

Ethics Q & A: CONFESSIONS OF A FORMER ETHICS OPINION WRITER

By Peter R. Jarvis, Esq

March 2001

From 1988 to 1991, a group of us undertook to review and rewrite Oregon's former set of formal ethics opinions, which numbered over 500, and to produce a new set that was issued in 1991 of just under 130 opinions. In the main, our goal was not to make new law but to restate more concisely and with updated citations those opinions that were worth keeping.

One of the issues we addressed was sexual relations between lawyers and clients. At that time, several members of the Oregon State Bar Board of Governors believed that there should be an absolute prohibition against the initiation of sexual relations during the course of an attorney-client relationship. There was no such black letter rule at the time, however.

In the absence of a black letter rule, those of us working on the new opinions felt that we could not issue anything stronger than what became OSB Legal Ethics Op No. 1991-99. That opinion relied upon DR 5-101(A), which prohibits lawyers from acting without a conflicts waiver if their personal or business interests reasonably may affect the exercise of their independent professional judgment on a client's behalf. The opinion held that a lawyer could not begin a sexual relationship with an existing client without first going through a conflicts waiver process.

Now for the confession. We were thinking about the possibility that domestic relations lawyers could prey upon vulnerable clients. None of us considered or even discussed the possibility that someone might, say, construe our opinion to hold that the mere fact of sexual relations always creates a conflict of interest without regard to whether the beginning of the sexual relationship preceded the attorney-client relationship.

In 1992, Oregon adopted DR 5-110, a black letter rule that expressly prohibits lawyers from beginning sexual relations with existing clients. Because of this new rule, OSB Legal Ethics Op No. 1991-99 was withdrawn and a new opinion, OSB Legal Ethics Op No. 1995-140, was adopted instead. The new opinion kept the same DR 5-101(A) analysis and added an analysis of DR 5-110.

I have been told that some bar personnel were or are considering whether the bar should construe both current OSB Legal Ethics Op No. 1995-140 and former OSB Legal Ethics Op No. 1991-99 to hold that all sexual relations always create DR 5-101(A) conflicts. We did not say that, and I am certain that we would not have reached such a result. Consider a couple, one of whom is a lawyer, who are happily married and who wish to buy a house because they are expecting their first child. If the mere fact of prior or continuing sexual relations between them is enough to trigger DR 5-101(A), the lawyer could not represent the couple in buying the house without going through a written conflicts waiver process—including the requirement to recommend that the spouse first consult independent counsel pursuant to DR 10-101(B). This would be a very dumb result, and very dumb results should be avoided whenever possible.

In light of the subsequent adoption of DR 5-110, it is time to acknowledge that current OSB Legal Ethics Op No. 1995-140 and former OSB Legal Ethics Op No. 1991-99 went too far. Prior

sexual relations do not necessarily or automatically result in current DR 5-101(A) problems. While the bar is and should be free to prove a DR 5-101(A) violation in a particular case (if, for example, the prior sexual relationship was germane to a present custody dispute), the bar should have to prove its case.

Note: OSB Ethics Opinions can be seen by clicking on OSB Legal Ethics OP and type in the number of the opinion.

If you would like to suggest one or more issues for future topics, please contact me at :Peter Jarvis via e-mail.

Peter R. Jarvis Stoel Rives LLP (503) 294-9456 e-mail: prjarvis@stoel.com An ethics article by attorney Peter R.Jarvis will appear in the Oregon Law Journal each month. Peter gives advice to and represents lawyers who have matters of discipline before the Oregon State Bar. E-mail your questions directly to Peter R. Jarvis. Prior articles by Peter can be seen by going to the Archives navigation button on the left, above.