THE BED & THE BAR: REGULATING ATTORNEY-CLIENT SEXUAL RELATIONS IN THE PHILIPPINES*

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ABSTRACT

Attorney-client sexual relations are improper because they diminish professionalism and invite lawyers to abuse their position of power. Foreign jurisdictions ban attorney-client sexual relations through express or implied rules. In contrast, there is a complete absence of any ban or regulation to govern such relations for lawyers who practice in the Philippines. This paper proposes a rule that bans lawyers and clients from engaging in sexual relations. A *per se* ban would be a valid exercise of police power and would not violate the Due Process Clause and the Equal Protection Clause of the Constitution. The IBP and the Supreme Court should revise the ethical rules on professional conduct of members of the bar, taking into account societal changes for the past quarter century since the Code of Professional Responsibility was adopted. The new rules must contain specific provisions against conduct involving sexual relations, to be included among the acts that have been held by the Supreme Court as improper, immoral, or otherwise unbecoming of a member of the bar. In balancing the public and private interests in an attorney-client relationship, the lawyer's interests as a private individual must ultimately yield to the public interest impressed in the legal profession.

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"Doctors can't do it. Psychotherapists can't do it. Ministers can't do it. Chiropractors and social workers can't do it. But lawyers can."
—Malinda L. Seymore[1]

"A lawyer, like any other person, may in his private life be a cad or a king, an inconstant lover or a rock of stability, gracious or a grouch, but in his professional life he may not overstep the bounds and abuse his position of trust as counsel, confidante, champion and fiduciary."
—Justice Edward J. Greenfield, *in* Sanders v. Rosen[2]

I. INTRODUCTION

For millennia, medical professionals have sworn to abide by the Hippocratic Oath, a portion of which states: "In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction and especially from the pleasures of love with women or with men."[3] Sexual relations between physicians and their patients have long been viewed as absolutely unacceptable, whether such relationship be before, during, or after the course of treatment.[4]

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[1] Malinda L. Seymore, *Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 YALE J.L. & FEMINISM 175 (2003). (Citations omitted.)

[2] 605 N.Y.S.2d 805, 808 (Sup. Ct. N.Y. County 1993), *cited in* Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209 (1996).

[3] *See* Seymore, *supra* note 1, at 177 n.19, *citing* Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 215 n.25 (1996), *quoting* CODES OF MEDICAL ETHICS, OATHS, AND PRAYERS: AN ANTHOLOGY 19 (Lewis P. Bird & James Barlow eds., 1989).

[4] Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 FORDHAM L. REV. 5, 52 (1993).

At least in the United States, psychotherapists, [5] ministers, [6] chiropractors,[7] and social workers[8] are prohibited from engaging in sexual relations with persons whom they serve as patients or clients. This prohibition may be deduced as founded on the broad principle of professionalism—that these licensed persons must observe the "skill, good judgment, and polite behavior that is expected from a person who is trained to do a job well."[9]

Lawyers are no different from these professions. Lawyers are in a position of power over their clients. One reason for this is that lawyers generally undergo a specific educational track and are usually required to pass a licensure exam in order to practice. The general public relies on lawyers for any legal matter that they wish to be handled in the same way as the public relies on physicians for matters relating to health or wellness. In the same vein, doctors are in a position of power over their patients and also undergo a specific educational track before taking a licensure exam. Lawyers and doctors are both able to directly affect one's life, liberty, and property and are both in professions impressed with public interest. It is thus proper to explore the propriety of prohibiting lawyers from engaging in sexual relations with clients, just as doctors, ministers, and the other mentioned professions are subjected to a prohibition.

This paper proposes to adopt a rule similar to that provided in the American Bar Association's Model Rules of Professional Conduct to prohibit lawyers and clients from engaging in sexual relations, subject to exceptions to be discussed herein. The rule will prevent undue exploitation and possible conflict of interest between the lawyer and the client. It will also serve to elevate the standards of regulation over the legal profession, and may act as a catalyst for further exploration on future amendments or revisions to the current Code of Professional Responsibility.

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[5] Seymore, *supra* note 1, at 175 n.2, *citing* PRINCIPLES OF MED. ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY, § 2(1) (1998); ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT, §§ 4.05-4.07 (1992); CODE OF ETHICS AND STANDARDS OF PRACTICE, §§ A.7, F.1(c) (1997).

[6] *Id.* n.3 *citing Sexual Ethics Within Ministerial Relationships*, *in* THE UNITED METHODIST BOOK OF RESOLUTIONS 135-36 (2000); Resolution 1991-B052, General Convention, GEN. CONVENTION OF THE EPISCOPAL CHURCH, Phoenix 783 (1992); Janice D. Villiers, *Clergy Malpractice Revisited: Liability For Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 3 (1996).

[7] *Id* n.4 *citing* CODE OF ETHICS: SEXUAL INTIMACIES WITH A PATIENT (1993).

[8] *Id.* n.5 *citing* CODE OF ETHICS: RELATIONSHIPS WITH CLIENTS (1997).

[9] *Professionalism*, MERRIAM-WEBSTER *available at* http://www.merriam-webster.com/dictionary/professionalism (last visited Jan. 13, 2016).

Part I discusses current regulations over sexual relationships involving lawyers and clients. It points out the lack of an express or implied rule in the Philippines that prohibits such sexual relationship. Lawyers in the Philippines would only be punished for sex-related acts if these would already constitute criminal acts or would already be considered an attack on the institution of marriage. This is in stark contrast with rules in other countries, especially the rules in the US, which provide for either an express or an implied prohibition against sexual relations, although not all of them are constructed the same way.

Part II explores the constitutionality and viability of a prohibition against lawyers and clients from engaging in sexual relations. It will show that a *per se* ban will be able to withstand both the rational basis test and strict scrutiny and will serve to fill the gaps in the current professional rules governing lawyers' conduct.

Finally, Part III will recommend concrete proposals to relevant institutions that govern the legal profession. It will also conclude that the lawyer's interests as a private person would have to yield to the public interest imbued in the legal profession.

II. REGULATION OF ATTORNEY-CLIENT SEXUAL RELATIONS

The matter of lawyer-client sexual relations is treated differently in different jurisdictions. One might surmise that a specific community's treatment on the matter would correlate highly with how it views sexual relations, considering the community's morals, religious beliefs, and behavioral norms. Laws and rules, after all, are, theoretically, reflections of a society's cultural and moral norms.[10] The subject of sexual relations, however, is curious if one considers American society, supposedly more liberal and modern, and juxtaposes it with the Philippines—a country deeply influenced by religious norms and beliefs. As will be shown and discussed further, the Philippines, unlike other jurisdictions such as the US and the United Kingdom, does not provide for any regulation against sexual relations between lawyers and their clients.

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[10] M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 47-51 (7th ed. 2001).

A. In the Philippines

The practice of law in the Philippines has been regarded as a privilege impressed with public interest.

> The practice of law is not a vested right but a privilege; a privilege, moreover, clothed with public interest, because a lawyer owes duties not only to his client, but also to his brethren in the profession, to the courts, and to the nation; and takes part in one of the most important functions of the State, the administration of justice, as an officer of the court.[11]

Philippine lawyers are regulated by the Judiciary, particularly by the Supreme Court.[12] The power to suspend and disbar is provided in Section 27, Rule 138 of the Rules of Court:

> A member of the bar may be disbarred or suspended from his office as attorney by the Supreme Court for any deceit, malpractice, or other gross misconduct in office, gross immoral conduct, or by reason of his conviction of a crime involving moral turpitude, or for any violation of the oath which he is required to take before admission to practice, or for a willful disobedience of any lawful order of a superior court, or for corruptly or willfully appearing as an attorney for a party to a case without authority so to do. The practice of soliciting cases at law for the purpose of gain, either personally or through paid agents or brokers, constitutes malpractice.[13]

There also exists the Integrated Bar of the Philippines (IBP), an organization of all persons admitted into law practice.[14] Through its Commission on Bar Discipline, the IBP has the power to hear disciplinary cases involving lawyers and to recommend the appropriate penalties to the Supreme Court.[15]

There are several bodies of rules that serve as sources of rights and obligations for members of the bar, such as, but not limited to Rule 138, a

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[11] *In re* Integration of the Bar of the Philippines, 49 SCRA 22, Jan. 9, 1973, *citing* Report, Comm'n on Bar Integration 44-49.

[12] CONST. art. VIII, § 5(5). *See also* RULES OF COURT, Rule 139-B.

[13] RULES OF COURT, Rule 138, § 27.

[14] Rule 139-A, § 1.

[15] Rule 139-A, § 12.

section of which has been quoted above, the lawyer's oath[16] and the Code of Professional Responsibility.[17] The Code is an actionable source of rights and obligations for lawyers, clients, the State, and the public in general. It has been used as basis for disciplinary actions against lawyers, which have merited penalties ranging from a simple reprimand to disbarment. Aside from the Code, a violation of the lawyer's oath is also a ground for disciplinary action against a lawyer.[18] Nowhere in these mentioned bodies of rules does the subject of sexual relations appear.

1. Code of Professional Responsibility

The Code of Professional Responsibility contains no canon or rule that deals specifically with sexual relations between lawyers and clients. It does, however, contain rules relating to competent representation,[19] conflicts of interest,[20] propriety,[21] trust and confidence,[22] and actions which reflect on the legal profession as a whole,[23] all of which may relate to engaging in sexual relations with a client. As discussed later in this paper, the foregoing grounds were actually the bases of the American Bar Association in providing for a *per se* ban on attorney-client sexual relations.

While these rules exist to guide the bench and the bar in their professional conduct, the application and construction of these rules by the Supreme Court, the highest disciplining body for lawyers, is quite a different matter.

2. Jurisprudence on Sexual Relations in General

As of this writing, there has been no disciplinary case filed against a lawyer for engaging in sexual relations with a client. Jurisprudence on the matter, as discussed below, is limited only to sexual relations that occur in

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[16] RULES OF COURT, Appendix of Forms, Form 28.

[17] CODE OF PROFESSIONAL RESPONSIBILITY (1988) *See* Jose I. Sabio, *The Lawyer's Oath: Its Significance and Importance*, 50 ATENEO L.J. 285, 288 n.10 (2005).

[18] Endaya v. Oca, A.C. No. 3967, 410 SCRA 244, 251, Sept. 3, 2003, *cited in* Jose I. Sabio, *The Lawyer's Oath: Its Significance and Importance*, 50 ATENEO L.J. 285, 286 (2005). "The lawyer's oath embodies the fundamental principles that guide every member of the legal fraternity. From it springs the lawyer's duties and responsibilities that any infringement thereof can cause his disbarment, suspension or other disciplinary action."

[19] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 18, Rules 18.01-.04.

[20] Canon 15, Rules 15.01, .03-.04.

[21] Canon 19.

[22] Canon 21.

[23] Canon 7.

connection with marital issues, criminal acts, or grossly immoral conduct; engaging in sexual relations *per se* has not been subject of disciplinary proceedings.

As early as 1963, a lawyer was disbarred for abandoning his lawful wife and cohabiting with another woman who bore him a child, thus failing to maintain the highest degree of morality expected and required of a member of the bar.[24] Another lawyer was disbarred for having illicit relations with a woman not his wife and engaging in open cohabitation with another woman who was married to another man.[25] By living an adulterous life, he was found to not have possessed good moral character at the time he applied for admission to the bar.[26]

In 1984, a lawyer was disbarred for failure to maintain the highest degree of morality of a member of the bar when he abandoned his wife and cohabited with another woman who bore him a child.[27] Later in 1989, another lawyer was indefinitely suspended from the practice of law for having maintained an adulterous relationship for about two years with a married woman, not his wife, in full view of the general public, to the humiliation and detriment of his legitimate family which he, rubbing salt on the wound, failed or refused to support.[28]

In an administrative case involving a judge—probably the closest thing the Philippines has to a ruling on attorney-client sexual relations—the Supreme Court meted a fine and a stern warning against the respondent judge for violations of the Code of Judicial Conduct, the Canons of Judicial Ethics, and the rule on official time.[29] One of the charges against the judge was for immorality in having illicit sexual relations with the wife of the complainant doctor. The Court absolved the judge of this charge, stating that the affair began before the complainant and his wife were married and before the respondent judge was appointed as such (i.e. while he was a practicing lawyer). The Court observed that their relationship "might have blossomed from the *attorney-client relationship* between the respondent and [the complainant's wife]."[30] Because the charge was for immorality committed by the respondent as a magistrate, the judge was absolved for insufficiency of

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[24] Toledo v. Toledo, A.C. No. 266, 7 SCRA 757, Apr. 27, 1963.
[25] Royong v. Oblena, A.C. No. 376, 7 SCRA 859, Apr. 30, 1963.
[26] *Id.* at 872.
[27] Obusan v. Obusan, Jr., A.C. No 1392, 128 SCRA 485, Apr. 2, 1984.
[28] Cordova v. Cordova, A.C. No. 3249, 179 SCRA 680, Nov. 29, 1989.
[29] Alfonso v. Juanson, A.M. No. RTJ-92-904, 228 SCRA 239, Dec. 7, 1993.
[30] *Id.* at 251.

evidence to prove that the judge and the complainant's wife continued their relationship after the former's appointment as a judge. This was despite the fact that the relationship continued even after the complainant and his wife tied the knot through the ceremony of marriage. "Her marriage to the complainant did not diminish her love for the respondent, for even after she committed herself to the complainant alone and made a vow of fidelity to him till death at the solemn ceremony of marriage, she still sneaked out her love notes to the respondent." [31] The Court went on to make a pronouncement about illicit sexual intercourse *vis-à-vis* immorality:

> [I]mmorality [...] is not based alone on illicit sexual intercourse. It is settled that immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness; or is willful, flagrant, or shameless conduct showing moral indifference to opinions of respectable members of the community, and as an inconsiderate attitude toward good order and public welfare.[32]

This case leaves many questions unanswered. Had the charge been sexual congress prior to the judge's appointment and during his practice as a regular member of the bar, would he have been found guilty of immorality? If so, would he have been penalized on the ground that such relationship runs afoul of the Code of Professional Responsibility or on the ground that it is a mockery of the social institution of marriage?

In more recent cases, a lawyer was suspended from the practice of law for a year on the ground of disgraceful and immoral conduct by living and having a child with another woman not his wife,[33] and another was suspended from the practice of law for two years for maintaining an illicit relationship with a woman who was not his wife.[34] Another attorney was disbarred for grossly immoral conduct for cohabiting and having a child with another woman who was not his wife, whom the respondent fondly addressed as "Tweetie" in several communications.[35]

In 2010, two lawyers were disbarred on grounds of gross immorality by cohabiting with each other; one of them was a married man while the other was a woman who, according to the court, was "a willing and knowing

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[31] *Id.*

[32] *Id.* at 255-56. (Citation omitted.)

[33] Navarro v. Navarro, A.M. No. O.C.A.-00-01, 339 SCRA 709, Sept. 6, 2000.

[34] Ferancullo v. Ferancullo, A.C. No. 7214, 509 SCRA 1, Nov. 30, 2006.

[35] Guevarra v. Eala, A.C. No. 7136, 529 SCRA 1, Aug. 1, 2007.

full participant in a love triangle whose incidents crossed into the illicit."[36] The following year, a lawyer was suspended from the practice of law for six months on the ground of gross immorality for having an illicit affair with a woman not his wife.[37] The case prospered despite an agreement between the complainant and respondent that the former would not file any legal action against the latter.[38]

In 2012, another lawyer was disbarred for engaging in bigamy *twice*, which the court stated was grossly immoral conduct.[39] The court explained that he exhibited a deplorable lack of that degree of morality required of him as a member of the bar and that he made a mockery of marriage, a sacred institution demanding respect and dignity.[40] In the same year, a lawyer was also disbarred for grossly immoral conduct by having sexual intercourse with a 13-year-old girl who was the daughter of his employee.[41] That the lawyer concerned was a married man also aggravated the charge, meriting his disbarment from the practice of law.[42]

In view of all the foregoing Philippine cases, it can be said that judicial decisions involving sexual relationships involving lawyers contemplate those that constitute either a crime or a transgression against the "inviolable social institution"[43] of marriage. To be sure, this silence does not in any way constitute an implied approval of sexual relations between lawyers and clients. Neither does it follow that this silence is so because these relationships do not actually occur.

B. In the United States

1. ABA Model Rules of Professional Conduct

Lawyer-client sexual relations in the US have been regulated since the 1980s,[44] with the American Bar Association (ABA) starting only in 1992 when it issued a formal opinion on such relationships.[45] In said opinion, the

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[36] Garrido v. Garrido, A.C. No. 6593, 611 SCRA 508, 527, Feb. 4, 2010.
[37] Tiong v. Florendo, A.C. No. 4428, 662 SCRA 1, Dec. 12, 2011.
[38] *Id.* at 3-4, 7.
[39] Villatuya v. Tabalingcos, A.C. No. 6622, 676 SCRA 37, July 10, 2012.
[40] *Id.* at 53.
[41] Ventura v. Samson, A.C. No. 9608, 686 SCRA 430, Nov. 27, 2012.
[42] *Id.* at 438.
[43] FAM. CODE, art. 1.
[44] Seymore, *supra* note 1, at 190.
[45] *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 92-364 (1992).

ABA did not explicitly impose a prohibition but merely stated that "because of the danger of impairment to the lawyer's representation associated with a sexual relationship between lawyer and client, the lawyer would be well advised to refrain from such a relationship."[46] The ABA stated that a sexual relationship may deprive the lawyer of independent judgment, creates risks of a conflict of interest, and may risk unwarranted expectations regarding preservation of confidence and related dangers.[47]

In the same year, the Young Lawyers Division of the ABA adopted a resolution urging that the Model Rules of Professional Conduct be amended to prohibit attorney-client sexual relationships. Their proposed rule read:

> An attorney shall not:
> (A) engage in sexual contact with a client, or
> (B) demand that a client engage in sexual contact with the attorney, or
> (C) attempt to coerce a client into engaging in sexual contact with the attorney, during the course of the attorney-client relationship.
>
> This rule does not apply to ongoing sexual relations which predate the professional relationship.

The ABA's Standing Committee on Ethics and Professional Responsibility responded that it would oppose the proposed rule if submitted before the ABA House of Delegates because it felt that Formal Opinion 92-364 adequately addressed the issue, and that it was unwilling to support a blanket prohibition because in its view, some attorney-client sexual relationships were "perfectly appropriate."[48]

After a decade of proposals and discussions,[49] the American Bar Association (ABA) in 2002 adopted in its Model Rules of Professional Conduct a *per se* prohibition against lawyers engaging in sexual relations with clients, with the narrow exception of sexual relationships predating the commencement of the attorney-client relationship.[50] This adoption by the

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[46] *Id.* at 5.

[47] *Id.* at 3-4.

[48] Seymore, *supra* note 1, at 191, *citing* Heather Wilks, *Sex in the ABA: Impotent Standing Committee or Proverbial Fox?*, 6 MD. J. CONTEMP. LEGAL ISSUES 205 (1995).

[49] *See* Seymore, *supra* note 1, at 190-94 for an exhaustive discussion on the timeline of events.

[50] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8(j) (AM. BAR ASS'N 2002).

ABA was met with much criticism because both proponents and opponents of a specific ban had meritorious arguments on numerous grounds.

i. Proponents of the *Per Se* Prohibition

At the start of the movement in the US to adopt a written rule for attorneys to prohibit sexual relations with clients, Margit Livingston wrote an extensive piece discussing the wisdom behind and the constitutionality of a *per se* ban.[51] Livingston proposed a rule to be adopted by bar associations "prohibiting attorney-client sexual relations during the period of representation[;] [b]y its terms, this proposal excludes situations in which the client is a partnership, corporation, or other entity [and] pre-existing lovers such as spouses or others with an established, on-going intimate relationship before the time of representation." She premised her proposal on the theory that all fiduciary relationships are founded on the premise that fiduciaries (e.g. the lawyer) should not engage in self-dealing, which may detriment their clients.[52] She concludes, thus:

> Attorneys who engage in sexual relations with clients with whom they were previously unacquainted do so largely, if not exclusively, for their own benefit. Most likely, lawyers do not consider whether a sexual affair will benefit their clients; perhaps they assume superficially that it will. But, in many cases, clients will be injured emotionally or financially by the relationship or will suffer some loss of quality in their legal representation.[53]

Similar to Livingston's proposal, and in the same year, Anthony Davis and Judith Grimaldi also proposed a *per se* prohibition[54] in light of the "shortcomings" of rules in place at that time, such as the California rule prohibiting lawyers from demanding or coercing sex from clients.[55] They contended that the latter prohibition does not address the issue of harm done to the client beyond the legal representation.[56] They proposed a prohibition worded as follows:

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[51] Livingston, *supra* note 4.

[52] *Id.* at 47-48.

[53] *Id.* at 63.

[54] Anthony E. Davis & Judith Grimaldi, *Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 57 (1993).

[55] *Id.* at 91.

[56] *Id.*

1. A lawyer shall not, for so long as the attorney-client relationship continues to exist, have sexual contact with a client unless the client is the spouse of the attorney or the sexual relationship predates the initiation of the attorney-client relationship. Even in these provisionally-exempt relationships, the attorney should strictly scrutinize his/her behavior for any conflicts of interest between the attorney's personal interests and the interests of the client, and to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may or will be impaired, or the client harmed by the continuation of the sexual relationship during the course of representation, the attorney should immediately withdraw from the legal representation.

2. A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.

3. For purposes of this rule, "sexual relations" means: (1) Sexual intercourse; or (2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.[57]

In a 1998 work, Abed Awad also argued in favor of a clear-cut rule against attorney-client sexual relationships, pointing out that they violate basic tenets of conflicts of interest, misconduct, and the lawyer's fiduciary duty to his or her client.[58] He also argued that the clear judicial trend is in the direction of a prohibition, pointing out that "[a]lmost every disciplinary opinion addressing attorney-client sex, and an overwhelming majority of commentators have proffered that a sexual relationship may, probably, potentially, likely, or possibly implicate numerous ethical rules."[59]

More recently (post-ABA *per se* ban), Malinda Seymore, the author quoted in the beginning of this work, provided for a comprehensive feminist critique of the absence of regulation over attorney-client sexual relations.[60] She argued that attorney-client sex, even when it might appear consensual, is

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[57] *Id.* at 99.
[58] Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131 (1998).
[59] *Id.* at 189-91.
[60] Seymore, *supra* note 1.

exploitative and dangerous in view of the fact that all clients—male and female—are dependent on their attorney's expertise.[61] She added that considering that in the "male-female attorney-client relationship[,] the exploitation of that dependence becomes the expropriation of sexuality[,] the [present] rules fail to address this particular form of exploitation which disproportionately affects the female clients of male attorneys."[62]

ii. Opponents of the *Per Se* Prohibition

Arguments against the prohibition rely heavily on the alleged lack of necessity of providing for a black letter rule. The opponents of the prohibition argue on the side of the private aspect of lawyering—that telling the lawyer with whom he can or cannot have sex with unduly infringes on the lawyer's decisional privacy, and that such regulation constitutes a command on a person's moral choices, a sphere which should not be regulated by law.

Philip Bower and Tanya Stern argued that an absolute ban on sexual relationships, as worded in Rule 1.8(j) of the Model Rules, may be considered as both overbroad and underinclusive at the same time. As regards overbreadth, the authors argued for "a more narrowly tailored rule that only prohibits sexual relationships in pro bono situations and in instances where a lawyer uses coercion or undue influence to initiate a sexual relationship." [63] In the matter of underinclusiveness, they based this conclusion on the Rule's categorical exclusion of prior sexual relationships, its lack of a disclosure requirement for a lawyer who has had a prior relationship with a client, and its lack of a specific definition of "sexual relations."[64] They further argued that the Rule may be a slippery slope, considering that it governs a lawyer's moral and personal choices, rather than his or her profession.[65] In sum, while they recognized the need for established boundaries with respect to lawyer-client sexual relationships, they called on the ABA to "look into state rules and other professions for guidance on a more effective rule."[66]

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[61] *Id.* at 222.

[62] *Id.* at 222-23.

[63] Phillip R. Bower & Tanya E. Stern, *Conflict of Interest?: The Absolute Ban on Lawyer-Client Sexual Relationships Is Not Absolutely Necessary*, 16 GEO. J. LEGAL ETHICS 535, 551 (2002-03).

[64] *Id.*

[65] *Id.*

[66] *Id.*

Craig Feiser, on the other hand, proposed to forego a specific prohibition altogether. Instead, he called for "[b]etter enforcement of existing ethical rules[,]" which, he argued, would render specific rules such as 1.8(j) unnecessary.[67] He pushed for a stronger commitment to overall professionalism, similar to the former ABA Model Code of Professional Responsibility,[68] in order to make dangerous behavior, such as sexual acts with clients, a "goes without saying" kind of behavior.[69] He closes thus:

> [R]ather than looking for new ways to spell out what attorneys can or cannot do (many of which are increasingly obvious), the ABA and state bar associations should be looking for new ways to encourage, perhaps even strong-arm, attorneys into striving for professionalism in every aspect of their career, both for their own benefit and for the benefit of the legal profession itself.[70]

Interestingly, how Craig Feiser suggests bar associations should handle professional rules, even citing the former Model Code, is how the Philippines *tries* to handle its attorneys. In fact, prior to the adoption of the Code of Professional Responsibility, the main body of rules to govern lawyers in their professional conduct is the Canons of Professional Ethics, which was taken verbatim from the ABA Model Code.[71] The Model Code provided, just as the former Canons of Professional Ethics did, and even as the current Code of Professional Responsibility continues to do, "a series of aspirational Canons for the legal profession [...] followed by a series of more specific disciplinary rules."[72]

Perhaps the strongest and most cited work that argues against a prohibition is that of Linda Fitts Mischler.[73] She argued that an outright ban unduly intrudes upon the lawyer's and the client's right to privacy and freedom of intimate association.[74] She posited that *both* consensual sexual and professional relations can co-exist within an attorney-client relationship.[75] She also submitted that the support for the prohibition as

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[67] Craig D. Feiser, *Strange Bedfellows: The Effectiveness of Per Se Bans on Attorney-Client Sexual Relations*, 33 J. LEGAL PROF. 53, 83 (2008-09).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 84.

[71] RUBEN E. AGPALO, LEGAL AND JUDICIAL ETHICS 24-27 (8th ed., 2009).

[72] Feiser, *supra* note 69, at 83 n.213.

[73] Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 Geo. J. Legal Ethics 209 (1996).

[74] *Id.* at 231-35.

[75] *Id.* at 211.

applied to therapeutic or medical relationships is not readily transferable to the attorney-client relationship, on the theory that the purpose, duration, scope of disclosure, and degree of intimacy of the latter relationship is markedly different from those of the former.[76] Instead of an outright ban, Mischler forwards an educational campaign to enlighten both the lawyer and the client.[77] This, in her opinion, is a more lasting and effective solution than an outright ban.[78]

2. State Regulation

The ABA Model Rules are in no way binding upon state bar associations. These are merely suggestive rules that state bar associations are free to adopt, reject, or modify; thus the title "Model Rules."[79] While there is widespread approval of the Model Rules, there are still several states that have not adopted them.[80] Since the merits of the *per se* ban as worded in the ABA Model Rules have been discussed above, it is proper to look into the different rationales used by a number of states in adopting their own rules on attorney-client sexual relations that do not use the ABA Model Rules' wording or adds to it.

To start, Iowa provides for a per se ban and also the exception for pre-existing sexual relations, similar to the ABA Model Rules. It also textually provides for an exception for relationships where the client is the lawyer's spouse. However, its rules also recognize the dangers brought about even by pre-existing relationships:[81]

> Even in these provisionally exempt relationships [i.e. pre-existing sexual relationships and spousal relations], the lawyer should *strictly scrutinize* the lawyer's behavior *for any conflicts of interest* to determine if any harm may result to the client or to the

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[76] *Id.* at 244-50.

[77] *Id.* at 259 *et seq.*

[78] *Id.*

[79] *See* Seymore, *supra* note 1, at 190, *citing* Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 666 (2001).

[80] For a complete list of states and the status of adoption of Rule 1.8(j), see American Bar Association CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 1.8(j) at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8j.authcheckdam.pdf (last modified May 2015).

[81] *See* Seymore, *supra* note 1, at 194 n.132. She also points this out, but reference was made to Iowa's old code. Its new rules lifted the rule on sexual relations from the old code verbatim.

> representation. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.[82]

Thus, in addition to the exception provided by the ABA Model Rules, Iowa further provides an exception to this exception, which provides in mandatory terms that the lawyer should withdraw from the representation if there is a reasonable possibility for impairment or harm to the representation or the client.

Florida's Rules of Professional Conduct also does not adopt the ABA Model Rules on sexual relations. Its prohibition on sexual relations is found in its rules on misconduct, as opposed to the ABA's, which is found under conflict of interest with current clients. Florida's rule states:

> [A lawyer shall not] engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.
>
> If the sexual conduct commenced after the lawyer-client relationship was formed it shall be *presumed that the sexual conduct exploits or adversely affects* the interests of the client or the lawyer-client relationship. A lawyer may rebut this presumption by proving by a preponderance of the evidence that the sexual conduct did not exploit or adversely affect the interests of the client or the lawyer-client relationship.
>
> The prohibition and presumption stated in this rule do not apply to a lawyer in the same firm as another lawyer representing the client if the lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the file concerning the legal representation.[83]

The salient point in the quoted rule is the rebuttable presumption of exploitation of or adverse effect on the client's interest. So while the rule is provided under Florida's rules on misconduct, the ban on sexual relations is still centered on the principle of conflict of interest between the lawyer's and the client's.

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[82] IOWA RULES OF PROF'L CONDUCT, Rule 32:1.8(j) (2015). (Emphasis supplied.)
[83] FL. RULES OF PROF'L CONDUCT, Rule 4-8.4(i) (2006). (Emphasis supplied.)

Quite similar to the Florida rule is the rule in the state of Utah, which provides briefly that "[a] lawyer shall not engage in sexual relations with a client that exploits the client-lawyer relationship."[84] It also provides a clause containing an exception and a presumption: "[E]xcept for a spousal relationship or a sexual relationship that existed at the commencement of the client-lawyer relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative. The presumption is rebuttable."[85]

Interestingly, the District of Columbia (DC) has no provision in its Rules on sexual relations. However, it does have a comment on the matter, which is published together with its rules:

> Because of [the lawyer's] fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest [...] or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.[86]

Maine, on the other hand, categorically refused to provide for a prohibition, as stated in its comments to its rules on professional conduct, because "such a rule seems *unnecessary* to address true disciplinary problems and it threatens to make disciplinary issues out of conduct that we *do not believe should be a matter of attorney discipline.*"[87] At the same time, however, it points out that its lack of a prohibition should not be construed as an approval of sexual relationships between lawyers and clients. It goes on to comment:

> [A] sexual relationship between lawyer and client in such circumstance may involve *unfair exploitation* of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise

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[84] UTAH RULES OF PROF'L CONDUCT, Rule 1.8(j) (2006).

[85] *Id.* at Rule 1.8(j)(2) (2006).

[86] D.C. RULES OF PROF'L CONDUCT, RULE. 1.7, CMT., AT ¶ 37 (2007).

[87] ME. RULES OF PROF'L CONDUCT, RULE 1.7, CMT., AT ¶ 12 (2015). (Emphasis supplied.)

> of *independent professional judgment*. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the *attorney-client evidentiary privilege*, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship.[88]

Effectively, therefore, Maine still *discourages* sexual relationships between lawyers and clients on the grounds of exploitation, professional judgment, and attorney-client privilege. Nowhere do the rules or comments thereto mention, however, that such relationships may lead to a conflict of interest. Maine also comments that "private moral judgment is not an appropriate basis for a rule of discipline."[89] The Task Force (the body that drafted the Maine rules) recognized even without a categorical prohibition, that the Board of Overseers (the disciplining authority) "has, when appropriate, been able to discipline lawyers for inappropriate sexual relationships with clients." [90] Thus, while Maine questions the wisdom and necessity of adopting Rule 1.8(j), it still recognizes that sexual relations, when inappropriate, must be subject to regulation.

Of particular significance is the California Rules of Professional Conduct, which devotes an entire rule to sexual relations between lawyers and clients; a rule which is not under any subcategory and is entirely different in its wording from the ABA Model Rules. The relevant portion of its rule is as follows:

> (A) For purposes of this Rule, the California Rules of Professional Conduct, which devotes an entire rule to sexual relations between lawyers and clients; a rule which is not under any abuse.
>
> (B) A member shall not:
> (1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or
> (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

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[88] Rule 1.7, cmt., at ¶ 12 (2015). (Emphasis supplied.)
[89] Rule. 1.7, cmt., Reporter's note, at ¶ 19-23 (2015).
[90] Rule. 1.7, cmt., Reporter's note, at ¶ 19-23 (2015).

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently[...].

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.[91]

Strikingly similar to the California rule is the rule established by the New York State Bar Association, worded below:

(1) A lawyer shall not:
- (i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;
- (ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm;
- (iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.[92]

An emphasis in the above rule is made as regards matters relating to domestic relations. In the comments on Rule 1.8 of the New York rules, it states that "domestic relations clients are often emotionally vulnerable,"[93] justifying the outright prohibition against lawyers from entering into sexual relations with domestic relations clients during the course of the representation. This outright prohibition applies despite consent by the two parties and even if prejudice to the client is not immediately apparent.[94]

Thus, for California and New York, there is only a *limited* prohibition on attorney-client sexual relations. For both, *quid pro quo* arrangements and coercive sexual relationships are banned, while

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[91] CAL. RULES OF PROF'L CONDUCT, Rule 3-120 (2015).
[92] N.Y. RULES OF PROF'L CONDUCT, Rule 1.8(j) (2014).
[93] Rule 1.8(j), cmt., at ¶ 17 (2014).
[94] Rule 1.8(j), cmt., at ¶ 17 (2014).

relationships between consenting adults are generally allowed even after the commencement of the professional relationship.[95] For California, consensual relationships are prohibited if "such sexual relations cause the member to perform legal services incompetently."[96] For New York, consensual relationships are prohibited if the matter involved in the representation is a domestic relations case, as discussed above.

It can thus be observed that generally, jurisdictions in the US provide for some rule to regulate sexual relations between lawyers and clients, although some are stricter than others. Despite the inconsistencies between how the states approach the issue and how they regulate it, it is important to point out that there is a general recognition of a state interest to protect clients from possible exploitation or conflicts of interest.

C. In Other Jurisdictions

1. In the European Union

The rules applicable to European lawyers are those provided by the Council of Bars and Law Societies of Europe (CCBE)[97] in its Code of Conduct for European Lawyers,[98] which, unlike the ABA Model Rules, is a binding text on all member states. Thus, "all lawyers who are members of the bars of [member] countries [...] have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries."[99]

Similar to the status quo in the Philippines, the CCBE Charter and its Code of Conduct does not provide for a prohibition, *per se* or otherwise, on the lawyer and the client engaging in sexual relations. What the CCBE Charter provides are certain core principles expected of a member of the legal profession, such as independence, confidentiality, avoidance of conflicts of interest, dignity and honor of the legal profession, loyalty to and

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[95] Seymore, *supra* note 1, at 197.

[96] CAL. RULES OF PROF'L CONDUCT, Rule 3-120(B)(3) (2015).

[97] *See* About Us, COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, *available at* http://www.ccbe.eu/index.php?id=375&L=0 (last visited Jan. 12, 2016).

[98] CODE OF CONDUCT FOR EUROPEAN LAWYERS (2007), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf (last visited Jan. 12, 2016).

[99] CCBE, CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS (2008).

fair treatment of the client, competence, respect towards colleagues, respect for the rule of law and the fair administration of justice, and self-regulation of the legal profession.[100] The CCBE Code of Conduct, on the other hand, provides for specific rules on the above principles.

2. In the United Kingdom

In the UK, two rules are applicable for the two distinct groups of members of the legal profession: the barristers[101] and the solicitors.[102] Neither of the rules applicable to barristers nor to solicitors provide for a textual prohibition against sexual relationships. What the rules provide are a clear-cut distinction between personal conflict of interest and conflict of interest between two clients,[103] and a positive duty to act in accordance with the best interests of each client, to provide competent standard of work, and to preserve the client s confidence.[104]

However, in the Solicitors' Code of Conduct of 2007, the Solicitors Regulation Authority provides for an authoritative comment on conflicts of interest:

> The interests envisaged by [the rule on conflict of interests] are not restricted to those of a primarily economic nature only. For example, if you become involved in a sexual relationship with a client you must consider whether this may place your interests in conflict with those of the client or otherwise impair your ability to act in the best interests of the client.[105]

There is thus an express recognition by the SRC—even in the absence of a textual rule—that sexual relationships between lawyers and clients may lead to a conflict of interest. While the comment is worded only

[100] *Id.*

[101] Barristers are governed by the rules provided by the Bar Standards Board. *See* BAR STANDARDS BOARD, available at https://www.barstandardsboard.org.uk (last visited Jan. 12, 2016).

[102] Solicitors are governed by the rules provided by the Solicitors Regulation Authority. *See* SOLICITORS REGULATION AUTHORITY, available at https://www.sra.org.uk/home/home.page (last visited Jan. 12, 2016).

[103] THE BAR STANDARDS BOARD HANDBOOK, rC21.2-.3 (2nd ed., 2015); SRA CODE OF CONDUCT 2011, O(3.2)-(3.3).

[104] *See, generally*, THE BAR STANDARDS BOARD HANDBOOK (2nd ed., 2015); SRA CODE OF CONDUCT 2011.

[105] *See* SOLICITORS CODE OF CONDUCT 2007, Annex, Guidance to rule 3 2007, conflict of interests, at ¶ 49.

in directory and not in mandatory terms, the express recognition by the governing authority for English solicitors may be a source of action against them.

III. PROPOSING A *PER SE* BAN IN THE PHILIPPINES

The status quo in the Philippines as to regulation of attorney-client sexual relationships, as seen from the numerous cases and how the Code of Professional Responsibility is worded, is very limited, if not non-existent. A member of the bar would probably be subjected to discipline for sleeping with a client if at least one of the parties to the relationship is married or if the sexual act constitutes a crime. Our rules and jurisprudence have not made clear any sort of rule as to sexual relations *in general*.[106]

It is submitted that a *per se* ban, as worded in the ABA Model Rules, is proper in the Philippine jurisdiction. The proposal is constitutionally and legally sound and necessary in light of the gaps in the Code of Professional Responsibility. The latter Code, while still being aspirational in nature similar to the old Canons of Professional Ethics, contains specific rules that deal with several positive and negative duties for lawyers. More specificity in the Code would certainly not do any harm, but would serve to help the judiciary in regulating lawyers in their professional conduct. For brevity and emphasis, the *per se* ban provided under the ABA Model Rules is worded as follows: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[107]

Although this rule might seem limited in light of how other states construct their rules, the possibility of adding provisos or further exceptions may also be considered. In addition to the prohibition as worded above, a precise definition of "sexual relations" should also be included. This will address possible loopholes that erring members of the bar might seek as a defense. For this purpose, it is submitted that the definition provided in the California Rules of Professional Conduct[108] should also be adopted in addition to the ABA Model Rule.

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[106] *See* Alfonso v. Juanson, A.M. No. RTJ-92-904, 228 SCRA 239, Dec. 7, 1993.

[107] ABA MODEL CODE OF PROFESSIONAL CONDUCT, Rule 1.8(j).

[108] CAL. RULES OF PROF'L CONDUCT, Rule 3-120 (A) (2015).

Should the above proposals be put into the Code of Professional Responsibility, they should be properly categorized under Canon 15 of the Code,[109] under which the rule on conflict of interest[110] also falls. Thus, Rules 15.04 to 15.08 should be renumbered accordingly to adjust to the inclusion of a new Rule 15.04, which will state:

> A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. For purposes of this Rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

It is also submitted that a written prohibition on sexual relations would make matters clearer to lawyers and clients that engaging in sexual relations brings about many issues on professional responsibility. The presence of a written rule would also dispense with the need for justifying or condemning sexual relations on grounds of conflict of interest, immorality, or impropriety, among others. It would also put the lawyer and the client on a more equal footing. Since the attorney-client relationship is "inherently unequal," the former being more learned in the law as compared to the latter, a written rule would guard the client from possible exploitation and impropriety by the lawyer. The client would only have to read the published rules in order to know that having sex with his or her current attorney-at-law would subject the latter to discipline as a member of the bar.

It must also be noted that the proposed *per se* ban applies not only to heterosexual relationships but covers the entire gamut of sexual relationships, including those between and among lesbian, gay, bisexual, and transgender (LGBT) persons.[111] It is further submitted, in connection with LGBT, that the Supreme Court or the IBP should not construe these relationships as an "aggravating" circumstance in meting out a disciplinary order pursuant to the *per se* ban. Otherwise, such treatment by the Court or

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[109] "A lawyer shall observe candor, fairness and loyalty in all his dealings and transactions with his clients."

[110] CODE OF PROFESSIONAL RESPONSIBILITY, Rule 15.03. "A lawyer shall not represent conflicting interests except by written consent of all concerned given after a full disclosure of the facts."

[111] *See* Maria Janina Ann Bordon, *The Universal Human Rights to Marry and to Found a Family: The Yogyakarta Principles and International Trends Against LGBTQ Discrimination in the Fight For Marriage Equality*, 88 PHIL. L.J. 848 (2014), for a more detailed discussion on LGBT Rights.

the IBP may properly be argued as a violation of the equal protection clause under the Constitution.[112]

A. Constitutional Issues

The Supreme Court in *People v. Marti*[113] ruled that "[i]n the absence of governmental interference, the liberties guaranteed by the Constitution cannot be invoked against the State."[114] This doctrine is known as the state action requirement which finds its roots from issues arising from the Fourteenth Amendment of the US Constitution.[115] A rule that prohibits sexual relationships between lawyers would have to be adopted and approved by the Supreme Court. In no unclear terms can it be said that this would fully satisfy the state action requirement to allow inquiry into constitutional issues. This is in partial contrast with some jurisdictions in the United States, where the state action argument is somewhat weaker in view of the fact that some state bar associations promulgate disciplinary rules with minimal to no state supreme court involvement.[116] State action being established, it is proper to look into possible constitutional questions that may be argued by opponents of a *per se* ban on sexual relationships.

In constitutional questions, certain tests are used which vary depending on the status of the right affected by the governmental act or any such other act that satisfies the state action doctrine. In *Serrano v. Gallant Maritime Services, Inc.*,[117] the Court laid down such tests:

> a) the *deferential or rational basis scrutiny* in which the challenged classification needs only be shown to be rationally related to serving a legitimate state interest; b) the *middle-tier or intermediate scrutiny* in which the government must show that the challenged classification serves an important state interest and that the classification is at least substantially related to serving that interest; and c) *strict judicial scrutiny* in which a legislative classification which impermissibly interferes with the exercise of a fundamental right

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[112] *See* Pacifico A. Agabin, Essay, *Reaction to Justice Vitug's Professorial Chair Lecture "Coping with the Changing Landscape in Civil Law"*, 88 PHIL. L.J. 948, 950 (2014), *citing* Ang Ladlad LGBT Party v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32, Apr. 8, 2010.

[113] G.R. No. 81561, 193 SCRA 57, Jan. 18, 1991.

[114] *Id.* at 64.

[115] *See* Developments in the Law, *State Action and the Public Private Distinction*, 123 HARV. L. REV. 1248, 1255 n.2 (2010).

[116] *See* Livingston, *supra* note 4, at 58 n.346.

[117] G.R. No. 167614, 582 SCRA 254, Mar. 24, 2009.

> or operates to the peculiar disadvantage of a suspect class is presumed unconstitutional, and the burden is upon the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least restrictive means to protect such interest.[118]

An argument that may be used against the *per se* ban is that it violates substantive due process[119] and equal protection of laws.[120] As regards due process, opponents of the rule may aver that the rule is unreasonable or unnecessary as it does not address any legitimate state interest when it deprives the lawyer and the client of liberty. Stated otherwise, the rule is an invalid exercise of police power. Significant to note in this argument is the fact that the *per se* ban not only affects lawyers but also clients, who are private persons that have rights to counsel and to choose a sexual partner.

As regards equal protection, it may be argued that the rule violates the said principle as the classification that the rule creates (i.e. lawyers and clients) is *not germane* to the achievement of legitimate state interests served by law. The *per se* ban is more proper to be argued on equal protection grounds, as the rule clearly finds application only to specific classes of persons, i.e. lawyers and current or prospective clients.[121] For purposes of resolving these issues, courts apply the minimum test of rationality if the rights involved are not fundamental or in the absence of a suspect classification.[122]

The strongest argument on constitutional grounds that may be averred against the *per se* ban is that it constitutes an undue infringement on the lawyer's and client's right to privacy.[123] In the 1968 case of *Morfe v. Mutuc*,[124] the Supreme Court adopted the ruling in the US case of *Griswold v. Connecticut*[125] that there exists a constitutional right to privacy.[126] The later

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[118] *Id.* at 277-78. (Emphasis supplied; citations omitted.)

[119] CONST. art. III, § 1. "No person shall be deprived of life, liberty, or property without due process of law[...]."

[120] CONST. art. III, § 1. "[...] nor shall any person be denied the equal protection of the laws."

[121] *See* Livingston, *supra* note 4, at 57.

[122] Biraogo v. The Philippine Truth Commission of 2010, G.R. No. 192935, 667 SCRA 78, 357-58, Dec. 7, 2010. (Emphasis in the original; citations omitted.)

[123] *See* Bower & Stern, *supra* note 65; Feiser, *supra* note 69. This is the strongest argument against the *per se* ban because strict judicial scrutiny would have to be applied in settling the question of the rule's validity.

[124] G.R. No. 20387, 22 SCRA 424, Jan. 31, 1968.

[125] 381 U. S. 479, 484 (1965).

case of *Ople v. Torres*[127] provided a more insightful discussion on the right to privacy. Independent of the constitutional right to liberty, there are several zones of privacy in the Constitution and statutes.[128] Privacy is a fundamental right guaranteed by the Constitution;[129] as such, therefore, the burden is on the state to show that its assailed act is justified by a compelling state interest and that it is narrowly tailored.[130]

The above issues will be analyzed *in seriatim* by applying the proper tests, i.e. the minimum test of rationality and strict scrutiny. As will be shown, the proposed *per se* ban should be able to withstand all levels of scrutiny.

1. Test of Valid Classification and Minimum Test of Rationality

Since the proposed rule makes a classification, i.e. lawyers, clients and the general public, its validity must first be satisfied before any further constitutional tests may be discussed. In the 1939 case of *People v. Cayat*,[131] the Supreme Court laid down the classic test of a valid classification:

1) the classification must rest on substantial distinctions;
2) the classification must be germane to the purpose of the law;
3) the classification must not be limited to existing conditions only; and
4) the classification must apply equally to all members of the same class.[132]

The proposed *per se* ban on sexual relationships making a classification between (1) lawyers and clients and (2) the general public satisfies all these requirements. The classification can easily be concluded to rest on substantial distinctions, as members of the bar became such only by

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[126] Morfe v. Mutuc, G.R. No. 20387, 22 SCRA 424, 444, Jan. 31, 1968.

[127] G.R. No. 127685, 293 SCRA 141, July 23, 1998.

[128] *Id.* at 156-58, *citing* CONST. art. III, II, 27685, 2 6, 8, 17; CIVIL CODE arts. 26, 32, 723; REV. PEN. CODE arts. 229, 290-92, 280; Rep. Act No. 4200 (1965); Rep. Act No. 1405 (1955); Rep. Act No. 8293 (1997); REV. RULES ON EVIDENCE, Rule 130, § 24.

[129] *Id.* at 158.

[130] *Id.*

[131] G.R. No. 45987, 68 Phil. 12, May 5, 1939.

[132] *Id.* at 18 *citing* Borgnis v. Falk Co., 133 N.W. 209 (1911). Lindsley vs. Natural Carbonic Gas Co., 220 U.S. 61 (1911), Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919). People and Hongkong & Shanghai Banking Corporation v. Vera and Cu Unjieng, G.R. No. 45685 (1937).

judicial discretion and not in their own rights.[133] Furthermore, lawyers are subject to the authority of the Supreme Court as a constituent element of its judicial power.[134] Even without the *per se* ban, the distinction between lawyers and non-lawyers already exists as clear as day under the Constitution,[135] statutes,[136] and rules.[137] As to the distinction between clients and non-clients, such is also substantial as even clients, though not necessarily members of the bar, are required to observe all court issuances or procedure in pursuing their legal rights as principals of their attorneys. Besides, being a non-client does not preclude the possibility of becoming some lawyer's client should the need for counsel arise; anyone and everyone may become some lawyer's client.

As regards germaneness to the purpose of the rule, suffice it to state that the proposed rule's immediate purpose being to regulate attorney-client sexual relationships, the classification made by the rule is by pure common sense related to the rule's lawful purpose. The classification is also clearly not limited to existing conditions. The issue of lawyers taking advantage of their clients is not solely dictated by any specific economic or cultural condition that may disappear in the future. Indeed, the proposed rule intends to at least mitigate such abuses. Lastly, the proposed rule applies equally to all lawyers and all clients, regardless of gender, area of practice, economic status, or any other distinction that may exist between all lawyers and between all clients.

As discussed previously, for the minimum test of rationality to apply, one of the requirements must be that the right or rights affected by the law or act concerned must not be fundamental. It is thus proper to closely examine the rights affected by the proposed rule to determine whether such rights are fundamental in character.

On the side of the lawyer, the rights affected are the lawyer's rights to pursue a livelihood and to choose a sexual partner. As to the client, the rights affected are those to counsel of choice and to choose a sexual partner. On the basis of jurisprudence in the Philippines and abroad, these rights

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[133] *See* AGPALO, *supra* note 73, at 28, *citing In re* Cunanan, 94 Phil. 534, Mar. 18, 1954.

[134] *Id.* at 29.

[135] *See, e.g.*, CONST. art. VIII, §§ 5(5), 7(1); art. IX-C, § 1(1); art. IX-D, § 1(1); art. XI, § 8.

[136] *See, e.g.*, Rep. Act No. 10667 (2014), § 6; Rep. Act No. 8293 (1998), § 7.2; Rep. Act No. 6770 (1989), § 5; Rep. Act No. 6397 (1971).

[137] *See, e.g.*, CODE OF PROFESSIONAL RESPONSIBILITY.

(e.g. to pursue a livelihood, to be represented by counsel of choice, and to choose a sexual partner) are *not* fundamental rights that would warrant strict scrutiny, but are still rights relating to one's life, liberty, or property, which the government cannot intrude into or take without due process of law.

Firstly, the lawyer's right to a livelihood, or more specifically the lawyer's right to practice law, is clearly not a fundamental right as it is well settled that the practice of law is a profession that is imbued with public interest, thus subject to the state's exercise of police power.[138] This is further justified by the promulgation of rules to govern lawyers in their professional conduct.

Secondly, the client's right to be represented by counsel of choice is also a proper subject of government regulation. While the Constitution itself provides for a right to be represented by counsel of choice in criminal proceedings,[139] the right to choose one's lawyer, in general, is neither absolute nor fundamental and "may be counterbalanced by considerations of the fair administration of justice."[140] For example, the presence of a serious and undeniable conflict of interest between the client and the lawyer's previous client or the lawyer himself would render the client's free choice of counsel limited.[141]

Lastly, a person's right to choose a sexual partner, while arguably the "most fundamental" among the mentioned rights,[142] has never been held as a fundamental right in American[143] or Philippine jurisprudence. In light of this ambiguity, a look into common principles and rules involving the "freedom" to have sex is proper in establishing that such a freedom is not a fundamental right.

In *Lawrence et al. v. Texas*,[144] the US Supreme Court struck down a statute that criminalizes two persons of the same sex engaging in private

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[138] *In re* Edillon, A.C. No. 1928, 84 SCRA 554, 563, Aug. 3, 1978, citing Nebbia v. New York, 291 U.S. 502 (1934). "'[A]ffected with a public interest' is the equivalent of 'subject to the exercise of the police power[.]'"

[139] *See* CONST. art. III, §§ 12(1), 14(2).

[140] Livingston, *supra* note 4, at 59.

[141] *See id.*

[142] *See id.* Livingston points out that the right to choose a sexual partner is arguably the most fundamental "as it relates to an inherently private sphere of activities in which the justification for state intrusion is weak."

[143] *See id.* at 60.

[144] 539 U.S. 558 (2003), *overturning* Bowers v. Hardwick, 478 U.S. 186 (1986).

sexual conduct by holding that such a statute violates the Due Process clause as it furthers no legitimate state interest which can justify intrusion into the personal and private life of the individual.[145] In the earlier case of *Eisentadt v. Baird*,[146] the US Supreme Court struck down a Massachusetts law banning the sale of contraceptives to unmarried couples, extending the constitutional protection to *procreate* to all kinds of sexual intercourse, not just that between married couples. In both cases, the US Supreme Court applied minimal scrutiny to arrive at their decisions. Had the right to engage in private sexual conduct been considered as a fundamental right, minimal scrutiny would not suffice because strict scrutiny would be more proper. In any instance, since the proposed *per se* ban touches on the relationship of a lawyer and a client—one which is impressed with public interest—their respective rights as such may properly be limited.

The freedom to choose a sexual partner may also be argued to a facet of the broader principle of freedom of association, or more specifically, freedom of *intimate* association.[147] This freedom, however, is also not a fundamental right, and is limited to personal affiliations that exemplify considerations of emotional enrichment from close ties with others, i.e. those that relate to family relationships.[148] However, when the right to choose a sexual partner is viewed from an argument based on the broader right to privacy, the minimum test of rationality would not be proper. This will be discussed in the next section of this part of the paper.

Since the proposed rule intrudes into these rights, albeit non-fundamental, the state is mandated to prove the existence of a legitimate state interest. The broad interests that the rule seeks to promote may be said to be the preservation of the integrity and efficiency of the legal profession and the promotion of public confidence in the administration of justice.[149] Specifically, the rule aims to "prevent lawyers from taking advantage of vulnerable clients by initiating sexual relationships that may compromise the clients' well-being and the lawyers' competence and objectivity."[150] Without question, these state interests are legitimate.

Apart from the requirement of a legitimate state interest, the state act must also be *rationally related* to such interest. Clearly, the proposed rule

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[145] *Id.* at 578.

[146] 405 U.S. 438 (1972).

[147] *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-20 (1984).

[148] *Id.* at 619.

[149] *See* Livingston, *supra* note 4, at 60.

[150] Livingston, supra note 4, at 60.

finds its rational basis on the mentioned state interests in the preceding paragraph. The promulgation of the proposed rule would certainly "[reduce] potential conflict of interest problems, [diminish] the risk of loss of objectivity by attorneys, and [protect] clients against predatory seductions."[151] As Livingston aptly observes: "While no rule can completely eliminate unethical conduct, its mere existence coupled with its vigorous enforcement would send a clear message to the bar that courts will not tolerate amatory exploitation of clients."[152] This is in contrast with Feiser's stand, who does not believe in the necessity of a written rule but calls for better enforcement of existing aspirational rules which may serve as basis to punish certain lawyer-client sexual relations. It is submitted, as a matter of policy, that Livingston's view—which is reflective of how the ABA acted in promulgating the *per se* ban—is more sound and is more attuned to the realities surrounding the attorney-client relationship.

2. Strict Scrutiny

Strict scrutiny applies to an assailed governmental act when it either "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class[.]"[153]

One of the fundamental rights guaranteed by the Constitution that has also been recognized by the Supreme Court as such is the right to privacy.[154] There are two categories of the right to privacy that are recognized by the US Supreme Court and have also been transplanted in Philippine jurisprudence: *informational* privacy and *decisional* privacy.[155] The former refers to the interest in avoiding disclosure of personal matters,[156]

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[151] *Id.*

[152] *Id.*

[153] Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, 582 SCRA 254, 278, Mar. 24, 2009.

[154] *See, generally*, Ople v. Torres, G.R. No. 127685, 293 SCRA 141, 158, July 23, 1998; Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424, Jan. 31, 1968, *citing* Griswold v. Connecticut, 381 U. S. 479 (1965). *See also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); IRENE CORTES, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY (UP Law Center, 1970); Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J. 78 (2008).

[155] *See* Whalen v. Roe, 429 U.S. 589 (1977). *See also* Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J. 78, 99 (2008).

[156] Pollo v. Constantino-David, G.R. No. 181881, 659 SCRA 189, 231, Oct. 18, 2011 (Bersamin, *J.*, *concurring and dissenting opinion*), *citing* Whalen v. Roe, 429 U.S. 589 (1977).

while the latter refers to the interest in the capacity of independent decision-making.[157] Both aspects of the right to privacy may be argued to be involved in attorney-client sexual relations. It relates to informational privacy because it would naturally require a certain degree of disclosure on the part of the attorney to be made, for example, to the current or prospective client or to the regulatory body involved, which, in this case, is the Supreme Court and the Integrated Bar of the Philippines. It also relates to decisional privacy since it affects the lawyer's and the client's capacity to make their own decisions independently, specifically the decision of choosing whom to have a sexual relationship with.

On this basis therefore, the rule on strict judicial scrutiny is applicable in testing the constitutional validity of the proposed *per se* prohibition against sexual relations when the issues raised arise from privacy grounds. Thus, the governmental act would have to be shown to (1) cater to a compelling state interest and (2) be narrowly-tailored.[158]

It is submitted that the proposed prohibition serves the state's interest in protecting clients from sexual exploitation by lawyers within its jurisdiction,[159] promoting and preserving the public's trust in the orderly administration of justice, and elevating professional standards for lawyers in light of social and cultural realities. It is further submitted that these interests are not just legitimate, but also compelling ones,[160] thus satisfying the first requirement under strict scrutiny.

It is also submitted that the prohibition, as worded in the ABA Model Rules, is narrowly-tailored to achieve the mentioned interest. As also pointed out by Livingston, a blanket prohibition without exception is concededly too overbroad and not narrowly-tailored, and would most likely fail in the second requirement under strict scrutiny.[161] A prohibition which does not allow the lawyer to terminate his or her professional relationship with a client whom the former wishes to engage in sexual relations with and subjects the lawyer to disciplinary measures without allowing him or her to exact corrective measures will also fail the requirement of being narrowly-tailored to address a compelling state interest.[162] However, considering that the prohibition under the ABA Model Rules actually contemplates certain

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[157] *Id.*

[158] *See, generally*, Ople v. Torres, G.R. No. 127685, 293 SCRA 141, July 23, 1998.

[159] *See* Awad, *supra* note 60, at 186.

[160] *See, generally*, *id.* at 149-64.

[161] *See* Livingston, *supra* note 4, at 63.

[162] *Id.*

exceptions, e.g. when the sexual liaison predates the professional representation, and allows for the lawyer to immediately terminate his or her professional relationship should he or she wish to continue with the sexual relationship, the prohibition would withstand the narrowly-tailored requirement.

Therefore, while privacy rights are concededly curtailed by the proposed prohibition, the same clearly serves compelling state interests and is narrowly-tailored to serve these interests. The *per se* prohibition survives strict scrutiny.

B. Code of Professional Responsibility

As mentioned previously, the Code of Professional Responsibility already has in place several canons and rules which may relate to attorney-client sexual relations. This part of the paper will discuss these rules and relate it to the ABA Model Rule on a *per se* ban, taking into consideration the ABA's comments on the said rule, and will look into the wisdom of having a specific rule prohibiting sexual relations between lawyers and clients.

1. Conflict of Interest — A Broader Principle

Of all the ethical principles applicable to the legal profession, conflict of interest is arguably the most fitting category in which sexual relations between lawyers and clients may be placed. The ABA Model Rules even includes the *per se* ban under its Rule 1.8, providing for specific rules for conflict of interest for current clients.

The ABA justifies the *per se* ban by saying:

> Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.[163]

Furthermore, as observed above, states which have not adopted the ABA Model Rules but prohibit sexual relations almost always find basis in

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[163] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8, cmt., at ¶ 17 (AM. BAR ASS'N 2002).

conflict of interest grounds. The interpretation of conflict of interest quoted above finds applicable the Code of Professional Responsibility, Rule 15.01 of which provides that lawyers, "in conferring with a prospective client, shall ascertain as soon as practicable whether the matter would involve a conflict with another client or *his own interest*[.]" [164]

However, most of the cases and commentaries on representation of conflicting interests focus mainly on the situation where the lawyer represents opposing parties or where the lawyer appears for a client whose case is against a former client.[165] The general test of inconsistency of interests for purposes of the prohibition under the Code is "when, on behalf of one client, it is the attorney's duty to contend for that which his duty to another client requires him to oppose."[166]

This test, however, ignores the breadth of the principle of conflict of interests, which may also relate to the manner by which the lawyer discharges his duty of fidelity and loyalty to his client's cause.[167] The broad principle of conflict of interest is recognized by the ABA in its Model Rules and in our own Code of Professional Responsibility.

When the Code of Professional Responsibility speaks of conflicting interests between the lawyer and the client, it is mostly premised on the highly fiduciary nature of the lawyer-client relationship. When the ABA speaks of sexual relations *vis-à-vis* conflict of interest, it speaks not of the interest of two clients but that between the lawyer and the client. Thus, it is the side of the lawyer which partakes of a dual nature: on the one side, it is the purely private aspect of the lawyer's life; on the other side is the lawyer's professional responsibilities, which are impressed with public interest.[168] For this purpose, the general exception of informed consent by the client, applicable to representing *two* conflicting interests, finds no application to the *per se* ban on sexual relationships. Besides, as Livingston pointed out, "it is unrealistic to expect that a lawyer and a client in the thrall of sexual passion would be able to sit down and discuss the possible conflict of interest problems engendered by their sexual affair, ultimately reducing the client's waiver to writing."[169]

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[164] CODE OF PROFESSIONAL RESPONSIBILITY, Rule 15.01. (Emphasis supplied.)

[165] AGPALO, *supra* note 73, at 299.

[166] *Id.*

[167] *Id.*

[168] *See* Seymore, *supra* note 1, at 210.

[169] Livingston, *supra* note 4, at 18.

2. Competent Representation —
Professional Attachment and Emotional Detachment

The relationship between lawyer and client is strictly personal, as it involves mutual trust and confidence of the highest degree.[170] This personal relationship, however, does not require—and in fact discourages—the lawyer from adopting his client's problems as his own, as it has been observed that "only a proper sense of *personal detachment* will enable the attorney to adequately serve the interest of his client and to keep his professional conduct within ethical bounds."[171] A lawyer is "a person preoccupied not with his own concerns but with the concerns of others. He speaks for his clients, argues on their behalf, and makes decisions for them."[172] Any personal involvement by a lawyer for himself or for a loved one may "blur his sense of duty and purpose and affect his performance to his or his client's detriment."[173]

Thus, the ABA's comment that "[a sexual relationship between the lawyer and the client] presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment[,]"[174] also finds application in our own jurisdiction, since our own rules on professional conduct place a high premium on competent representation.[175] It need not be pointed out that sexual relations in general almost always involve emotions and attachment between the parties.

3. Fiduciary Relationship — Inherent Inequality

The highly fiduciary nature of the attorney-client relationship demands of the lawyer an "undivided allegiance, a conspicuous and high degree of good faith, disinterestedness, candor, fairness, loyalty, fidelity and absolute integrity in all his dealing with clients[,]"[176] and "an utter renunciation of every personal advantage conflicting in any way [...] with

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170 AGPALO, *supra* note 73, at 183.

171 *Id.* at 184. (Emphasis supplied.)

172 Eleanor N. Balaquiao, *Rings and Towers: A Study of Judicial and Legal Ethics in the Philippines*, 88 PHIL. L.J. 150, 162 (2014).

173 *Id.*

174 MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8, cmt., at ¶ 17 (AM. BAR ASS'N 2002).

175 *See* CODE OF PROFESSIONAL RESPONSIBILITY, Canon 18.

176 AGPALO, *supra* note 73, at 185.

the interest of his client."[177] This characteristic of the attorney-client relationship is the principal reason that the relationship is imbued with public interest and not just of the two immediate private interests at play.

The ABA goes further to state that "[t]he [lawyer-client] relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage."[178]

This statement may be more appreciated if situational examples are given. In a legal separation proceeding,[179] the lawyer of the wife-petitioner, for example, may become reluctant to support a possible reconciliation between the married couple in the course of the proceedings if the lawyer is sexually involved with the complainant. This must be emphasized to an even greater degree when the proceedings involve a married couple with children.

The dangers brought about by sexual relationships are not limited to proceedings involving marital relations. A person's case involving his or her property may also be prejudiced by a sexual relationship between that person and the lawyer. The latter, in order to prolong the representation, could unduly delay the case or even intentionally weaken the client's case for a prolonged representation on appeal. Worse, the lawyer may threaten the client with a purposely lost case if the latter does not accede to engaging in a sexual relationship with the former. All these examples, among many others, illustrate how the inherently unequal relationship between the client and the lawyer (who is supposedly an advocate, an agent, and a fiduciary all at once) may be subject to exploitation and improper handling when sex and emotions are involved.

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[177] *Id.*

[178] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8, cmt., at ¶ 17 (AM. BAR ASS'N 2002).

[179] Similar examples have been given by different authors in the US. The usual example is divorce proceedings; here, however, the local context of legal separation (limited divorce) proceedings is more apt.

4. Reflection on the Legal Profession — Upholding integrity

An overarching principle of all the rules of professional conduct is that which demands that all lawyers must uphold the integrity and dignity of the legal profession. This principle is embodied in Canon 7 of the Code of Professional Responsibility, which provides: "A lawyer shall at all times uphold the integrity and dignity of the legal profession and support the activities of the integrated bar."

Under said Canon is Rule 7.03, which states that "[a] lawyer shall not engage in conduct that adversely reflects on his fitness to practice law, nor should he, whether in public or private life, behave in a scandalous manner to the discredit of the legal profession." The respect demanded by the public of the legal profession is "inexorably diminished whenever a member [...] betrays his trust and confidence reposed in him by his client."

It cannot be gainsaid that engaging in sexual relations with a client, in several possible instances, adversely reflects on the legal profession as a whole. Without the public's confidence in the legal profession, the fair and efficient administration of justice would undoubtedly be curtailed. Misgivings on the necessity of a written rule against sexual relationships would have to bow down to the pervasive and inescapable public interest imbued in the practice of law as a profession.

IV. CONCLUSIONS AND RECOMMENDATIONS

By the very definition of the words *personal* and *professional*, there exists a wall of separation. One's professional work and one's personal life are separate worlds. This distinction applies no less to sexual relationships, which is personal in every sense of the word. It is a distinction that has long been recognized by the medical profession and other public service professions, and one that has recently been textually recognized by the US legal profession, as well as those of other jurisdictions. Its grounds or justifications are based on, in general, protecting the interests of the general public. The Philippine legal profession should not lag behind on these important developments. The judiciary must not turn a blind eye to the fact that sexual relationships between lawyers and clients actually occur and that these may lead to undue exploitation, among other evils.

The IBP should look into the merits and demerits of adopting a ban on sexual relations similar to that adopted by the ABA. It should be noted that the IBP's authority and scope is broader in view of its national clout

over the entire Philippine Bar. This is in contrast to that of the ABA, whose rules are not binding on state bar associations. Fortunately for the IBP, it has at its disposal a plethora of persuasive material from the US and from other jurisdictions, as outlined in this paper, exploring the viability of regulating sexual relations between lawyers and their clients. Considering the more conservative leaning of Philippine society, as compared to the liberal states such as the US, we should have more reason to adopt this rule.

It is thus submitted that the IBP should propose to the Supreme Court, a new set of rules which contain specific provisions against conduct involving sexual relations, among other acts that have been ruled by the Supreme Court as improper, immoral, or otherwise unbecoming of a member of the bar. The Code of Professional Responsibility being adopted in 1988, it is timely and proper that the IBP and the Supreme Court explore the possibility of a revision of the ethical rules on professional conduct of members of the bar. Certainly, the *mores* of Philippine society have changed for more than a quarter of a century, which is enough reason to consider drafting new rules. The IBP should also conduct a preliminary survey among lawyers and clients aimed at making an estimate on the number of incidences of sexual relations between said persons, so that the need for a black letter rule prohibiting such relations may be properly justified by data.

The issues presented can be summarized into two interests that must be balanced: the private interest of two adults entering into a sexual relationship, and the public interest imbued in the practice of law. Upon commencing a lawyer-client relationship, the former is duty bound to observe several tenets of professional conduct embodied in our rules and jurisprudence. Private interests must yield to this public duty in the same manner that the Supreme Court has time and again enunciated that "the practice of law is a profession and not a business."[180] In this instance, the practice of law is a profession and not a matchmaking service. If a lawyer wishes to engage in a sexual relationship with a client, the *per se* ban does not prohibit the lawyer as a private person from doing so; rather, it is an imposition on the lawyer to terminate the lawyer-client relationship, not the sexual relationship that the lawyer wishes to pursue.

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[180] *See, e.g.*, *In re* Tagorda, 53 Phil. 37, 42, Mar. 13, 1929; Burbe v. Magulta, A.C. No. 5713, 383 SCRA 276, 284-85, June 10, 2002.