vietnam and her grandmother passed away." *Id.* at 257.

[88] *See* Serban, *supra* note 27, at 81–82; Taylor & Wagner, *Sex Between Therapists and Clients: A Review and Analysis*, 8 PROFESSIONAL PSYCHOLOGY 593, 596 (1976).

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III. SEEKING REDRESS FOR SEXUAL EXPLOITATION

A. The Ethical Prohibition of Sexual Contact

Any lawyer concerned about the ethical implications of sex with a client would find the relevant sources conspicuously silent on the subject. Neither the ABA Model Code of Professional Responsibility nor the ABA Model Rules of Professional Conduct explicitly addresses sexual relations between attorneys and their clients.[89] Likewise, no state bar association has adopted a rule prohibiting attorney-client sexual relations, although a few states have found that their ethics rules and decisions prohibit such behavior.[90]

The lack of explicit judicial or legislative guidance with respect to sexual relations with clients partially explains why there are so few disciplinary actions in this area. The cases that have been reported usually involve egregious offenses, such as criminal acts against one's client or others.[91] Frequently the sexual misbehavior is but one of many ethical violations committed by the attorney.[92]

The most important reason for the dearth of attorney discipline cases, however, is the distinction that courts draw between professional and personal conduct. While psychotherapists be-

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[89] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981); MODEL RULES OF PROFESSIONAL CONDUCT (1983); Committee on Professional Ethics and Conduct v. Durham, 279 N.W.2d 280, 283 (Iowa 1979) ("there is little specific guidance on the subject of sexual conduct").

[90] *See* A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 801:4334 (1984–85) (Maryland); *Sex With a Divorce Client Unethical, Oregon Bar Rules*, 95 L.A. Daily J., July 16, 1982, at 5, col. 5 (Oregon); *Durham*, 279 N.W.2d 280 (Iowa). Other courts have declined to establish rules in the absence of action by the State Bar. *See, e.g.*, Matter of Wood, 265 Ind. 616, 624, 358 N.E.2d 128, 133 (1976); Barbara A. v. John G., 145 Cal. App. 3d 369, 384, 193 Cal. Rptr. 422, 433 (1983).

[91] *See In re* Stanton, 103 N.M. 413, 708 P.2d 325 (1985) (disbarred for attempted criminal sexual contact of the fourth degree on client); Cincinnati Bar Ass'n v. Lisner, 65 Ohio St. 2d 62, 417 N.E.2d 1381 (1981) (gross sexual imposition); Florida Bar v. Kay, 232 So. 2d 378 (Fla. 1970), *cert. denied*, 400 U.S. 956 (1970) (indecent exposure arising from homosexual contact in public lavatory in violation of city ordinance).

[92] *See* Wisconsin v. Heilprin, 59 Wis. 2d 312, 207 N.W.2d 878 (Wis. 1973) (two of seven charges involved sexual assault of clients); People v. Gibbons, 685 P.2d 168 (Colo. 1984) (in addition to sleeping with client, attorney had represented multiple clients, submitted false information to grievance committee, and had been previously convicted of six counts of tax evasion and perjury).

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lieve that the professional relationship is inextricably bound up with the personal feelings of the individuals involved, the legal profession attempts to separate the emotions of personal life from the representation of a client. For example, DR 5-101(A) of the Code of Professional Responsibility states that an attorney "shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own . . . personal interests."[93] This provision protects only the quality of legal representation; it does not address the physical or emotional harm a client suffers as a result of her sexual relationship with her attorney. Likewise, DR 1-102(A)(6)'s catch-all provision that an attorney "shall not . . . engage in any . . . conduct that adversely reflects on his fitness to practice law" has rarely been used in sexual misconduct disciplinary cases.[94]

Courts have found explicit offers of legal services for sexual favors coercive enough to constitute a breach of professional responsibility.[95] In *Matter of Wood*, the court suspended for one year an attorney who gave his legal services to two clients in exchange for sexual favors and nude photographs.[96] In concluding that Wood had improperly combined "professional and personal interests," the court mentioned the facts that Wood took the photographs in his office and that he had applied "economic pressure" on his clients to comply with his desires.[97] Nine years later, some eight years after Wood had been reinstated at the Bar,[98] he was again disciplined for exchanging his services for sexual favors and nude photographs.[99] This time, the photographs

[93] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1981); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983) (analogous provision). This provision has been applied to sexual misconduct in some disciplinary cases. *See Gibbons*, 685 P.2d at 175; Disciplinary Proceedings Against Gibson, 124 Wis. 2d 466, 474, 369 N.W.2d 695, 700 (Wis. 1985), *appeal dismissed*, 106 S.Ct. 375 (1985) (relying on analogous provision in state regulations).

[94] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (1981); *Durham*, 279 N.W.2d at 284; *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1983) (analogous provision applying only to criminal acts that reflect adversely on attorneys' fitness).

[95] *See* Matter of Higgins, 79 A.D.2d 145, 436 N.Y.S.2d 71 (N.Y. App. Div. 1981) (sexual favors for influence as family court judge); Matter of Wood, 265 Ind. 616, 358 N.E.2d 128 (1976) (sexual favors and nude photographs for legal services).

[96] *Wood*, 265 Ind. at 617, 358 N.E.2d at 129.

[97] *Id.* at 625, 358 N.E.2d at 133.

[98] *In re* Wood, 379 N.E.2d 967 (Ind. 1978).

[99] *In re* Wood, 489 N.E.2d 1189 (Ind. 1986).

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were intended for commercial distribution.[100] The court disbarred Wood, noting that individuals "relying on his legal skills" had been exploited.[101]

In cases where the sexual relationship is less bound up with the legal one, however, the courts have rarely found that the affair would impair the legal representation. The Oregon State Bar issued a decision in 1979 which held that sexual relations with a divorce client would be unethical only in certain narrow circumstances:

> If there is to be contested child custody in the case, the lawyer's conduct may be very detrimental to his client's interest. Also, the lawyer's conduct may sufficiently aggravate the other spouse, possibly making reasonable settlement nearly impossible. In the event of a trial, the potential for embarrassing disclosure of the lawyer's affair could cause him to curb effective and aggressive representation. In those cases, such conduct would appear to be improper.
>
> In the class of cases that involve no children "and an amicable settlement or a default proceeding," it does not appear that such conduct would necessarily affect the client's interests or the attorney's judgment and would not, per se, be unethical.[102]

This analysis focuses solely on how an affair would affect the attorney's legal judgment and the client's legal interests. Nowhere does it recognize the personal harm that the affair might cause.

In 1982, the Oregon Bar broadened its earlier opinion, concluding that sexual relations are always unethical in the divorce context.[103] "It would appear impossible for the lawyer to carry on such an affair with the client and maintain an independent judgment about whether the affair might harm the client's inter-

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[100] *Id.* at 1190.

[101] *Id.* at 1191.

[102] 1980 SUPPLEMENT TO THE DIGEST OF ASSOCIATION ETHICS OPINIONS 521 (1982); *see also Sex and Ethics Finale in Oregon*, 3 NAT'L L.J., April 20, 1981, at 35, col. 1 (public controversy concerning the decision).

[103] Legal Ethics Opinion No. 475 (Or. State Bar Bd. of Governors June, 1982), *quoted in Barbara A.*, 145 Cal. App. 3d at 385 n.11, 193 Cal. Rptr. at 433 n.11.

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est."[104] Like the 1979 opinion, however, the 1982 one omits any consideration of harms extending beyond the client's legal interests. The Disciplinary Board recognized that "[t]he nature of [the] fiduciary relationship tends to make the client intellectually and, in many cases, emotionally dependent upon the attorney," but concluded from this fact only that the client's consent to continued representation would not be "truly informed and voluntary."[105] The court thus failed to draw the natural conclusion from its recognition of harms stemming from personal ties between an attorney and his client: just as the client's judgment with respect to her representation is impaired by the personal relationship, so the client's personal judgment with respect to the affair is impaired by her professional relationship with her attorney.[106]

The clearest example of the judicial separation of professional and personal behavior is found in *Committee on Professional Ethics of Iowa State Bar Association v. Durham*, in which the Iowa Supreme Court reprimanded an attorney for engaging in sexual contact with her client while she was visiting him in prison.[107] Finding that she had violated ethical considerations regarding professional propriety,[108] the court stressed that she had indicated in the visitors' log that she was seeing the prisoner as his attorney. Were it not for this fact, no ethical violation would have occurred.[109] The decision is based, therefore, on the harm suffered by the legal profession rather than by the client.[110] And, unlike the opinions discussed above, this court acknowl-

[104] Legal Ethics Opinion No. 475, *supra* note 103.

[105] *Id.*

[106] The Maryland Bar likewise held in 1983 that in the divorce context, a sexual relationship "may have an adverse effect on the lawyer's ability to protect his client's interest." A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, *supra* note 90, at 801:4334.

[107] *Durham*, 279 N.W.2d 280.

[108] *Id.* at 285. Because of these violations, the court concluded that Durham had also violated DR 1-102(A)(6), which states that an attorney must not "engage in any other conduct [besides that enumerated in DR 1-102(A)(1)–(5)] that adversely reflects on his fitness to practice law." *Id.*; *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (1981).

[109] *Durham*, 279 N.W.2d at 285.

[110] *Cf.* A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, *supra* note 90, at 801:4334 ("A sexual relationship between a lawyer and client reflects negatively on the integrity of the legal profession"); 1980 SUPPLEMENT TO THE DIGEST OF ASSOCIATION ETHICS OPINIONS, *supra* note 102, at 521 (concerns that the affair might be exposed at trial); *Wood*, 489 N.E.2d at 1191 (attorney's "lack of professionalism is an embarrassment to the Bar of this State").

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edged neither the coercive nature of the attorney-client relationship nor the vulnerability of an individual in prison.[111]

Some ethical rules do focus on the harms an attorney can cause his client. DR 7-101(A)(3), the most pertinent of these rules, requires that the attorney not "intentionally . . . [p]rejudice or damage his client during the course of the professional relationship."[112] This has been applied in only a few disciplinary cases involving sexual relationships,[113] probably because of the requirement that the attorney intend to cause harm.

In *Disciplinary Proceedings Against Gibson*, the Wisconsin Supreme Court imposed discipline in an opinion which focuses on the effect on the client of sexual relations with her attorney.[114] The client had applied for a temporary restraining order to remove her husband from their home following a "violent episode."[115] At a meeting to discuss what would occur at the hearing on her application, the attorney sexually assaulted her.[116] The court found that Gibson had violated a common law ethical rule[117] against unsolicited sexual contact. Refusing to consider the testimony of four former clients with whom Gibson had similarly engaged in unsolicited sexual conversation and conduct, the court suspended him for ninety days.[118]

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[111] One explanation for this fact is surely that the attorney in this case is a woman and the client a man.

[112] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(3) (1981); *cf.* MODEL RULES OF PROFESSIONAL CONDUCT (1983) (no analogous provision that could be construed to cover sexual misconduct).

[113] *See* People v. Gibbons, 685 P.2d 168, 175 (Colo. 1984) (sex with criminal defendant); Matter of Stanton, 103 N.M. 413, 414, 708 P.2d 325, 326 (1985) (sexually attacking clients).

[114] 124 Wis. 2d 466, 369 N.W.2d 695 (1985).

[115] *Id.* at 468, 369 N.W.2d at 697.

[116] *Id.* A more complete discussion of the case appears *supra* text accompanying notes 72–78.

[117] The rule Gibson violated was a state ethical rule which provided discipline for violations of "[a] standard of professional conduct as defined by the supreme court by rule, order or decision." *Id.* at 474 n.3, 369 N.W.2d at 699 n.3.

[118] *Id.* at 472–73, 475, 369 N.W.2d at 698–99, 700. The court also refused to consider evidence that the attorney had been convicted of contributing to the delinquency of a minor, arising out of his sexual relations with a 17-year-old foster placement in his home. *Id.* at 472, 369 N.W.2d at 698. The court considered a state ethics rule identical to DR 7-101(A)(3), but did not consider whether it applied to Gibson, because it found a disciplinary violation on other grounds. *Id.* at 467, 472, 369 N.W.2d at 696, 699. It may have refused to apply the rule because of the force of Gibson's defenses, which included the arguments that he hadn't intended harm and that "damage" in the allegedly applicable regulation referred only to "damage to a client's interest in the lawyer's professional representation." *Id.* at 473, 369 N.W.2d at 699.

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The court's opinion at first appears to recognize the emotional stresses which increase both the difficulty of resisting the sexual advances and the harm they cause, for it notes that "[f]requently, the client is in some difficulty and, as a result, is particularly vulnerable to improper advances made by the attorney."[119] The court goes on, however, to focus on the effects that vulnerability will have on the client's judgment, not on her emotional well-being: "[o]ften, a client will be reluctant to terminate representation in response to an attorney's improper conduct for fear of losing time and money already invested in the attorney's representation."[120] The court's emphasis on economic considerations is reminiscent of *Wood*'s focus on the economically coercive aspects of the attorney's misconduct,[121] and of the Oregon Bar's narrow view that emotional dependence affects the parties' legal decisions but not their personal lives.[122]

One might surmise that the Bar's unwillingness to oversee what it considers an attorney's personal affairs, and the courts' lenience toward professional impropriety, are due to a general lack of disciplinary vigor. Indeed, there are examples in the sexual misconduct cases of attorneys not disbarred and witnesses not believed which suggest that the legal profession is less than enthusiastic about policing its own.[123] However, if one considers the response of disciplinary boards to attorneys who abuse their professional positions to gain unfair economic advantage, one discovers that the Bar can be a strict disciplinarian.

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[119] *Id.* at 474, 369 N.W.2d at 699.

[120] *Id.*

[121] *See supra* text accompanying notes 96–101.

[122] *See supra* text accompanying notes 104–106.

[123] In Office of Disciplinary Counsel v. Wanner, 15 Ohio St. 3d 319, 473 N.E.2d 829 (1984), the court decided not to disbar an attorney who, while employed as a "parent" in a girls' group home, had engaged in sexual intercourse with two seventeen-year-old girls who were under his supervision. Seven attorneys wrote letters maintaining that the attorney was a "competent, conscientious and ethical attorney." *Id.* at 319, 473 N.E.2d at 830. Admittedly, the young women were not the attorney's clients. In Montgomery County Bar Ass'n, Inc. v. Haupt, 277 Md. 326, 353 A.2d 629 (1976), the court refused to accept the charges of a nineteen-year-old that three years previously the attorney, who was appointed her guardian ad litem, had "attempted to take sexual liberties with her" on several occasions. *Id.* at 328, 353 A.2d at 630. While the court found that her testimony was inconsistent, uncorroborated, and contradicted by other testimony, a dissent noted the detailed nature of her story and the consistency with which she had asserted its truthfulness, the partial corroboration of her story by others, and the attorney's lack of candor at the disciplinary hearing. *Id.* at 335, 353 A.2d at 633 (Shure, J., dissenting).

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Take, for example, disciplinary cases involving the misappropriation of clients' funds. DR 9-102 applies explicitly to such conduct.[124] When attorneys violate this rule, the courts react with severe disciplinary sanctions.[125] Because of the appearance of impropriety, even the commingling of funds is considered a serious offense.[126]

The courts similarly scrutinize gifts and bequests from clients to their attorneys. In such cases, the courts recognize the lawyer's personal influence over his client, and presume that such transactions are the product of undue influence.[127] The fact that

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[124] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1981); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1983) (analogous provision).

[125] *See generally*, A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, *supra* note 90, at 45:601. A number of courts have disbarred attorneys for misappropriating their clients' funds. *See, e.g.*, People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); *In re* Hampares, 89 A.D.2d 428, 455 N.Y.S.2d 602 (1982); Florida Bar v. Ross, 417 So. 2d 985 (Fla. 1982); Louisiana State Bar v. Zeringer, 447 So. 2d 466 (La. 1984); Attorney Grievance Comm. v. Micka, 289 Md. 131, 422 A.2d 383 (1980); *In re* Galloway, 278 S.C. 615, 300 S.E.2d 479 (1983). Restoration of the funds, an intention to restore the funds, personal problems, inexperience, and the disorganized state of an attorney's practice have all been rejected as defenses to misappropriation. *See, e.g.*, A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, *supra* note 90, at 45:604; Committee on Professional Ethics and Conduct v. Pappas, 313 N.W.2d 532 (Iowa 1981) (attorney restored the funds to client); *In re* Garris, 279 S.C. 559, 309 S.E.2d 755 (1983) (same).

[126] A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, *supra* note 90, at 45:502. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1983). Commingling often leads to disbarment. *See, e.g.*, Committee on Professional Ethics and Conduct v. Thompson, 328 N.W.2d 520 (Iowa 1983); *In re* Jones, 65 A.D.2d 282, 411 N.Y.S.2d 335 (App. Div. 1978); *In re* Denend, 98 Wash. 2d 699, 657 P.2d 1379 (1983). As with misappropriation, the sanctions may be harsh despite the fact that the affected client did not lose any money as a result of the commingling. *See, e.g.*, Office of Disciplinary Counsel v. Lucarini, 504 Pa. 271, 472 A.2d 186 (1983) (disbarment); Columbus Bar Ass'n v. Cohodes, 9 Ohio St. 3d 83, 459 N.E.2d 494 (1984) (indefinite suspension); Louisiana State Bar Ass'n v. Stinson, 368 So. 2d 971 (La.), *appeal dismissed*, 444 U.S. 803, *reh'g denied*, 444 U.S. 985 (1979) (three-year suspension); *In re* Crowley, 66 A.D.2d 164, 412 N.Y.S.2d 506 (1979) (two-year suspension).

[127] *See, e.g.*, Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Behnke, 276 N.W.2d 838, 846 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979) (three-year suspension); Radin v. Opperman, 64 A.D.2d 820, 407 N.Y.S.2d 303 (1978) (gift voided); *see generally* A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, *supra* note 90, at 51:601–02; Annot., 19 A.L.R.3D 575, 581 (1968) (inter vivos gift presumptively result of undue influence; testamentary gift requires suspicious circumstance for presumption to apply). *Cf.* 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 168 (1981) (in physician-patient context, gift is subject to suspicion and physician has burden of showing the gift was made without undue influence). One commentator has surveyed the literature on cases involving charges of undue influence and concluded that various types of transference manipulation are involved. Shaffer, *supra* note 63, at 218; *see also* S. FREUD, *Beyond the Pleasure Principle* (1920), in 18 STANDARD EDITION, *supra* note 13, at 21 (noting that patients under the influence of a positive transference often "produce a plan or a promise of some grand present").

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the gift-giver is a "childless old person[] without close family ties"[128] or a business associate and personal friend[129] does nothing to allay the courts' suspicion; if anything, it enhances the requirements that the attorney advise his client to "secure disinterested advice from an independent, competent person who is cognizant of all the circumstances," and that the attorney not draw up the instrument conveying the gift.[130]

So far, no court has held that prohibiting attorneys from receiving gifts because of their influence over their clients is analogous to prohibiting attorneys from receiving sexual gifts stemming from that same influence. Sexual relations are often initiated by the client, who gives herself as a token of appreciation; Andrew Watson, a psychiatrist, writes that transference causes a desire to bestow affection.[131] He warns that this affectionate feeling is unrealistic, wholly a product of the professional relationship; to act on it "would be quite as unethical as making personal use of the client's money or property which had been entrusted to [the attorney] in the course of carrying out the professional role."[132]

The legal profession's stance (or lack thereof) on sexual relations between attorney and client compares unfavorably with that of the medical profession. Doctors in general and psychotherapists in particular have long recognized that doctor-patient sexuality is a gross abuse of the professional relationship. The Hip-

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[128] *Behnke*, 276 N.W.2d at 846.

[129] Committee on Professional Ethics v. Randall, 285 N.W.2d 161, 165 (Iowa 1979).

[130] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1981); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1983) (analogous considerations codified in rule); *Behnke*, 276 N.W.2d at 846; A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, *supra* note 90, at 51:602 (citing cases imposing discipline for failing to advise client of need to seek disinterested advice).

The most striking example of the courts' disapproval of gift-giving by clients can be found in The Florida Bar v. Shapiro, 1 CURRENT REPORTS A.B.A./B.N.A. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 43 (Fla. 1984), in which the Florida Supreme Court suspended for two years an attorney who had befriended an old woman and subsequently received gifts from her and was named the major beneficiary of her will. The court acknowledged that no attorney-client relationship existed, that the attorney did not draw up the will, and that the lawyer who did prepare the will testified that the woman was "completely alert and aware of what she was doing." *Id.* Nevertheless, it found that the attorney "had a duty to protect the woman from her own improvidence." *Id.* The court had no difficulty in concluding that such behavior reflected on the attorney's professional abilities.

[131] Watson, *The Lawyer as Counselor*, 5 J. FAMILY L. 7, 16 (1965).

[132] *Id.*

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pocratic oath explicitly proscribes sexual relations with patients.[133] The American Psychiatric Association,[134] the American Psychological Association,[135] and the National Association of Social Workers all forbid sexual intimacies with clients.[136] Several states have made sexual advances towards patients illegal, and provide for professional discipline for any violation.[137]

Within the therapeutic professions, the most frequently filed ethics complaints are related to sexual misconduct;[138] in California, sexual relations are the basis for fifty-six percent of the actions taken by the Psychology Examining Committee.[139] The customary sanction in such cases is revocation of the doctor's license.[140] The rationale courts use in these cases would often

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[133] *See* Lange & Hirsh, *Legal Problems of Intimate Therapy*, MED. TRIAL TECH. Q. ANN. 201, 203 n* (1982) ("Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female or male persons, be they free or slaves").

[134] *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, 130 AM. J. PSYCHIATRY 1058, 1061 § 1 (1973); *see also* Lange & Hirsh, *Legal Problems of Intimate Therapy*, *supra* note 133, at 203 n.**.

[135] Ethical Principle 6, Welfare of the Consumer, *Ethical Principles for Psychologists* (APA, 1981); *see also Ex parte* Abell, 613 S.W.2d 255, 264 (Tex. 1981).

[136] National Association of Social Workers Code of Ethics § 11 #5; *see also* Comment, *Psychotherapist-Patient Sex: A Proposal for a Mandatory Reporting Law*, 16 PAC. L.J. 431, 439 n.71 (1985).

[137] *See, e.g.*, Reid v. New Mexico Bd. of Examiners in Optometry, 92 N.M. 414, 415, 589 P.2d 198, 199 (1979); Department of Professional Regulation v. Wagner, 405 So. 2d 471, 472 (Fla. App. 1981); Waters v. Bourhis, 40 Cal. 3d 424, 436, 709 P.2d 469, 477, 220 Cal. Rptr. 666, 674 (1985).

[138] Pope, Keith-Spiegel & Tabachnick, *supra* note 4, at 147.

[139] *Id.*

[140] 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 83 (1981). *See, e.g.*, Solloway v. Department of Professional Regulation, 421 So. 2d 573 (Fla. App. 1982) (psychiatrist's license revoked after he engaged in sexual relationship with 22-year-old female patient); Bernstein v. Board of Medical Examiners, 204 Cal. App. 2d 378, 22 Cal. Rptr. 419 (1962) (statutory rape conviction led to license revocation); Dorsey v. Board of Regents of Univ. of State of N.Y., 87 A.D.2d 728, 449 N.Y.S.2d 337 (1982) (psychiatrist's license revoked for engaging in sexual intercourse with two female patients); Dresser v. Board of Medical Quality Assurance, 130 Cal. App. 3d 506, 181 Cal. Rptr. 797 (1984) (psychologist's license revoked for engaging in sexual relations with patients). The charges are usually professional misconduct, moral turpitude, negligent and incompetent treatment, or gross negligence. Other types of health care practitioners are also disciplined for sexual misconduct. *See, e.g.*, Martinez v. Texas State Bd. of Medical Examiners, 476 S.W.2d 400, 402 (Tex.), *appeal dismissed*, 409 U.S. 1020 (1972) (doctor's license revoked for sexual intercourse with one patient); Department of Professional Regulation v. Wagner, 405 So. 2d 471 (Fla. App. 1981) (chiropractor's license suspended for sexual misconduct); *In re* Polk License Revocation, 90 N.J. 550, 449 A.2d 7 (1982) (physician's license revoked for sexual abuse of five female patients). Sometimes, however, the discipline imposed seems inordinately lenient. *See* Davidson v. Washington, 33 Wash. App. 783, 657 P.2d 810, 812 (1983) (chiropractor suspended for six months for treating female patients' lower back pain by massaging their breasts and genital areas with hand-held vibrator); Ross v. State, 342 So.

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apply to attorneys who have sex with their clients. In a disciplinary action in which a psychologist had initiated sexual contact with female clients, the court confirmed the licensing authority's revocation of the psychologist's license, noting:

> Imposition by a person in a helping profession of his personal intimate desires upon individuals who are likely to be at an emotionally vulnerable point in their lives conflicts with a duty to act in the best interests of his clients. The licensing authorities, as well as the courts, are loathe to tolerate misconduct of a sexual nature by professionals in the human services field.[141]

A review of similar suits against lawyers, however, suggests that a court asked to discipline a divorce attorney for sexual activities would respond with merely a minor penalty, such as a reprimand or a short-term suspension.[142]

B. Direct Liability Suits Against Attorneys

A sexually exploited client could sue her attorney directly in addition to reporting his actions to the state bar. A traditional malpractice suit is likely to fail, however, because courts will characterize the actions as personal, not professional, misconduct.[143] The client must proceed under a different theory: breach of fiduciary duty. A fiduciary relationship is created when two parties are in unequal bargaining positions due to one party's dependence on and trust in the other's knowledge and power.[144] The superior party has a fiduciary duty not to take advantage of the dependence and trust created by the relationship. It is well-

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2d 1023 (Fla. App. 1977) (chiropractor suspended for six months for treating female patient's back condition by massaging pubic area with vibrator and manipulating himself to orgasm while straddled on her legs; 22 years of "unblemished" service a mitigating factor).

[141] Rudner v. Board of Regents of N.Y. State Dep't of Education, 105 A.D.2d 555, 556, 481 N.Y.S.2d 502, 503 (1984).

[142] *See supra* text accompanying notes 96, 107, 118.

[143] *See supra* text accompanying notes 93–111.

[144] BLACK'S LAW DICTIONARY 564 (5th ed. 1979); *see, e.g.*, *Barbara A.*, 145 Cal. App. 3d at 383, 193 Cal. Rptr. at 432.

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established that an attorney stands in a fiduciary relationship to his client.[145]

Only one court has considered whether sexual relations with a client constitute a compensable breach of fiduciary duty. In *Barbara A. v. John G.*,[146] a suit for the collection of attorneys fees, the client cross-complained that she had suffered damages from an ectopic pregnancy following sexual intercourse with the attorney. Alleging that he had told her, "I can't possibly get anyone pregnant,"[147] she charged the attorney with battery and misrepresentation.[148] The court remanded the case after determining that the client had stated a cause of action, and held that if the client could prove that the fiduciary relationship gave rise to a confidential relationship between the parties, then the burden of proof would shift to the attorney to show that the client had consented to the alleged battery or had unreasonably relied on the attorney's assurances of sterility.[149]

In its discussion of the fiduciary relationship, the court distinguished between "social" and "legal" relations, finding that parties who stand in a fiduciary relationship to each other with respect to legal representation do not necessarily have fiducial obligations in their social dealings.[150] The court refused to hold that a *personal* fiduciary relationship exists as a matter of law, warning that this "would have a chilling and far-reaching effect on any personal relations between an attorney and his or her clients."[151] However, the court did recognize that the attorney-client relationship has personal effects on the client.[152]

The court held that whether the fiduciary relationship extended to the sexual relations at issue was a question for the jury.[153] In other words, the jury could consider whether an attorney's representation influenced his client's decision to have sexual rela-

[145] 7 AM. JUR. 2D *Attorneys at Law* § 119 (1981). The court in *Gibson* relied on the fiduciary nature of the relationship to fashion a common law rule against unsolicited sexual advances. 124 Wis. 2d at 474, 369 N.W.2d at 699.

[146] 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

[147] *Id.* at 374, 193 Cal. Rptr. at 426.

[148] The misrepresentation claim was brought under the tort of deceit, which includes fraudulent and negligent misrepresentation. *Id.* at 375, 193 Cal. Rptr. at 426–27.

[149] *Id.* at 383–84, 193 Cal. Rptr. at 432.

[150] *Id.* at 384, 193 Cal. Rptr. at 432–33.

[151] *Id.* at 384, 193 Cal. Rptr. at 432–33.

[152] *Id.* at 383, 193 Cal. Rptr. at 432.

[153] 145 Cal. App. 3d at 384, 193 Cal. Rptr. at 432.

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tions with her attorney. As this Note argues, the answer in virtually all divorce cases would be that the attorney's influence extends so far.

Finally, the court in *Barbara A.* took a step toward recognizing that personal harms from attorney-client relationships are compensable. Although the question of compensating purely emotional harms was not presented, the court held that there was no reason to distinguish between the economic and physical harms suffered by a client as a result of an attorney's breach of his duty.[154] This recognition of more than purely economic damage may bode well for future plaintiffs in similar cases.

There are no reported cases of clients suing their attorneys for sexual misbehavior alone. No discussion of a client's alternatives in such a situation would be complete, however, without a consideration of sexual malpractice cases brought by patients against their psychotherapists.[155] In these cases, some courts impose liability on the theory that the therapist's involvement violated the professional standard of care.[156] Some of these courts broadly define the doctor's standard of care as encompassing all actions which might harm the patient, based on the ethical codes' blanket prohibition on sexual relations with clients.[157] Other courts merely presume that the sexual intimacies are related to the professional behavior of the therapist and lie within the scope of therapy.[158]

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[154] *Id.* at 383, 193 Cal. Rptr. at 432.

[155] Such suits against psychotherapists are growing in popularity. Before 1970, civil suits against psychologists or psychiatrists for sexual relations with patients were practically nonexistent. Annot., 33 A.L.R.3D 1393, 1394 (1970). Since then, however, the number of such cases has increased to the point where insurance companies insuring psychiatrists against malpractice spend 20% of their funds on cases involving sexual misconduct. Simon, *Sexual Misconduct of Therapists: A Cause for Civil and Criminal Action*, 21 TRIAL 46, 47 (May 1985). Approximately 10% of the malpractice suits covered by the American Psychologist Association insurance trust involve sexual misconduct. Pope, Keith-Spiegel & Tabachnick, *supra* note 4, at 147.

[156] *See, e.g., Anclote Manor Foundation*, 263 So. 2d at 258; Cotton v. Kambly, 101 Mich. App. 537, 540–41, 300 N.W.2d 627, 628 (1980); Mazza v. Huffaker, 61 N.C. App. 170, 180, 300 S.E.2d 833, 840 (1983).

[157] *See Mazza*, 61 N.C. App. at 183, 300 S.E.2d at 842 ("the accepted standards of care are coterminous with the relevant standards of professional ethics"); Horak v. Biris, 130 Ill. App. 3d 140, 147–48, 474 N.E.2d 13, 19 (Ill. App. Ct. 1985) (National Ass'n of Social Workers code clearly forbids sexual activity with a patient).

[158] *See Horak*, 130 Ill. App. 3d at 145, 474 N.E.2d at 17; *Waters*, 40 Cal. 3d at 434, 709 P.2d at 476, 220 Cal. Rptr. at 673.

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These courts have essentially created a standard of malpractice based on the doctor's fiduciary duty to his patient. The dynamics of a fiduciary relationship have been similarly described by psychiatric and legal commentators. Freud noted that the "decisive factor" in the psychoanalyst's reaction to his patient's love must be the fact that the love is created only by the "medical situation."[159] "It is therefore plain to [the doctor] that he must not derive any personal advantage from it. The patient's willingness [to engage in sex] makes no difference; it merely throws the whole responsibility on the analyst himself."[160] Alan Stone argues that courts which find psychotherapists liable for sexual misconduct are "reaching for a way to say that the psychotherapist has a duty not to become sexually involved with a patient, even if she maturely consents,"[161] and he argues that the most consistent approach is to characterize the relationship as fiducial.[162] At least one court has explicitly accepted such reasoning and found that a therapist's breach of his fiduciary duty is an actionable tort.[163]

Such a tort logically applies to any divorce lawyer who exploits his client. Fortified by the holdings in the therapist cases and the nature of divorce representation, an exploited client may argue that the sexual relationship itself constitutes a breach of the fiduciary duty. Such arguments will be the most fruitful avenue for the ex-client emotionally damaged by an exploitative attorney.

Arguments by analogy will be difficult, however, for as the discussion of the supposed uniqueness of transference notes, courts and attorneys will likely react with disbelief to the claim that attorney-client and therapist-patient relationships are com-

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[159] S. FREUD, *Observations on Transference-Love* (1915), in 12 STANDARD EDITION, *supra* note 13, at 169.

[160] *Id.*

[161] A. STONE, *supra* note 7, at 199.

[162] *Id.* at 194.

[163] *Horak*, 130 Ill. App. 3d at 145, 474 N.E.2d at 17. *Contra* Martino v. Family Serv. Agency, 112 Ill. App. 3d 593, 596, 445 N.E.2d 6, 8 (Ill. App. Ct. 1982) (court finds no precedent for plaintiff's claim that breach of fiduciary duty is a tort). A large number of courts have held that a doctor's breach of confidence, which is a specific violation of the doctor's fiduciary duty, constitutes a tort. *See generally* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1427 (1982) (discussing the inadequacies of traditional theories of liability in this area); Note, *To Tell or Not to Tell: Physician's Liability for Disclosure of Confidential Information About a Patient*, 13 CUMB. L. REV. 617, 620 (1983) (breach of duty of confidentiality is one theory of liability for wrongful disclosure).

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parable. Lawyer defendants may attempt to refute such arguments by pointing out the following: that sex is malpractice only because it renders therapy ineffective; that transference, while admittedly existing in all professional relationships, is unique in psychotherapy because it is a tool of the trade; and that mental health professionals, unlike lawyers, are trained to handle vulnerable or "seductive" patients. A careful examination of each of these arguments reveals that despite the differences between therapists and attorneys, both should face liability when they abuse the fiduciary relationship and engage in sex with their clients.

1. The Sexual Relationship as a Failure to Properly Treat the Patient

The attorney facing a sexual exploitation suit will argue that psychotherapy cases are distinguishable, since sexual misconduct by a therapist constitutes a failure to properly treat the patient.[164] A sexual relationship that damages a client emotionally conflicts directly with the purpose of therapy: to improve the client's emotional well-being. Therapists are primarily concerned with their patients' personal lives, while there is a distinction between the lawyer's professional and personal contacts with his clients.

Such a distinction is artificial, however, because it is specious for the divorce lawyer to claim that so long as he adequately represents his client legally, he can harm his client emotionally. As discussed above,[165] the divorce lawyer is both treated and perceived as much more than a source of legal information; he is also a counselor. Sexual misconduct thus constitutes a failure to adequately represent and counsel the client, and is analogous to sexuality in the therapeutic relationship.

2. The Therapist's Duty Not to Mishandle the Transference

A more subtle argument attempts to distinguish lawyer-client sexuality from therapist-patient sexuality by referring to the

[164] *See, e.g.*, Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 308 (Minn. 1982); Roy v. Hartogs, 85 Misc. 2d 891, 893, 381 N.Y.S.2d 587, 588 (N.Y. Sup. Ct. 1976).
[165] *See supra* text accompanying notes 208–17.

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transference. Again, transference exists in all professional relationships.[166] A sexually abusive lawyer would argue, however, that only the therapist has a professional duty not to mishandle transference.[167] Freud and his successors have stressed the centrality of transference to psychoanalytic therapy.[168] One psychiatrist has argued that use of transference makes psychiatric work unique:

> Unlike the general physician working intuitively within the ambit of a positive transference, which provides hope and succor to the patient, the psychiatrist *works directly with the transference as a therapeutic tool*, even at times encouraging its emergence. Thus, mishandling it is negligent psychotherapy.[169]

This argument provides a potentially powerful argument for the attorney facing a sexual misconduct claim. However, a fuller explanation of transference reveals that a charge that a psychotherapist has "mishandled the transference" is nothing more than a technical way of describing an abuse of the fiduciary relationship. Properly understood, this so-called distinction actually provides a strong argument for holding sexually abusive attorneys liable for their sins.

Transference is not a static and indivisible phenomenon. On the contrary, it has various stages, not all of which inevitably appear in every patient's therapy. Freud made it clear that therapy begins with a form of transference that facilitates the patient's memory and furthers the therapy.[170] This initial stage of transference is a combination of the patient's faith in the doctor and the

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[166] *See supra* text accompanying notes 63–67.

[167] Several courts have held that therapists who engage in sexual relations are guilty of mishandling the transference. *See* Zipkin v. Freeman, 436 S.W.2d 753, 756 (Mo. 1968); *Anclote Manor Foundation*, 263 So. 2d at 256; *Horak*, 130 Ill. App. 3d at 148, 474 N.E.2d at 19; *Waters*, 40 Cal. 3d at 434, 709 P.2d at 476, 220 Cal. Rptr. at 673; St. Paul Fire & Marine Ins. Co. v. Mitchell, 164 Ga. App. 215, 296 S.E.2d 126 (Ga. Ct. App. 1982).

[168] Shaffer, *supra* note 22, at 204 (quoting C. G. Jung); M. GILL, *supra* note 20, at 43, 55, 72; S. FREUD, *The Dynamics of Transference* (1912), in 12 STANDARD EDITION, *supra* note 13, at 108.

[169] Simon, *supra* note 155, at 50–51 (emphasis added). *See also* A. STONE, *supra* note 7, at 196 ("it is only in psychotherapy that the management of the transference and countertransference is considered a central feature of the treatment").

[170] S. FREUD, *An Outline of Psycho-analysis* (1940), in 23 STANDARD EDITION, *supra* note 13, at 181.

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patient's unconscious identification of the doctor with images from her past. It is frequently called the unobjectionable positive transference.[171]

As analysis proceeds, the positive transference may become either hostile or sexually affectionate.[172] In either case, it no longer facilitates remembrance, but in fact acts as a resistance.[173] Hostile impulses and sexual attraction do not bring therapy to an end, however; they merely change the rules of the game. The therapist no longer uncovers the patient's "pathogenic instincts" through her memories, but instead analyzes the patient's reactions to the therapist.[174] In other words, the transference itself is analyzed.

Through this process, the transference neurosis is created;[175] all of the patient's symptoms reappear within the context of the therapeutic relationship.[176] The unobjectionable positive transference does not disappear, however, but continues to act as the "vehicle of success in psychoanalysis exactly as it is in other methods of treatment."[177]

The average physician intuitively takes advantage of transference—the unobjectionable positive transference. At the same time, the psychoanalyst uniquely uses the transference as a tool; he interprets the patient's transference neurosis. Hence, for the therapist who analyzes the patient's transference neurosis as part

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[171] *See* M. GILL, *supra* note 20, at 9–10; H. RACKER, *supra* note 51, at 13. Freud distinguishes the confidence in the analyst and the patient's motive to get well from the positive transference. S. FREUD, *An Outline of Psycho-analysis* (1940), in 23 STANDARD EDITION, *supra* note 13, at 181. This distinction, however, is probably between the conscious and the unconscious elements of the patients' reaction to the doctor, which are conceptually distinct but exist simultaneously and are mutually reinforcing. *See, e.g.*, S. FREUD, *Analysis Terminable and Interminable* (1937), in 23 STANDARD EDITION, *supra* note 13, at 239. Watson, in his psychiatry guide for lawyers, suggests that the modern use of the word includes both aspects of the patient's reaction to the physician. A. WATSON, *supra* note 13, at 6.

[172] H. RACKER, *supra* note 51, at 13.

[173] *See* S. FREUD, *Remembering, Repeating and Working-Through* (1914), in 12 STANDARD EDITION, *supra* note 13, at 151; S. FREUD, INTRODUCTORY LECTURES, *supra* note 3, at 443; S. FREUD, *The Dynamics of Transference* (1912), in 12 STANDARD EDITION, *supra* note 13, at 105.

[174] S. FREUD, *Remembering, Repeating and Working-Through* (1914), in 12 STANDARD EDITION, *supra* note 13, at 154.

[175] *See* M. GILL, *supra* note 20, at 73, 75, 76.

[176] S. FREUD, *The Dynamics of Transference* (1912), in 12 STANDARD EDITION, *supra* note 13, at 104.

[177] *Id.* at 105. *See* M. GILL, *supra* note 20, at 80 (unobjectionable positive transference "should be left untouched").

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of therapy, sleeping with the patient misuses that neurosis (the patient's sexual attraction to the doctor) and constitutes malpractice. Attorneys charged with malpractice for similar reasons would argue that because they do not make analogous use of the transference, they cannot be held liable.

A charge that a psychotherapist has "mishandled the transference" indeed sounds as if it could apply only to a psychotherapist. However, because not all doctors believe in transference,[178] that concept is better understood to mean "trusting relationship" so that it encompasses the general perspective of professionalism, not just psychoanalysis. Many therapists do not consider the development of a transference neurosis necessary for successful treatment,[179] and others do not analyze it even if it occurs.[180] Instead, they recognize transference merely as an emotional bond between doctor and patient, so that the word "mishandling" loses its technical gloss and merely reminds one of the need for restraint on the part of the therapist. What is left is "abuse of the trusting relationship," and courts have often retreated to analogous phraseology, such as the familiar "breach of the fiduciary relationship," in justifying a finding that a therapist has committed malpractice.[181] The technical differences between psychoanalysts and other professionals no longer appear to justify treating their sexual relationships with clients differently.

3. The Attorney's Ignorance of the Potential Harm

One final argument that the attorney might make in his defense would stress the disparity in psychological knowledge between

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[178] *See* A. STONE, *supra* note 7, at 199; Serban, *supra* note 27, at 81. *Cf. id.* at 83 ("transference . . . is a concept not validated by responsible research"). A recent survey of the psychological literature that has investigated the empirical validity of Freudian psychoanalysis discovered that "there has been relatively little quantitative research on the concept of transference" and "[v]ery little systematic work" on the relationship between transference and therapeutic outcome. S. FISHER & R. GREENBERG, *supra* note 21, at 383. While the research that has been done suggests that stress on the transference in the analyst's interpretation of the patient's statements may improve the outcome of therapy, *id.* at 384, the authors concluded that transference interpretation is not a necessary element of successful therapy. *Id.* at 389–90.

[179] *See* M. GILL, *supra* note 20, at 77.

[180] S. FREUD, *Recommendations to Physicians Practicing Psycho-analysis* (1912), in 12 STANDARD EDITION, *supra* note 13, at 118; S. FREUD, *An Autobiographical Study* (1920), in 20 STANDARD EDITION, *supra* note 13, at 43; M. GILL, *supra* note 20, at 93.

[181] *See supra* text accompanying notes 156–163.

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lawyer and therapist. In other words, how could the lawyer have known that the affair would harm his client? Most lawyers are poorly trained to understand their clients' psychological reactions to divorce.[182]

One cannot assume, however, that psychotherapists are better trained to avoid sexual relations with their clients. That assumption is belied by studies which surveyed psychologists' graduate training in sexual attraction problems,[183] examined standard psychotherapy texts,[184] and surveyed the incidence of sexual involvement between faculty and students in mental health training institutions.[185] In addition, one should not assume that psychotherapists are somehow better equipped to avoid sexual attraction; even the best of analysts is subject to resistances,[186] and these resistances impair the psychoanalyst's appreciation of the countertransference.[187] Nevertheless, no one has ever argued that we should excuse the therapist for not knowing better, and mere intuition should be enough to steer a lawyer away from sexual relations with a divorce client. The fact that divorce lawyers are poorly trained to understand their clients' problems is thus an argument for education rather than exculpation.

This analysis has demonstrated that an attorney should not be able to escape liability merely by claiming that he is different from a therapist. Those differences which do exist do not support making the attorney substantially less amenable than a therapist to a suit for liability in tort.[188]

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[182] *See* Kressel, Lopez-Morillas, Weinglass & Deutsch, *supra* note 56, at 251.

[183] *See* Pope, Keith-Spiegel & Tabachnick, *supra* note 4, at 154 (55% had received no education about such matters, 24% "very little," 12% "some," and 9% an adequate amount).

[184] *See* Bouhoutsos, *supra* note 33, at 181.

[185] *See* Pope, Levenson & Schover, *supra* note 5, at 688; Bouhoutsos, *supra* note 33, at 181 (arguing that such behavior affects future professional behavior).

[186] S. FREUD, *On Beginning the Treatment* (1913), in 12 STANDARD EDITION, *supra* note 13, at 126.

[187] *See* H. RACKER, *supra* note 51, at 106.

[188] In fact, some therapists may have one defense which will never be available to attorneys: therapeutic sexuality. Some psychoanalysts openly defend sexual relationships with clients. *See* McCartney, *supra* note 35, at 227 (advocates overt expression of sexual needs by analysts); M. SHEPARD, *supra* note 14, at 6. They argue that bodily contact is therapeutic because it may help the patient overcome his shyness or fear of intimacy. *See* Serban, *supra* note 27, at 78–79 (explaining the argument); *see also* Holroyd & Brodsky, *supra* note 5, at 845 (30% of humanist therapists thought that nonerotic bodily contact might be beneficial to treatment); Kardener, Fuller & Mensh, *supra* note 5, at

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IV. PROPOSALS

The foregoing analysis demonstrates that basic ideological changes must occur before the legal profession can effectively police the sexual abuses of its attorneys. First, the Bar must recognize that its efforts to distinguish between attorneys' personal and professional activities are inappropriate, at least where divorce attorneys are concerned. Second, the courts must make a commitment to acknowledging and compensating the real emotional damage that results from sexual relations in the divorce context.

When an attorney has sex with his or her client, the courts and bar associations should acknowledge that the affair is part and parcel of the professional relationship. In most cases, the attorney and client would never have met and the affair would never have occurred but for the attorney's professional status. That status cannot but permeate the resulting affair. In the divorce context, the effect of the attorney's superior position can only work to the detriment of the vulnerable client. And it is impossible to determine whether the attorney's professional judgment will be adversely affected by the affair. On a broader scale, the integrity of the legal profession suffers whenever an attorney takes advantage of his or her position to gain sexual gratification.

If the bar associations and courts would recognize how inseparable the personal and professional are in the divorce context, they could fashion rules that would apply explicitly to sexual misconduct with clients, or they might recognize that existing rules apply to such misconduct. DR 5-101(A)'s concern with the effect of an attorney's personal interests on his professional judgment would clearly be implicated. Under this revised understanding, the fact that an attorney misused his influence to gain sexual advantage would appropriately be recognized to adversely reflect on his fitness to practice law, in violation of DR 1-102(A).

In the context of a malpractice suit against the attorney, a broadened understanding of "representation" would have far-reaching effects. The courts' recognition that sex with clients implicates the professional relationship, taken to its logical con-

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1079 (some therapists feel sexual intimacy helps patients with sexual maladjustments); Bouhoutsos, *supra* note 5, at 189 (some feel intimacy helps patients with low self-esteem).

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clusion, would bring the tort of breach of fiduciary duty within the coverage of malpractice insurance. This has already occurred in the therapeutic professions. Sexually exploited patients sue their therapists for malpractice rather than other possible torts[189] because malpractice insurers provide the deep pocket that makes such claims especially valuable.

In order to fall within the coverage of their therapists' insurance, patients sometimes allege that the sexual intimacies were "prescribed."[190] Therapeutic sexuality is not a prerequisite to liability, however; it is merely an easy means of guaranteeing that the damages are collectible. For an attorney to claim that this factor distinguishes lawyer-client sexuality from doctor-patient sexuality, since the lawyer never "prescribes" the sexuality, is to push the distinction too far. It is sufficient for liability that the sexual relations occur during the course of therapy, or analogously, representation.

Furthermore, courts have implicitly encouraged patients' attempts to frame their claims within what is covered by the insurance. Several plaintiffs have successfully alleged malpractice where the therapist clearly did *not* label the sexual acts as therapy.[191] In *Waters v. Bourhis*, the California Supreme Court acknowledged that it recognized the implications of such a broad reading of the scope of therapy, reasoning that "there is little justification for . . . foreclosing [a patient's] recovery from any available malpractice insurance," because such insurance "is generally intended to protect patients from the risks arising out of the professional relationship."[192] There is as great a risk of sexual exploitation in attorney-client relationships as there is in thera-

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[189] *See* Hays, *supra* note 6, at 1248 (possible claims include malpractice, assault and battery, fraud and deceit, intentional infliction of mental distress, and gross negligence).

[190] *See Roy*, 85 Misc. 2d at 896, 381 N.Y.S.2d at 591; Greenberg v. McCabe, 453 F. Supp. 765, 770 (E.D. Pa. 1978); St. Paul Fire & Marine Ins. Co. v. Mitchell, 164 Ga. App. 215, 220–21, 296 S.E.2d 126, 130 (1982); *Waters*, 40 Cal. 3d at 428, 709 P.2d at 471, 220 Cal. Rptr. at 668; *Zipkin*, 436 S.W.2d at 755.

[191] *See Marston*, 329 N.W.2d at 308 (psychologist told patient he would see her regardless of therapy); *Mazza*, 61 N.C. App. 170, 300 S.E.2d 833 (sexual relations with patient's wife).

[192] *Waters*, 40 Cal. 3d at 434–35, 709 P.2d at 476, 220 Cal. Rptr. at 673; *see also* Mazza v. Medical Mut. Ins. Co., 311 N.C. 621, 319 S.E.2d 217 (1984) (court acknowledged that medical malpractice policy would cover actual and punitive damages caused by psychiatrist's misconduct); *Zipkin*, 436 S.W.2d 753 (insurer is liable to pay claim arising out of a psychiatrist's mistreatment of the transference phenomenon).

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pist-client relationships. No logical reason exists for denying malpractice insurance coverage of claims asserting sexual exploitation as a breach of the attorney-client fiduciary relationship.

A broadened understanding of the professional relationship would not necessarily mean that no attorney could ever engage in a sexual relationship with a client. The considerations that are compelling in the divorce context—the client's vulnerability, the attorney's superior power, the resulting transference—will not exist in every attorney-client relationship. A business executive being represented in a real estate transaction would not require special protection against an attorney who wished to "take advantage;" on the other hand, a criminal defendant could easily fall prey to the forces that make the divorce client vulnerable, and would thus need the laws' protection. Other situations in which a client is particularly vulnerable include foreclosure proceedings and cases in which the clients are poor or uneducated. Any application of an expanded rule must of necessity be responsive to the compelling concerns of the individual situation. The more egregious the attorney's actions, the less vulnerable the client need be before the rules would be applied.

The second change in perspective necessary for exploited clients to win full compensation requires that the courts recognize the purely emotional harms that may result from sexual misconduct. The law has long been suspicious of anything as intangible and subjective as emotion; the courts' historical unwillingness to consider purely emotional harms in assessing damages reflects their desire to function on a quantifiable and rational basis. Courts readily discipline attorneys when economic interests are concerned;[193] their contrasting reluctance to draw the analogy to sexual "misappropriation" or sexual "gift-giving" reiterates their reluctance to deal in the intangibles of psychological impacts.

Needless to say, sexual behavior cannot be refunded. The intimate nature of sexual behavior is sure to expose the client to far greater and more lasting emotional harm than a loss of money.[194] It will be a rare plaintiff who can prove that economic or even physical damages resulted from her sexual exploitation.

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[193] *See supra* text accompanying notes 125–30.

[194] *Cf.* Dahlberg, *supra* note 70, at 123 (arguing that psychotherapeutic acting-out is more harmful than keeping a patient in therapy longer than necessary).

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But if the courts refuse to consider and quantify her emotional suffering, she will effectively be left without a remedy.

V. CONCLUSION

Many psychotherapists have admitted that the sexual abuse of patients is a problem that must be dealt with openly. Attorneys, on the other hand, while anxious to vindicate the rights of exploited patients, fall silent when their colleagues commit similar indiscretions against their clients.

One might cynically conclude that if doctors were judges, there would be many more lawyers as defendants, yet doctors have done a far better job than lawyers in punishing sexual exploitation among their own. One reason for this difference may be that physicians and therapists do not distinguish between the professional and the personal as attorneys do. Many attorneys "focus on 'winning' cases in a narrow materialistic sense,"[195] and wish away their clients' emotional difficulties by saying that they are not psychiatrists.[196] In so doing, lawyers ignore what is really at stake: the emotional health of the parties involved. As a result, few divorce lawyers leave their clients satisfied. One survey of divorced individuals found that over seventy percent of the women and over ninety percent of the men were either disappointed or angered by their representation, and "felt helpless and unimportant, victimized by their ex-spouses and their *own* attorneys."[197] While a lawyer might respond that representation in such emotional matters presents a no-win situation, that argument implicitly acknowledges the importance of subjective evaluation in determining the "success" of a divorce. If there really is no winner, then the quality of representation must be judged on emotional grounds. After all, couples do not divorce solely for alimony; they divorce to improve their lives and end the pain of an unhappy union.

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[195] Levinger & Miles, *Consequences for the Ex-spouses*, in DIVORCE AND SEPARATION, *supra* note 56, at 183.

[196] *See* Kressel, Lopez-Morillas, Weinglass & Deutsch, *supra* note 56, at 262.

[197] L.C. HALEM, *supra* note 46, at 30–31 (emphasis added).

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The dissatisfaction with adversarial means of handling divorce has led a number of observers to argue that divorce lawyers should be more like counselors than zealots.[198] If courts would recognize that the harms of sexual exploitation go far beyond the attorney's ability to represent his client and, more broadly, that the fiduciary duty includes the responsibility not to emotionally damage one's clients, steps might be taken to make the attorney-client relationship a more caring one.

[198] Callner, *Boundaries of the Divorce Lawyer's Role*, 10 FAM. L. Q. 389 (1977). In no-fault divorce cases, which are more cooperative in nature, the attorney can more easily combine his roles as advocate and counselor. Mussehl, *supra* note 24, at 447.

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