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Attorney-Client Sexual Relationships in the #MeToo Era

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Attorney-Client Sexual Relationships in the #MeToo Era

UNDERSTANDING THE REGULATORY GAP AND WORKING TOWARDS A BETTER RULE

Power Dynamics

What is #MeToo?

- Common theme: Imbalance of Power

Legal profession has the same problem!

- Survey: 28.57% of law firm workers reported pressure ***“to engage in sexual behavior or develop a personal relationship with someone at work to advance”***

Problem is amplified when the perpetrator is an attorney and the victim is a client!

Fiduciary Duties of Attorneys

TRUST AND CONFIDENCE: Foundation of all attorney-client relationships

- Loyalty: Independent / Free from Conflicts of Interests
- Advice & Counsel: Competence, Open Communication, Honesty
- Information Use: Only for Client's Benefit - Privacy / Confidentiality Required

Inherent power imbalance between attorneys and clients!

- Attorney-client sexual relationships jeopardize trust and confidence

Model Rule 1.8(j)

“A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”

Seventeen States plus D.C. have not adopted!!!

- No express prohibition at all: DC, GA, LA, MD, MA, MI, MS, NJ, RI, TN, TX, VT, VA
- Nominal prohibition only (“exploitive or abusive”): AL, FL, SC, UT
- Other weak regulation: NY

Why not Adopt Model Rule 1.8(j)?

1. Insufficient data to demonstrate need for rule
 - Counter: Data isn't necessary
2. Model Rule 1.8(j) is unnecessary / might create new problems
 - Counter: Rules prohibit other specific conduct - what makes sex different?
3. Improper to delve into attorney's private life
 - Counter: Other professions prohibit sexual relationships with clients
 - Counter: FIDUCIARY DUTIES

Other Issues

What if client is organization?

- Model Rule 1.8, Comment 19: “When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.”
- Is interpretive guidance enforceable?
- Only nine states address the issue via express rule: AK, AL, FL, IA, MN, NV, OR, WA, WI

Evidentiary standards and burdens for sexual relationships?

- Rebuttable presumption of wrongfulness: AL, FL, UT
- Strict scrutiny of permissible relationships: IA

Proposed Rule

- (1) A lawyer shall not solicit or have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced;
- (2) For purposes of this rule, when the client is an organization, “client” means a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization’s legal matters. See Rule 1.13 for the definition of “constituent”;
- (3) Even in a sexual relationship provisionally exempt under paragraphs (1) and (2) above, the lawyer’s behavior should be strictly scrutinized for any conflicts of interest 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 be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.

Improving the Model Rule

Rule 1.8(j)'s bright-line test for sexual relationships of greatest concern necessary is a good start

Improvements:

- Reinforces basic fiduciary duties applicable to any attorney-client relationship
- Codifies interpretive guidance to assure enforceability
- Establishes a standard of review to assist decision-maker
- Specifies appropriate course of action: **WITHDRAWAL**
 - Once attorney-client relationship is tainted, questions regarding the representation will persist
 - Withdrawal better assures that the client can obtain independent, unbiased counsel

Questions?
