

I. INTRODUCTION

Generally, one's choice of sexual associations is not a matter for outside regulation. These are matters governed only by one's discretion and the consent of another adult. This paper does not advocate the regulation of such associations by statutory rules of general application. However, members of a *profession* - that is, a calling that casts its members in a public light and has a duty to serve the public good - must be held to a higher standard. This higher standard has been a stated purpose in the codes of conduct of virtually all callings with an aspect of public service.

It is worth noting that both in Canada and the United States, all medical and related professions have rules governing sexual relationships between the professionals and their patients. While most callings of similar public esteem have such rules, lawyers have been a notable exception. Some have argued that lawyers' professional codes of conduct are sufficiently broad as to encompass such a proscription by implication.

The new Alberta Code of Professional Conduct, which came into effect on January 1, 1995, continues in this direction. The goal of this paper to show that, while it may be theoretically possible to interpret the rules as encompassing sexual relationships between lawyers and clients, in practice, such reliance is problematic. A better approach would include the addition of a qualified rule prohibiting sexual relationships between lawyers and clients, and carrying a rebuttable presumption of undue influence by the lawyer.

II. EXTENT OF PROBLEM

The profession has often turned a blind eye to the issue of lawyer-client sexual relations.¹

¹see generally, D. Filipovic, "The Sex Police Cometh: Lawyer-Client Sexual Relationships" (1993) 31 Alta. L.R. 391.

This attitude is typified by the following newspaper clipping:

The British weekly newspaper *The Lawyer* offers advice on "practice management problems".:

Q. I am a 32-year-old assistant solicitor working for a medium-sized general practice, specializing mainly in litigation. Last month I had an appointment with an established client, an attractive blonde divorcee who had purchased a defective vacuum cleaner from a local shopkeeper, who had refused to replace it or refund her money. As I took down the details I could not help noticing that her dress was extremely low-cut and she kept giving me long lingering looks. Our eyes met and within seconds we were making passionate love on my desk. I have met her on several subsequent occasions, when the same thing happened. I am married with three children. What should I do?

A. Your client should be able to obtain redress under s. 13 or 14 of the Sale of Goods Act 1979, provided it can be established that the goods were not of merchantable quality or fit for the purpose for which they were sold. Legal Aid will probably not be available owing to the small amount of the claim.²

In both Canadian and American jurisdictions, the number of complaints of this type lodged with provincial Law Societies and American State Bar Associations is relatively small,³ however the number has been increasing. This has been interpreted to signify that there are many unreported cases⁴. In any event, the number of complaints lodged is a poor measure of the problem, as many victims are reticent in filing complaints. It is well-documented that sexual misconduct by those in a position of trust and power often causes the victims to feel a sense of betrayal and an inability to trust others. If a client feels that the trust placed in the lawyer-client relationship has been breached, the client may be wary of trusting other lawyers.

In addition, the client may be wary of lodging a complaint with a provincial Law Society because of the perception that nothing will come of the proceedings.⁵ While, in Alberta,

²"No Sex Please, We're Lawyers" *The Lawyers' Weekly* (23 September 1988) 20.

³L.M. Jorgensen and P.K. Sutherland, "Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact" (1992), 45 *Ark. L.R.* 459 at 463.

⁴D. Filipovic, *supra*.

⁵L.M. Jorgensen and P.K. Sutherland, *supra*, at 467.

disciplinary hearings before the Discipline Committee of the Law Society of Alberta were recently made open to the public, few cases garner public attention. In addition, there is a general public perception that the legal community is relatively insular and that its members "look out for their own".⁶

Indeed, there is evidence that tends to suggest that Law Societies and Bar Associations do treat cases of lawyer-client sexual relations somewhat leniently. Matthew Certosimo, in his article entitled "A Conflict is a Conflict is a Conflict: Fiduciary Duty and Lawyer - Client Sexual Relations"⁷ discusses a Nova Scotia disciplinary hearing entitled *Re MacDonald*⁸ in which a client approached MacDonald in a divorce matter. The client revealed that she was emotionally vulnerable. Nevertheless, MacDonald pursued the client sexually and became involved in a brief relationship. The Committee found that as a consequence of the grievance, the complainant suffered continuing distress that had impacted upon matters of emotional and sexual intimacy between herself and other men. MacDonald was given a reprimand.

While Canadian disciplinary cases are difficult to obtain, a number of U.S. examples reveal similar leniency. Filipovic⁹ reviews a U.S. example of some notoriety. In the first *In re Wood*,¹⁰ Mr. Wood demanded and received nude pictures of his female client and her daughter in lieu of payment. In addition, Mr. Wood had sex with the mother. In handing down a one-year

⁶S.M. Grant, "Sex, Lies and Legal Ethics: Reflections on the Sources of Our Virtue" (1990) 24 Gazette 103 at 106.

⁷M. Certosimo, "A Conflict is a Conflict is a Conflict: Fiduciary Duty and Lawyer-Client Sexual Relations" (1993) 16 Dalhousie L.J. 448.

⁸*Re MacDonald*, (June 19, 1991), Nova Scotia Barristers' Society as quoted in Certosimo, *supra*.

⁹*supra*, note 1.

¹⁰358 N.E.2d 128 (1976) (Ind. S.C.), as quoted in Filipovic, *supra*.

suspension, the Court declined to establish guidelines, but asserted that it had no choice but to impose some penalty given the mischief that was the subject of the complaint.

In 1986, *ten years* later, Mr. Wood was disbarred after having demanded nude pictures and oral sex from different clients - this time, an aunt and niece who were also in financial difficulty.¹¹ The Court relied on four separate sections of the Professional Code provisions, as no express rule prohibiting lawyer-client sexual relations had then been adopted. One is left to speculate on the number of unreported offenses which occurred in the interim. Perhaps, if an explicit rule were in place these unreported incidents would not have occurred, and the concomitant erosion in the repute of the profession could have been avoided.

A review of several American disciplinary proceedings involving cases ranging from sexual assault to coercion followed by blackmail on the offending lawyer revealed penalties of at the most severe, a public reprimand, to a deferred sentence and probation at the least severe.¹²

It appears evident that Law Societies in both the United States and Canada tend to favour only nominal sanctions. This appears to be a step forward from earlier cases in which disciplinary committees concerned themselves mainly with whether the lawyer had breached a statute. Later cases focus upon harm to the administration of justice and the suitability of the individual to practice law. More recently, disciplinary committees have begun to focus on the harm inflicted on the client victim of the sexual misconduct.

Unfortunately, the absence of an express rule prohibiting lawyer-client sexual relations has resulted in a patchwork of reasoning with committees being forced to rationalize their

¹¹*In re Wood*, 489 N.E.2d 1189 (1986) (Ind. S.C.) as quoted in Filipovic, *supra*.

¹²L. Dubin, "Sex and the Divorce Lawyer: Is the Client Off Limits?" (1987-88) 1 *Geo. J.L.E.* 585.

decisions based on a broad and liberal interpretation being given to various provisions in the different professional codes across both countries.

This communicates a number of incorrect messages to the profession and public.¹³ Such casual treatment of complaints trivializes and demonstrates lack of respect both for the victims and the profession. It discourages future complaints. In addition, it indicates a lack of understanding on the part of discipline committees of the potential harm that lawyer-client sexual relationships can cause the parties, the administration of justice and the profession.

Further, the lack of meaningful sanction neither promotes ethical conduct by lawyers nor fosters public respect. The present reliance by disciplinary committees on the implicit inclusion of lawyer-client sexual in other provisions of the codes of conduct has been criticized on the ground that despite committees' dawning recognition of the harms suffered by complainants, the conduct is not yet considered unethical *per se*.

In both Canada and the United States, the legal profession is self-regulated, and the Courts have been reluctant to usurp the role of the Law Society. However, the Courts have the duty to safeguard society's legal institutions and protect the administration of justice from disrepute. In recent years, victims of sexual harassment and sexual misconduct have become more willing to file formal complaints and seek redress. These developments have occurred in an era where the population has become far more sophisticated and, as a result, less deferential to lawyers. Some have even begun to question traditional self-regulation. As these trends continue, there will be increasing pressure on legislators and courts to take steps to correct the perceived failings of the self-governing bodies. If the self-governing professions, including the legal

¹³D. Filipovic, *supra*, at 400.

profession, continue to ignore issues which, in the minds of the public, bear on the integrity of their institutions, they run the risk of losing the privilege of self-governance.

III. THE LAWYER AS FIDUCIARY

Both Canadian and American courts have recognized the problems that can arise from lawyer-client sexual relations. Canadian courts have generally taken a considerably more "hands off" approach, conscious of the danger in usurping the traditional role of the Law Societies as disciplinarian.¹⁴ The result, arguably, has been a void in the disciplinary process which ought rightly to be filled by Law Societies. If this continues, the Canadian courts may become more willing to follow the path taken by their American counterparts and take a more active role in the discipline of the legal profession.

Where the Courts have imposed civil liability on lawyers in the lawyer-client sexual relationship, they have done so on the basis of a breach of the lawyer's fiduciary obligations to the client. The framework of an action for breach of fiduciary obligation provides a strong basis for understanding the potential harms that can arise from lawyer-client sexual relationships.

The rule against breach of fiduciary duty was originally conceived in Equity in relation to trustees. The rule was meant to prevent those who had undertaken a particular task outside the scope of agency or contract law from avoiding the performance of their duties. Simply stated, the equitable principle provides that one who undertakes a task on behalf of another must act exclusively for the benefit of that other. A fiduciary cannot permit his or her own interests to come into conflict with the interests of the beneficiary of the relationship.

¹⁴D. Filipovic, *supra*, at 403.

In the fiduciary relationship between lawyer and client, the lawyer is forbidden from using confidential information received in the course of the relationship for the benefit of himself or a third party. In addition, the lawyer is forbidden from using confidential information to the detriment of the beneficiary. The courts have taken a proscriptive approach in enforcing the rule, and have taken the stance that even where the benefit obtained could not have been earned for the beneficiary, the fiduciary is not permitted to retain the benefit and would be liable for breach of duty.

In the leading case of *Frame v. Smith*,¹⁵ the Supreme Court of Canada, per Wilson J., stated that

Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

In *LAC Minerals Ltd. v. International Corona*, Mr. Justice Sopinka of the Supreme Court of Canada referred to these characteristics with approval. The Court stated that in establishing a breach of fiduciary duty, it must be determined

1. That the information conveyed was confidential;
2. That the information conveyed was intended by the beneficiary to be maintained

¹⁵[1987] 2 S.C.R. 99 at 136.

in confidence; and

3. That the information was misused by the party to whom it was communicated.¹⁶

Where the fiduciary obtains a benefit, the onus shifts to him to prove that there was full and fair disclosure to the client, as well as informed consent to the fiduciary's receipt of the benefit.

The concept of fiduciary duty was developed in the context of trusts and commercial transactions. Its application to personal relationship is not universally accepted.¹⁷ Indeed, it is evident that discipline committees tend to treat conflicts of interest and duty arising out of commercial transactions and those arising from personal relations disparately. Certosimo illustrates this by contrasting the *MacDonald* disciplinary hearing with the *Re Goldberg*¹⁸.

In *Re Goldberg*, lawyer Goldberg lent money to and became active in the operations of a client firm. The disciplinary committee adopted the breach of fiduciary duty analysis and found that Mr. Goldberg jeopardized his independence and integrity by becoming both investor and lawyer to the client company without insisting that the company have independent legal advice and become fully informed of any actual or potential conflicts of interest. The committee reprimanded Mr. Goldberg and ordered him to pay costs.¹⁹

In *Re MacDonald*, the disciplinary committee also adopted a breach of fiduciary duty

¹⁶*LAC Minerals Ltd. v. International Corona* (1989), 61 D.L.R. (4th) 14 at 63 (S.C.C.)

¹⁷M. Certosimo, *supra*, at 456.

¹⁸(1991), Nova Scotia Barristers' Society, as quoted in M. Certosimo, *supra*.

¹⁹M. Certosimo, *supra*, at 461.

analysis and found Mr. MacDonald liable on the basis that he failed to consider his client's best interests, given her vulnerable emotional state. The committee's focus on the client's particular fragility seems to suggest that this was a pivotal consideration in its finding, as the solicitor-client relationship was not apparently affected.

In *Re Goldberg*, however, Mr. Goldberg's failure to insist upon the client's obtaining independent legal advice was found culpable *per se*. There appears to be no convincing reason why this different requirement should exist in cases of breach of fiduciary duty in personal as opposed to commercial contexts.

As noted, the rules regarding breach of fiduciary duty are founded on the possibility that if the interests of the fiduciary and beneficiary conflict, either potentially or in actuality, the interests of the beneficiary may be compromised. In the same way that a beneficiary's interests may be compromised in commercial conflicts of interest, they may likewise be harmed in personal conflicts of interest. The most obvious situation is where the lawyer, armed with the knowledge that a client is emotionally distraught and vulnerable, pursues her sexually. While the relationship may provide benefits to the lawyer in a number of forms, it may prove singularly detrimental to the client in that she may feel that her trust has been betrayed. The client's emotional condition may also worsen due to the strain of carrying on an illicit affair.

In addition, Professor Dubin points out that a number of ethical obligations imposed on the lawyer by his Code of Professional Conduct for the benefit of the client may be breached.²⁰ These rules are also contained within the new Alberta Code of Professional Conduct. Dubin illustrates how a lawyer who becomes involved with a divorce client might procrastinate getting

²⁰L. Dubin, *supra*, at 594.

through the divorce proceedings in order to prolong the relationship with the client. Here, the lawyer's personal interest in sustaining the relationship subverts his professional duty to act diligently and efficiently. This may conflict with the client's best interests in completing the divorce proceedings expeditiously.

Should the relationship become a disappointment for the lawyer, he may choose to avoid contacting the client in the hope that she will find alternative counsel. In this scenario, the lawyer's ethical duty to properly advise the client, and to perform legal services conscientiously, diligently and competently have been subverted.

If any possibility existed prior to the relationship of a reconciliation between the divorcing parties, and the client's estranged husband becomes aware of the relationship, not only is that possibility potentially destroyed, but where the divorce was uncontested, the husband may now wish to reduce his offer of property distribution and demand custody of any children.

It is also possible that a court may deem communications between the lawyer and client as not being within the scope of solicitor-client privilege, as the lawyer was not acting in his professional capacity when the disclosures were made. As a result, he may be required to appear as a witness in the divorce proceedings.

Dubin also posits that an affair between lawyer and client may have unpredictable effects on both the nature of the lawyer's behaviour and on the outcome of the proceedings. He cites the case of *In re Frick*²¹, where a respected lawyer became involved with a client and left his wife to live with her. During the relationship, he learned that she was romantically involved with other men on a regular basis. The lawyer began to harass the client, writing threatening letters and

²¹L. Dubin, *supra*, at 612.

vandalizing her property.

In *In re Lehr*²², the trial judge was apparently troubled that the client had moved in with her lawyer. As a result, he awarded custody of the children in the divorce matter to the client's former husband despite clear evidence showing the father to be a substance abuser who spent little time with the children.

While the majority of cases and scenarios in the literature are drawn from divorce cases, the arguments are equally applicable in all areas of the law. Personal injury clients often feel insecure and isolated, and a large number of clients feel overwhelmed at the complexities in the law, thus they may feel particularly reliant upon the lawyer. In these cases, the lawyer may take on an almost magical image in the mind of the client, due to the lawyer's ability to guide the client around the legal hurdles and provide solutions to their problems.

In addition, clients may be emotionally vulnerable for reasons unrelated to the legal matter consulted upon. Even in these situations, it is submitted that the lawyer is subject to ethical obligations not to use any information communicated to him in confidence for his own benefit or to the detriment, emotional or otherwise, of the client.

When one considers the harm which may result from these relationships and the relative frequency of their occurrence, it would appear that an express prohibitive rule with specific qualifications is warranted.

The Courts in Canada appear to favour an analysis which draws no distinction between conflicts of interest and duty arising from commercial relationships and those arising from

²²583 P.2d 1157 (1978) (Oregon C.A.) as quoted in L. Dubin, *supra*.

personal relationships. In *Szarfer v. Chodos*²³, Mr. Szarfer approached Mr. Chodos in respect of a wrongful dismissal action. As a result of the wrongful dismissal, Mr. Szarfer had been unable to find full-time employment and had enrolled in a re-training program. This forced Ms. Szarfer to shoulder a larger proportion of the household expenses, causing marital difficulties. During discussions with the client, Mr. Szarfer, it also was revealed to Mr. Chodos that Mr. Szarfer was impotent and that this was adding strain to the union. Ms. Szarfer was called upon to prepare legal documents from time to time by Mr. Chodos, and was familiar to him. Shortly after obtaining this information, Mr. Chodos initiated an affair with Ms. Szarfer. When the affair was discovered by Mr. Szarfer, he suffered a severe emotional disorder. On reconciliation with his wife, he brought an action for breach of fiduciary duty against Mr. Chodos.

The trial court found that Mr. Chodos had received confidential information from his client and used it to his client's detriment. Further, the presumption of misconduct was not rebutted. In the result, the Court awarded Mr. Szarfer over \$43,000 in general and special damages.

On appeal to the Ontario Court of Appeal, in a judgment of the unanimous Court (Morden, Cory and Krever JJ.A. presiding) affirmed the reasoning of the trial judge and added that

There is no reason in principle why the loss has to be of a commercial or business nature.²⁴

In *Deiwick v. Frid*²⁵, a parish minister acted as a marriage counsellor to a married couple.

²³(1986), 27 D.L.R. (4th) 388 (Ont. H.C.), aff'd (1988), 54 D.L.R. (4th) 383 (Ont. C.A.).

²⁴*Szarfer v. Chodos* (1988), 54 D.L.R. (4th) 383 at 383 (Ont.C.A.).

²⁵(Oct. 21, 1991), O.J. No. 1803-1129-009A (Ont. Gen. Div.).

The counselling proved unsuccessful and the couple separated. Within two weeks of the separation, Mr. Frid and Ms. Deiwick became involved in a sexual relationship. The affair lasted approximately four years. Mr. Frid promised Ms. Deiwick on numerous occasions that he would leave his wife and the church, however it became apparent that this would never happen. As a result, Ms. Deiwick left the relationship and brought an action for breach of fiduciary duty causing emotional distress and mental illness.

The Court adopted a traditional fiduciary duty analysis, concerning itself more with how the fiduciary, Mr. Frid misused confidential information and exploited his position of trust for his benefit in fostering a sexual relationship with Ms. Deiwick. The Court held that the fiduciary obligations survived the counselling relationship, as do the fiduciary obligations existing between corporate directors and their companies, and lawyers and clients after their retainers have been terminated.

IV. FIDUCIARY DUTIES IN THE 1995 ALBERTA CODE OF PROFESSIONAL CONDUCT

The 1995 Alberta Code of Professional Conduct²⁶ ("Alberta Code") contains a number of provisions relevant to the issue of breach of fiduciary duty in both the contexts of commercial and personal relationships. The Code's Preface states that two fundamental principles underlie the Code and are implicit throughout its provisions. The first is that a lawyer is expected to establish and maintain a reputation for integrity. The second is that a lawyer's conduct should be

²⁶ Alberta Code of Professional Conduct, Law Society of Alberta, 1995.

above reproach.²⁷ While personal behaviour is unlikely to be disciplined unless it is dishonourable or demonstrates an unsuitability for the practice of law, these broad statements would indicate that conduct such as that described in earlier sections of this paper are unlikely to be viewed in a favourable light by the objective observer.

The Law Society is vested with a broad power to declare any conduct worthy of sanction, whether or not it is related to the lawyer's practice. In assessing conduct, Interpretation, s. 3(a) provides that the Law Society's primary concern will be conduct which reflects poorly on the practice of law or calls into question the suitability of an individual to practice law. Assessment will be based on all facts and circumstances as they existed at the time of conduct. In addition, Chapter 3, Rule 1 provides that "A lawyer must refrain from personal or professional conduct that brings discredit to the profession. The Commentary at p.22 underlines that the lawyer's position in society is quasi-official, therefore the lawyer's professional behaviour will attract a higher standard. The lawyer has an obligation to avoid even the appearance of impropriety. While the Commentary provides some examples of dishonourable conduct, sexual relationships with clients are not mentioned.

These statements of high ideal are essential to impress upon the minds of the membership in the Law Society the importance accorded to them by the public, and to remind them that they are under closer scrutiny than other members of the public. These rules are designed to encourage the highest standards of conduct from the membership, and are successful in the vast majority of cases. However, because of the generality of their terms, the minority of opportunistic lawyers cannot be relied upon to conduct themselves in accordance with the same

²⁷Alberta Code, *supra*, at iii.

standards. Instead, they will attempt to manipulate the generalities as somehow excluding their questionable conduct.

Chapters 6 and 7 deal with the essence of fiduciary obligation, namely conflicts of interest and confidentiality, respectively. These two chapters work in tandem for purposes of finding rules within the Alberta Code which apply to conflict of interest where the conflict is of a personal nature. The Statement of Principle²⁸ for Chapter 6 states that a lawyer's judgement and fidelity to the client's interests must be free from compromising influences. The Commentary for Rule 3 at page 59 states that the lawyer's duty not to use confidential information to the disadvantage of a client or former client continues indefinitely. The Commentary goes on to permit that the passage of time will generally mitigate the effect of a lawyer's possession of particular confidential information and may eventually permit the lawyer to act against a former client where the information becomes outdated or irrelevant and is no longer prejudicial. In the context of intimate relations with clients, this may be interpreted to suggest that a "cooling off" period is required where the lawyer wishes to pursue a client sexually after the representation has ended.

Rule 6(c) of Chapter 6 requires the lawyer acting in a situation where there may be a reasonable apprehension of impropriety, to disclose the relationship to the client.

Rules 7 and 8 may be considered the core rules in the present context. Rule 7 provides that a lawyer must not act where there is a conflict or potential conflict between lawyer and client unless the client consents and it is in the client's best interests that the lawyer so act. Rule 8 prevents the lawyer from acting personally in a matter when the lawyer's objectivity is impaired

²⁸ Alberta Code, Chapter 6, *supra*, at 49.

to the extent that the lawyer would be unable to properly and competently carry out the representation. Consent in the Code means voluntary consent following full and fair disclosure. The difficulty in applying these rules in the present context is that the lawyer may not be in a position to assess the best interests of the client or determine if a conflict even exists if he is pursuing her sexually. With regard to Rule 8, there arises the danger that the lawyer may not realize the extent to which his judgement has become impaired.

Rule 6 of Chapter 7 provides that a lawyer who possesses confidential information of a client or former client must not use such information for the lawyer's personal benefit or the benefit of a third party, and must not continue to act for another client if the lawyer would have a duty to disclose such information to that client. These are the basic rules of the duty of utmost good faith to the fiduciary. As has been noted, disciplinary committees have been reluctant to extend their application beyond the context of commercial transactions to the personal realm.

Chapter 2, Rule 2 provides that a lawyer must not act or continue to act in any matter in which it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services. Rule 5 of Chapter 2 provides that a lawyer must refrain from conduct that impairs the lawyer's capacity or motivation to provide competent services. According to the General Commentary for Chapter 2, competence involves the intellectual and emotional capacity to perform competently. The Commentary for Rule 2 suggests that the circumstances potentially preventing a lawyer from rendering competent services may be of a personal nature, including

personal feelings about the client that could reasonably create an impairment of professional judgement.

The rules in Chapter 2 are those which come the closest to addressing the issue of lawyer-client sexual involvement. Where the lawyer's continued employment would violate the lawyer's obligations with respect to conflict of interest, Rule 2(d) of Chapter 14 requires the lawyer to withdraw from the file.

V. ARE THE RULES SUFFICIENT?

While the rules are worded sufficiently broadly so as to permit them to include the regulation of lawyer-client sexual relations, a number of drawbacks exist in the absence of an express rule proscribing such behaviour. Firstly, the broad and necessarily vague wording of the Code permits lawyers to advance technical arguments and assert questionable defences. For example, a lawyer may assert the defence that he did not intend to conduct himself in a manner that would violate the code. Yet another may be that the client waived the lawyer's obligation to represent the client's best interests by willingly participating in the affair. At the worst, the lawyer may assert that since there is no express prohibition in the rules, discipline would be inappropriate without some advance notice that the involvement was unethical.²⁹

Second, the absence of an express rule regarding the conduct in question, the conduct complained of must be measured along a sliding scale, since it is a matter of degree. However, the question then becomes where along the sliding scale does the particular conduct fall? The answer to the question is largely arbitrary, as the strictness of the disciplinary committee's

²⁹D. Filipovic, *supra*, at 399.

sanction may depend to a degree on the members' association with the lawyer to be disciplined, its attitude toward the issue of lawyer-client sexual involvement, and its understanding of the seriousness of the harm that may befall the client as a result. The absence of a clear rule deprives the committee of an objective benchmark position from which exceptions can be made where warranted.³⁰

To rebut these defences, a disciplinary committee is called upon to impose a construction which the words of the Code will bear under strain, if at all satisfactorily.

Thirdly, the absence of an express rule fails to recognize the conduct in question as *per se* potentially giving rise to real conflicts between the lawyer's personal interests and the personal, legal and financial interests of the client. Instead, the question shifts to the harms suffered to the frailties of the complainant, and whether the lawyer took steps to consider the interests of the client. It is submitted that the lawyer has an ethical obligation to consider the client's best interests in all dealings with her, personal or otherwise.

Fourthly, undue attention is shifted to the credibility of the client, and away from an inquiry into questionable conduct of the lawyer. This latter approach is more in congruity with the analysis common in fiduciary obligations. It is well established that the fiduciary's misconduct is actionable without evidence of harm to the beneficiary.

Fifthly, attention is again drawn away from the questionable conduct to the applicability of the rules sought to be applied.³¹ Dubin posits that this is akin to inquiring whether the misappropriation of trust funds by the lawyer violates other sections of the Code. This further

³⁰D. Filipovic, *supra*, at 399.

³¹L. Dubin, *supra*, at 618.

allows the use of technical arguments and defences.

Lastly, the absence of a clear rule fails to advance one of the purposes of a Code of Professional Conduct, namely to nurture good character and promote conduct of high standards.

VI. CONCLUSION

The issue of lawyer-client sexual relations is one that is growing. It is an area which is gaining public attention.³² The public is less deferential to lawyers than it has been in the past and is more willing to level criticism. Pressure has been mounting on the self-governing bodies to make a response to an area of such incongruity with other professions. To date, several jurisdictions in Canada and the United States have implemented express rules. The first jurisdictions were California and Nova Scotia. These rules prohibit the lawyer from engaging in sexual relations with clients who are emotionally vulnerable. In both, exceptions are made for pre-existing, stable relationships.

It is submitted that a similar approach should be taken in Alberta. In this way, the mischiefs noted can be addressed, while the other rules in the Code cover the nuances.

As the issue gains notoriety, if the Law Society fails to act, the Courts and legislature may be forced to take action. The absence of a rule is becoming less defensible given the increasing awareness of sexual misconduct by persons in professions enjoying the public trust. Throughout its history, the legal Profession in Canada has enjoyed the privilege of self-government. A precedent such as the actions which may result in the loss of this tradition forever.

³²L.M. Jorgensen and P.K. Sutherland, *supra*, at 499.

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