

**SUBJECT:** Proving lack of consent in a sexual assault prosecution

**COMMITTEE:** Criminal Jurisprudence — favorable, without amendment

**VOTE:** 5 ayes — Hinojosa, Keel, Talton, Garcia, Shields  
0 nays  
4 absent — Dunnam, Green, Kitchen, Martinez Fischer

**WITNESSES:** For — Larry Joe Doherty; Hannah Riddering, Texas National Organization for Women; *Registered but did not testify:* Bree Buchanan, Texas Council on Family Violence  
  
Against — *Registered but did not testify:* Keith S. Hampton, Texas Criminal Defense Lawyers Association

**BACKGROUND:** Penal Code, sec. 22.011(b) defines the circumstances under which a sexual assault is without the consent of the person assaulted. These circumstances include, among others, the actor's being a public servant who coerces the other person to submit or participate; a mental health services provider or health-care services provider who causes a patient or former patient to submit by exploiting the other person's emotional dependency on the actor; or a clergyman who causes the other person to submit by exploiting the person's dependency on the clergyman as a spiritual advisor. Sexual assault is a second-degree felony, with a penalty of two to 20 years in prison and an optional fine of up to \$10,000.

**DIGEST:** HB 2042 would provide that a sexual assault is without consent of the other person if the actor was an attorney who caused a current or former client to submit or participate by exploiting the client's emotional dependency on the attorney as a legal adviser.  
  
The bill would take effect September 1, 2001, and would apply only to an offense committed on or after the effective date.

**SUPPORTERS SAY:** HB 2042 is needed to ensure that attorneys do not abuse their fiduciary duty to their clients. Clients grant their attorneys high levels of confidence and trust. Vulnerable clients may feel compelled to engage in sexual relations

with their attorneys out of fear that refusal would jeopardize their cases.

A sexual relationship between a client and an attorney compromises the attorney's professional position and creates a conflict of interest. It could obscure the objectivity and reasonableness that contribute to the lawyer's professional judgement. Confidences imparted in the context of the sexual relationship could lose the protection of the attorney-client privilege.

HB 2042 would put both attorneys and clients on notice that engaging in sexual relations could be unethical. The rules of professional conduct in most states, including Texas, do not prohibit sexual relations between lawyer and client. The absence of a rule makes it more difficult to discipline attorneys for sexual misconduct. Disciplinary authorities must find some other category under which they can punish misconduct of a sexual relationship, such as an act of moral turpitude.

HB 2042 would place on the legal profession the same ethical rules required of other professionals. Physicians are prohibited from engaging in sexual relations with their patients. Psychiatrists and psychologists are prohibited from engaging in sexual relations not only with present clients, but with former clients as well.

This bill would not change the definition of sexual assault. Its purpose is to address unethical and improper relationships that can arise between attorneys and clients because of the attorney's position.

OPPONENTS  
SAY:

HB 2042 would blur the definition of sexual assault without the consent of the other person. Instead of considering lack of consent, it would define sexual assault in terms of exploitation, rather than of violence. The state should not add another type of professional to the list of those whose presumed influence over their clients can expose them to a charge of sexual assault. Under this bill, a person who originally consented to a sexual relationship with that person's attorney but later regretted it could claim sexual assault. The alleged perpetrator could be lead to believe that the sex was consensual and later be accused of sexual assault.

Current law adequately defines sexual assault. Examinations for bruises, rape kits, and observation of a victim's demeanor provide evidence of sexual assault. Basing sexual assault on a person's sense of exploitation is harder to

justify and prove. A client who feels pressured to engage in sexual relations with an attorney can choose to hire another attorney. In sexual assault, the victim has no choice.