

What Are Forbidden Sexual Relations With Clients?

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The short answer is that all “sexual relations” with clients are forbidden under Rule 1.8(j), unless a consensual relationship existed between the attorney and the client when the attorney-client relationship commenced. However, what constitutes “sexual relations” was previously not defined at all in the rule, and that has led to some interesting questions in our increasingly remote and virtual world.

Violations of Rule 1.8(j) remain a persistent issue for attorneys. Just since 2020, there have been at least four instances of public discipline for Rule 1.8(j) violations. Discipline in these matters has ranged from public reprimand to disbarment. In *ODC v. Shainberg*, the respondent received a one-year suspension on consent after he made unwanted physical contact with his client including unwanted hugs and kisses and touching her breasts and crotch. However, the contact also included text messages and

phone calls “unrelated to her legal matters.” The respondent also took the client to lunch at a hotel and invited her to go up to a room. Although the disciplinary opinion included allegations that the client’s decisions regarding the objectives of representation were not abided by, the main basis for the one-year suspension appears to be unwanted sexual contact.

In an effort to clarify what constitutes “sexual relations” under the rule, our Supreme Court has amended both Rule 1.8(j) and Comment [17] which relates to Rule 1.8(j). Effective Nov. 8, 2024, Rule 1.8(j) of the Pennsylvania Rules of Professional Conduct was amended to include “communications of a sexual nature” within the definition of prohibited sexual relations between lawyers and their clients. Comment [17] to the rule elaborates:

For purposes of this rule, “communications of a sexual nature”

means requesting or transmitting any content, images, audio, video or messages that contain sexually explicit material or that are intended to arouse or gratify the sexual desire of the sender or recipient. Communications that contain sexually explicit content but are related to the client's legal matter and are made in furtherance of the representation are not "communications of a sexual nature" for the purposes of this rule.

This change follows a number of disciplinary investigations in recent years related to "sex with clients" where the matter involved sexual communications such as "sexting" rather than actual physical relationships. To our knowledge, Pennsylvania is the first state to adopt this type of language clarifying and extending the prohibition on sexual relations with clients to sexual communications.

The intent of Rule 1.8(j) is, of course, to require professionalism in the relationship between lawyers and their clients. The rule arises from the necessary power imbalance in the attorney-client relationship, and the concern that attorneys may exploit that power imbalance with vulnerable clients. As Comment [17] has always stated: "The 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." The rule is also based on the

difficulty in exercising independent professional judgment when the line between the attorney and client is blurred. As the comment states: "such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment."

In August 2023, the Pennsylvania Supreme Court issued a proposed amendment to Rule 1.8(j). The proposed change added a statement in the comments to the Rule that sexual communications are sexual relations (essentially the same language that has now been added to the rule itself). However, the proposed amendment did not include any changes to the text of the rule, nor did it provide any context or explanation as to what constitutes sexual communications. The Philadelphia Bar Association expressed concerns that absent any definition the new language was too vague and could potentially lead to inadvertent violations, or even an assertion of a violation if the attorney was merely the recipient of inappropriate communications from a client.

The final change provides attorneys with additional guidance as to what, exactly, is prohibited, and also allows for protection against disciplinary repercussions for conduct that is not invited by the lawyer. The change also recognizes that there may be times when explicit material is exchanged as a legitimate part of representation such as in matters involving alleged sexual abuse or sexual harassment.

The takeaway from this is easy. Do not engage in inappropriate sexualized behavior of any type with clients. This can be particularly important and sometimes difficult in the face of a flirtatious client, but attorneys need to be aware that it does not matter if the sexual relation is instigated by the client, any sexual relations, including consensual sexual relations constitute a violation of Rule 1.8(j).



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