

The Devil's Advocate

The sex revolution isn't all it's cracked up to be. Professional persons have not been liberated, even though the *hoi polloi* may be entitled to their hanky-panky. This sex discrimination is manifest when we consider the status of doctor, lawyer, and public office holder.

Congressman Hays, as this is written, is about to discover the facts of life—political life. that is. It is not safe to make Hays while the sun shines (or sets). Even with grass widows. A well-known publisher has made it clear that men are not the only ones who kiss and tell. Moreover, if you went a lot to Camelot, or provided grist for the Mills (Congressman Wilbur), the publishers line up for the hot copy.

Psychiatrists lately have been learning about what the law calls the "quality of the touch." Sterne once said, regarding doctors, that there were worse occupations than feeling a woman's pulse. It all depends upon where it is taken, and how the physician feels about it. "Sublimated" judges believe that a physician should not obtain private enjoyment from administrations to female patients. Intent and motive are important to the law: did he sneak a feel or feel a sneak? Justice Holmes once said that even a dog knows the difference between a kick and a stumble. *A fortiorari* a judge may decide the "quality of the touch."

A sensuous psychiatrist from Missouri had to shell out \$17,000 because he mixed pleasure with business,¹ and an English psychiatrist had to pay for manhandling transference and countertransference.² The therapeutic couch is reserved for the patient, and free association refers to thoughts, not body language.

The question of the potential tort liability of potent lawyers was raised by a recent phone call to the Devil's Advocate. A negligence lawyer called regarding a possible malpractice suit against a fellow attorney. The client claimed that she had been seduced by the lawyer while he was representing her in a divorce action against her husband on the ground of *his* adultery. After the case was started, the husband amended his defense to counterclaim for divorce on the ground of the wife's adultery with her counsel. At the trial the husband produced detectives and witnesses who proved her adultery, but she failed to prove adequately that the husband was guilty as charged. As a result, the husband obtained the divorce and was freed from paying any alimony.

(1) Was the lawyer's conduct with the client a breach of professional ethics? (2) Did the client give an "informed consent" so as to bar suit? (3) Might the client be entitled to damages?

The Code of Professional Responsibility³ provides that a lawyer shall not "engage in illegal conduct involving moral turpitude." In New York, adultery is a Class B misdemeanor.⁴ There is no doubt that it is included within the term "moral turpitude," whatever one may think about the wisdom of making marital sin a crime.⁵ Thus, the first lawyer violated this section of the code and perhaps other sections as well. The professional relationship is one of trust and confidence, and although figuratively they do not deal at arm's length, actually they must.

The "informed consent" issue may be more difficult. As a general rule, *volenti non fit injuria*.⁶ But was her consent "informed"? Certainly as to the physical consequences, but probably not as to the legal consequences. The unethical lawyer is presumed to know the law, namely, that an affair with him might forfeit her ground for divorce

(doctrine of "recrimination") and might provide the husband with a ground (unless both were found to be guilty of adultery). Moreover, the lawyer is presumed to know that in New York a wife guilty of such misconduct as constitutes a ground for divorce is barred from alimony.⁷ It is unlikely that the wife knowingly assumed such legal risks, although his powers of persuasion may have been such that she would have said "What the heck" in any event.

The damages have been already indicated. The husband's strong proof of her adultery made her proof of his weak and unconvincing. She lost her divorce action. Far worse, she lost both her right to support and her right to alimony. Only if she becomes destitute or a public charge may his support obligation be revived.⁸ Would the seduced woman win her case against the amorous attorney? Who knows? Much depends upon how they appear to the court and whether it regards the situation as one of "assumption of risk" or *res ipsa loquitur*.

The moral to be drawn from the above erotica is that the public still snickers when the preacher is caught *sans culotte* with the choir singer (male or female). This prurient interest is carefully cultivated by the media in terms of vicarious or other satisfactions. Exposure of the professional idol's feet of clay titillates those who formerly were unaware that the emperor had no clothes. For the professional, the motto should be *caveat amour*.

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References

1. See *Zipkin v Freeman*, 436 SW 2d 753 (Mo 1969). See also *Anclote Manor Foundation v Wilkinson*, 263 So 2d 256 (Fla 1972) (husband awarded \$28,000 against psychiatrist who treated wife and told her he was going to get a divorce and wanted to marry her, where the wife obtained the divorce and later committed suicide). See also Chester P: *The sensuous psychiatrists*, New York Magazine, June 19, 1972, at 52; Shepard M: *The Love Treatment: Sexual Intimacy Between Patients and Psychotherapists*, 1971; Kardner S, Fuller M, and Mensh F: *A survey of physician's attitudes and practices regarding erotic and non-erotic contact with patients*, Am J Psychiat 130:1077, 1973; and note by Brooks A: *Law, Psychiatry and the Mental Health System*, 1079, Boston, Little, Brown, 1974
2. See *Landau v Werner*, 105 Sol J 257, 1008 (1961)
3. Code of Professional Responsibility, Disciplinary Rule 1-102 (A) (3)
4. NY Rev Penal Law §255.17 makes adultery a Class B misdemeanor punishable by up to three months imprisonment.
5. Spinoza once said that "He who tries to fix and determine everything by law will inflame rather than correct the vices of the world." *Tractatus Theol Polit*, ch 20
6. "He who consents cannot receive an (legal) injury."
7. NY Domestic Relations Law §236
8. NY Soc Serv Law §101