Unprofessional relationships with clients

BY SUSAN HUMISTON

Recently, the Minnesota Supreme Court suspended a family law lawyer for engaging in explicit sexual conversations with a client he was representing in a divorce.[1] This case is certainly a cautionary tale and I wanted to take this opportunity to share some important ethical reminders.

The case

Mr. Winter (respondent) was hired by his client to represent her in a divorce. Before retaining counsel, the parties had generally agreed to custody and parenting time terms for their minor children. They had few assets. Due to strained finances, in fact, the client and her husband continued to cohabitate notwithstanding their separation. From the beginning, the client reported, the respondent conducted himself in what she described as a flirtatious manner, such as complimenting her appearance and eyes. This conduct continued through mediation, where respondent told his client that she was beautiful, and made other suggestive statements. At this point, the client had exhausted the initial $5,000 retainer (advanced by her husband against the equity in the family home) and had paid respondent an additional $3,000 at the time of mediation. After the matter failed to resolve at mediation, the client

expressed her anxiety about the lack of progress and the ongoing attorney's fees.

In a meeting following the mediation to discuss next steps, respondent apologized to his client for being "really flirty" but said that she was "sexy," so he was unable to help himself. This made the client uncomfortable, but she did not believe she could terminate the representation. She didn't have the funds to hire new counsel, particularly given that the divorce petition had not yet been filed. Things escalated from there to a sexually explicit email chain that I will not summarize here but is set forth in the petition for disciplinary action. Close in time to this exchange, respondent also invited his client on a couple of occasions to come into his office, including on the weekend for a haircut (the client was a stylist). Shortly thereafter, the client consulted with another attorney, who agreed to take her case without an advance fee retainer, and terminated the representation. The matter came to the attention of the director upon the client complaint and, following a contested probable cause hearing, ultimately resulted in a petition alleging that respondent engaged in misconduct—namely, engaging in explicit sexual conversations with a client, including contemporaneous efforts to meet in person, causing a conflict of interest; failing to recognize that conflict of interest; and attempting to engage in sexual relations with his client in violation of Rules 1.1, 1.7(a)(2) and 8.4(a), Minnesota Rules of Professional Conduct.

Respondent ultimately admitted the misconduct and stipulated to recommending to the Court the imposition of a public reprimand. Whether a public reprimand was the appropriate discipline, however, was a matter of some debate. In fact, the Court requested additional briefing on this topic from the parties. After briefing, the Court suspended respondent for 30 days, with one justice stating separately that she believed more discipline was warranted.

Sex with clients is prohibited

Rule 1.8(j), MRPC, prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship predated the lawyer-client relationship. The comments to the rule articulate several bases for this prohibition, namely (1) potential unfair exploitation of the lawyer's fiduciary role; (2) potential interference with the exercise of independent professional judgment when a lawyer becomes personally involved; and (3) blurred lines potentially impacting client confidentiality and privilege.[2] Because most states teach the model rules in law school professional

responsibility classes, this prohibition is likely not a surprise to any reader. Minnesota is one of 39 states that expressly prohibit sex with clients through adoption of some form of the American Bar Association's model rules, but you might be surprised to know that there are several states that do not have such a bright-line rule.[3] Because of the strict prohibition in the rule, even when a relationship is consensual, it is unethical if it started after the attorney-client relationship began.

While I was not surprised to learn that there are states that do not have such an express prohibition, I confess I'm surprised that there is a contingent of states and lawyers that do not think affairs with clients should be prohibited or who think that if there are no "sexual relations," a defined term in Minnesota's rules, there is no ethics violation. Perhaps I should not be, because Minnesota has a unique provision in its rule—Rule 1.8(j)(4), MRPC, which requires the director to consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge if someone other than the client files the complaint. This provision is not found in the model rule, which simply states: A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

The prohibition applies with organization clients as well—specifically, to any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization, pursuant to Rule 1.8(j)(2), MRPC. This provision is also narrower than the model rule—which covers, per the comment, any individual who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Conduct short of sex can be problematic

As the Winter matter demonstrates, conduct short of sex can also raise ethical issues and lead to discipline. Rule 1.7(a)(2), MRPC, defines a conflict as a "significant risk that the representation of one or more clients will be materially limited by... a personal interest of the lawyer." Rule 8.4(a), MRPC, prohibits an attempt to violate the rules. Sexual harassment also violates the ethics rules (Rule 8.4(g), MRPC)—as it should. I have no idea why someone would believe that it is okay to flirt with their client or engage in sexually explicit texts or emails with a client. Do not do this. If you are personally interested, terminate the fiduciary representation and then there is no issue. Part of the #MeToo movement reflected an improved society-wide understanding of power dynamics. Due to the fiduciary nature of the lawyer-client relationship, as the comment to Rule

1.8(j) indicates, such relationships are almost always "unequal." Competency is also at issue when a lawyer fails to recognize when a personal interest may burden the attorney-client relationship with a conflict.

The Court's decision to impose a suspension in Winter recognizes the harm that such conduct can cause to the client and to the public's perception of the profession and should serve as a strong deterrent to those lawyers who do not have a personal bright line on this point. The Court had not previously had occasion to articulate the appropriate discipline where a lawyer engaged in sexually explicit communications with a client and attempted to engage in sexual relations, but did not have sex with the client. In suspending respondent, the Court imposed more discipline than other courts that have had occasion to impose discipline in such cases, where the more typical discipline is a public reprimand. A strong message indeed.

Conclusion

It goes without saying that any sexual assault or quid pro quo involving sex with a client will result in significant discipline. Sex with clients is a type of conflict that usually results in a suspension, although each case is considered on its unique facts. The Court's recent decision in the Winter matter provides a warning to lawyers that certain conduct short of sex, such as sexting, creates a conflict that can give rise to public discipline.

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Notes

[1] *In re Petition for Disciplinary Action against William A. Winter*, 991 N.W.2d 278 (Minn. 2023) (Mem).

[2] Rule 1.8(j), MRPC, comment [17].

[3] Hanna Albarazi, *Are Attorneys Being Held Accountable for Client Sexual Contact*, Law360 (6/28/2023) (reporting that 11 states plus the District of Columbia have not adopted a form of the model rule: Georgia, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, Rhode Island, Tennessee, Texas, and Virginia).