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## TIME'S UP FOR ATTORNEY-CLIENT SEXUAL VIOLENCE

GILLIAN R. CHADWICK\*

### ABSTRACT

*Lawyers have positioned themselves at the helm of litigation and policy reform catalyzed by #MeToo. However, lawyers have catastrophically failed to self-regulate with respect to sexual violence. When confronted with fellow lawyers who have sexually abused and harassed their own clients, the attorney discipline system has fallen short of its mission to protect the public and maintain the integrity of the profession. Despite a robust set of ethical rules that would support strong disciplinary consequences for attorneys who have committed sexual misconduct against their clients, a review of post-#MeToo cases reveals remarkable leniency in the discipline of such attorneys. State disciplinary authorities and courts have consistently prioritized the subjective experience of the offending attorney to the near total exclusion of the client-victim's subjective experience. In justifying lenient sanctions for egregious sexual misconduct, adjudicators have used a proportionality analysis linked to regressive precedent, thus halting any potential progress towards fairer outcomes. Adjudicators have devalued the harm experienced by client-victims of sexual violence by their attorneys. As a result, attorneys have been permitted to prey upon clients—including particularly vulnerable, marginalized, and desperate clients—with relative impunity. This Article argues for the need to take bold action to address attorney-client sexual violence and assure the public that attorney-client sexual exploitation is not tolerated within the profession. Accordingly, the Article advocates for the long-overdue universal adoption of the sexual conflict of interest rule and proposes strict liability and presumptive disbarment for attorney-client sexual contact and presumptive actual suspension for all other attorney-client sexual harassment. The Article also proposes a survivor-centered model of attorney discipline and argues that such a model would bring the discipline system closer to achieving its widely accepted purposes of protecting the public and maintaining the integrity of the profession.*

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*Finally, the Article makes the perhaps controversial proposal that the legal profession should explore abuse prevention protocols to reduce attorney-client sexual violence, particularly against minors. Given the harm that lawyers have inflicted upon those we purport to help, the profession must be open to new strategies to address and prevent attorney-client sexual violence.*

## INTRODUCTION

Despite lawyers playing a central role in litigation and advocacy catalyzed by #MeToo,<sup>1</sup> the legal profession has yet to address its own sexual violence problem.<sup>2</sup> This Article addresses the attorney discipline system's ongoing failure to adequately address sexual violence committed by lawyers against clients. While #MeToo generated an explosion in legal scholarship,<sup>3</sup> only a small portion of that scholarship

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<sup>1</sup> Darlene Ricker, *#metoo Movement Spurs National Legal Response Lawyers Create Defense Networks to Assist Victims*, ABA JOURNAL (Mar. 1, 2018, 2:40 AM), [https://www.abajournal.com/magazine/article/lawyer\\_defense\\_networks\\_metroo\\_victims](https://www.abajournal.com/magazine/article/lawyer_defense_networks_metroo_victims) (describing lawyers playing central roles in emerging #MeToo movement).

<sup>2</sup> This Article will use the term sexual violence to encompass both sexual harassment and sexual abuse as defined *infra* notes 6 and 7.

<sup>3</sup> See, e.g., Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1810 (2021) (arguing that legal reforms arising from the Me Too movement have failed women of color); Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 833-34 (2019) (arguing private actors are recasting the public sphere as private space in furtherance of their own norms and values); Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079, 1088, 1093 (2019) (examining potential effects of #MeToo on the gender composition of public company boards in relation to the composition of legislative bodies); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 111, 113-14 (2018) (arguing that racial biases reflected in the #MeToo movement illustrate the need for an objective standard in sexual harassment law centered on intersectional and multidimensional identities of complainants); Nora Stewart, *The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgment of Those #MeToo Leaves in the Dark*, 87 FORDHAM L. REV. 1693, 1712, 1715 (2019) (proposing restorative justice response, based on indigenous jurisprudence, as a legal solution to certain #MeToo misconduct); Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 71, 91-92, 110 (2019) (examining complexities of restorative justice and insights of transitional justice for workplace sexual misconduct); Caitlin Beller Miner, *A Crossroads in Time: The Implications of Intersectionality and #MeToo for Sexual Harassment Law*, 12 DREXEL L. REV. 651, 685-88 (2020) (applying an intersectional, critical race feminist approach to contextualize sexual harassment law and culture); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 298 (2018) (discussing legal and practical repercussions of #MeToo on employer practices); Daniel Maggen, *"When You're A Star": The Unnamed Wrong of Sexual Degradation*, 109 GEO. L.J. 581, 634-35 (2021) (arguing the need for #MeToo to shed light on the distinct features of sexual degradation).

has focused on the legal profession itself.<sup>4</sup> Even less has centered on the topic of lawyer sexual misconduct towards clients.<sup>5</sup> While intra-professional sexual harassment<sup>6</sup> and abuse<sup>7</sup> of lawyers is an important issue, this Article will focus on sexual harassment and abuse by lawyers against their clients.

The power that lawyers have over their clients is profound. This is particularly true in pro bono or low fee cases and in criminal and family law contexts.<sup>8</sup> The consequences of losing one's liberty, custody of children, and even parental rights create incredibly high stakes for clients in these practice areas. Criminal and family lawyers often work in solo or small firm practice.<sup>9</sup> This combination of distressed clients

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<sup>4</sup> See, e.g., Katherine Yon Ebright, *Taking #MeToo Seriously in the Legal Profession*, 32 GEO. J. LEGAL ETHICS 57, 75 (2019) (arguing that #MeToo movement has yet to reach the legal profession); Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women from Harassment*, 96 U. DET. MERCY L. REV. 579, 583 (2019) ("This Article explores options available to legal professionals in order to become more aware of and address sexual harassment within the profession."); Ashley Badesch, *Lady Justice: The Ethical Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 GEO. J. LEGAL ETHICS 497, 499 (2018) (analyzing the "opportunities and limitations of Model Rule 8.4(g) in addressing gender-based discrimination and sexual harassment within the legal profession"); Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599 (2020) (examining sexual harassment in the legal industry, particularly federal courts).

<sup>5</sup> See Ebright, *supra* note 4, at 68-69 (analyzing several discipline cases involving attorneys who sexually abused or harassed clients); Hess, *supra* note 4, at 590-93 (tying lawyer sexual harassment of clients into a broader analysis of attorney sexual misconduct); Badesch, *supra* note 4, at 505-06 (discussing lawyer sexual harassment of clients among other analyses).

<sup>6</sup> This Article will use "sexual harassment" to mean unwelcome sexual comments or behaviors directed towards a person that make that person uncomfortable. These behaviors may or may not violate criminal laws including those prohibiting stalking, voyeurism, revenge pornography, and a variety of other crimes. Similarly, such behaviors may or may not meet the definition of harassment as used in an employment law context.

<sup>7</sup> This Article will use "sexual abuse" to mean unwanted sexual touching or attempted sexual touching, including sexual contact or acts obtained through coercion. These behaviors may or may not violate criminal laws, but when they do, exact elements and degrees of such offenses vary greatly.

<sup>8</sup> See Phillip R. Bower & Tanya E. Stern, *Conflict of Interest?: The Absolute Ban on Lawyer-Client Sexual Relationships is Not Absolutely Necessary*, 16 GEO. J. LEGAL ETHICS 535, 543-44 (2003) (discussing the high risk of client exploitation in divorce/family, probate, and pro-bono matters, and arguing for a ban on sexual relationships between pro bono attorneys and clients).

<sup>9</sup> *The West Legal Directory: Criminal*, available through Westlaw, "[p]rofiles . . . law firms and . . . attorneys who practice criminal law in any of the 50 states, Puerto Rico, the Virgin Islands, and Canada." Thomson Reuters, *West Legal Directory: Criminal Scope Information*, WESTLAW EDGE, <https://next.westlaw.com> (choose "Content types"; then, under "Specialty areas," choose "Directories"; then select "West Legal Directory" under "West Directories"; then choose the "Practice Area" labeled "Criminal"; then click on the "Scope icon," represented by a circle containing the letter "i"). *The West Legal Directory: Family* contains equivalent information for those practicing family law. Thomson Reuters, *West Legal Directory: Family Scope Information*, WESTLAW EDGE, <https://next.westlaw.com> (choose "Content types"; then,

and isolated office settings makes clients in these environments especially vulnerable. Although many attorneys, particularly criminal and family law attorneys, are undoubtedly drawn to that work by the highest ideals of service and justice, a review of recent attorney discipline cases reveals that many attorneys take advantage of their power and their clients' vulnerability to commit sexual violence.<sup>10</sup>

While its long-term implications are up for debate, #MeToo drew attention to the issue of sexual violence and created pressure towards accountability and justice for sexual violence.<sup>11</sup> The legal profession's accountability mechanism for professional misconduct of all kinds, including sexual misconduct, is the attorney discipline system.<sup>12</sup> Unfortunately, recent cases across the country show the attorney discipline system continues to be quite tolerant of lawyers who sexually abuse and harass their clients.<sup>13</sup> Indeed, it is alarming what lawyers have done to their clients without losing the privilege to practice law.<sup>14</sup> This Article will address this problem in four parts.

Part I will discuss several examples of permissive disciplinary results in attorney-client sexual misconduct cases decided since 2018.<sup>15</sup> These cases demonstrate the legal profession's unwillingness to hold our own accountable to basic standards of decency and professionalism

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under "Specialty areas," choose "Directories"; then select "West Legal Directory" under "West Directories"; then choose the "Practice Area" labeled Family then click on the "Scope icon," represented by a circle containing the letter "i").

Searching via the advanced search form in *West Legal Directory: Criminal* for "USA" as a "Key Search Term" (search chosen to retrieve as many lawyers as possible) retrieves more than 10,000 records. Of these, 9,836 list "Law Firm" as their profile type. Many of the law firm entries are inactive or stub records with little information, but among the 2,281 records for which firm size data is available, 658 (29%) are for solo practitioners. *West Legal Directory: Criminal*, WESTLAW EDGE, <https://next.westlaw.com> (last visited May 26, 2022). The same search on *West Legal Directory: Family* also retrieves more than 10,000 records, 9,847 of which are for law firms. 2,358 records provide firm size data, and that data shows 556 entries (24%) for solos. *West Legal Directory: Family*, WESTLAW EDGE, <https://next.westlaw.com> (last visited May 26, 2022).

These figures may well undercount the actual percentage of solo practitioners. "[D]irectories generally include only the information that the subjects provide," Mary Whisner, *The 4-1-1 on Lawyer Directories*, 106 L. LIBR. J. 257, 261 (2014), and some evidence suggests the West Legal Directory may not be as comprehensive as other major lawyer directories. *See id.* at 262. If solo practitioners enjoy less administrative support than firm attorneys, which seems intuitively reasonable, they may be less likely to contribute information to the directory.

<sup>10</sup> *See infra* Part I.

<sup>11</sup> *See infra* Part II.

<sup>12</sup> *See generally* Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209 (2011) (examining attorney discipline systems on a state-by-state basis).

<sup>13</sup> *See infra* Part I.

<sup>14</sup> *See infra* Part I.

<sup>15</sup> *See infra* Part I.

when it comes to sexual violence against clients.<sup>16</sup> Through the attorney discipline system, the legal profession fails to reconcile the widespread harm that members of the profession do in the form of sexual abuse and harassment of clients. Indeed, case after case shows that lawyers have been allowed to sexually prey upon particularly vulnerable clients, even children, and continue practicing law after a brief—if any—suspension.<sup>17</sup>

Part II begins with a brief discussion of the Me Too movement and #MeToo,<sup>18</sup> noting that #MeToo drove litigation and legal reform efforts in which lawyers played critical roles.<sup>19</sup> This discussion is juxtaposed with an exploration of the profound harm that attorney-client sexual violence does to client-victims, the public, and the legal profession. Sexually predatory lawyers not only harm and traumatize their victims, but also diminish the credibility and integrity of the profession as a whole. The profession and the public are further harmed when the purportedly self-regulating attorney discipline system fails to hold those abusive attorneys accountable.

Part III applies existing rules of professional conduct to attorney-client sexual violence, demonstrating that current attorney ethics rules and guidelines have the capacity to address this problem, and suggests several reasons why that capacity is being severely underutilized in many instances.<sup>20</sup> Those reasons include protectionism, minimization of harm, regressive precedent, and consent confusion. This Article rejects the notion that clients are free to consent to sex within the attorney-client relationship. Due to the power imbalance inherent in the attorney-client relationship, any sexual contact between attorney and client is inherently unequal. When clients face the possibility of losing their freedom or children, this power imbalance is compounded. Clients may be particularly vulnerable due to indigency and social marginalization.<sup>21</sup> In the context of such a power imbalance, sexual contact is inherently exploitative.

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<sup>16</sup> See *infra* Part I.

<sup>17</sup> See *infra* Part I.

<sup>18</sup> The distinction between the Me Too movement and #MeToo is delineated in Part II.A.

<sup>19</sup> See *infra* Part II.

<sup>20</sup> See *infra* Part III.

<sup>21</sup> Sexual abusers choose victims who are particularly vulnerable because they want a victim who is less likely to report the abuse and less likely to be believed if he or she does report. Therefore, those who are poor, Black, Indigenous, people of color, immigrants, queer, and other marginalized identities are more vulnerable to this pattern of abuse by lawyers who purport to help them. See Heather Littleton & David DiLillo, Introduction, *Global Perspectives on Sexual Violence: Understanding the Experiences of Marginalized Populations and Elucidating the Role of Sociocultural Factors in Sexual Violence*, 11 PSYCH. VIOLENCE 429, 429 (2021) (“[R]isk

Finally, Part IV suggests a number of reforms to bring clarity, accountability, and prevention to attorney-client sexual misconduct. Among the reforms this Article proposes is a universal ban on attorney-client sexual contact.<sup>22</sup> Although not a panacea, a universal ban would improve clarity and administrability of existing professional norms. Additional reforms would drive more serious consequences for attorneys who sexually victimize their clients. Specifically, the Article proposes a strict liability approach to sexual conflict of interest, presumptive disbarment for attorney-client sexual contact, and presumptive actual suspension for other forms of sexual harassment against clients.

### I. FAILURE OF ACCOUNTABILITY

In a profession that purports to value justice and fairness, too many attorneys have sexually abused and harassed their clients with relative impunity and returned to the profession with little to no

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for sexual violence is not evenly distributed. Although some high-risk groups have been studied consistently (e.g., women), other vulnerable populations have received little attention. In particular, those with marginalized and stigmatized identities, including LGBTQ+ individuals and racial/ethnic minority individuals experience elevated rates of sexual violence but have rarely been the focus of research to understand their experiences.”) (citations omitted).

<sup>22</sup> Twelve states have no rule of professional responsibility banning attorney-client sexual contact. GA RULES OF PRO. CONDUCT, r. 1.8; LA. RULES OF PRO. CONDUCT, r. 1.8; MD. ATT’YS’ RULES OF PRO. CONDUCT, r. 19-301 cmt. 12, r. 19-308.4 cmt. 3; MASS. RULES OF PRO. CONDUCT, r. 1.8; MICH. RULES OF PRO. CONDUCT, r. 1.8 cmt. Sexual Relations with Clients; MISS. RULES OF PRO. CONDUCT, r. 1.8; N.J. RULES OF PRO. CONDUCT, r. 1.8; R.I. RULES OF PRO. CONDUCT, r. 1.8; S.C. RULES OF PRO. CONDUCT, r. 1.8; TENN. RULES OF PRO. CONDUCT, r. 1.8; TEX. DISCIPLINARY RULES OF PRO. CONDUCT, r. 1.8; VA. RULES OF PRO. CONDUCT, r. 1.8. A number of scholars have argued that so-called consensual sex between attorney and client should be permitted by ethics rules, or that there are circumstances under which such behavior could be equitable and therefore ethically permissible. *See, e.g.,* Bower & Stern, *supra* note 8, at 541-44 (arguing that Model Rule 1.8(j) is overinclusive); Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209 (1996) (criticizing the ethical ban on attorney-client sex); Craig D. Feiser, *Strange Bedfellows: The Effectiveness of Per Se Bans on Attorney-Client Sexual Relations*, 33 J. LEGAL PRO. 53, 54-55 (2008) (“Some claim that while preventing attorney exploitations and abuses of the legal relationship are laudable goals, any per se ban on sexual relationships necessarily sweeps too broadly into personal relationships . . .”). *But see, e.g.,* Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 FORDHAM L. REV. 5 (1993) (reviewing state rules and cases and recommending a per se ban); Anthony E. Davis & Judith Grimaldi, *Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 57, 58 (1993) (arguing the need for a specific ethical rule banning attorney-client sex); Casey W. Baker, J.D., *Attorney-Client Sexual Relationships in the #MeToo Era: Understanding Current State Approaches and Working Towards a Better Rule*, 49 SW. L. REV. 243 (2020) (analyzing Model Rule 1.8(j) and different state approaches to addressing attorney-client sexual relations, and proposing a new model rule that leans more towards entirely and expressly banning such relations.).

additional oversight, limitations, or safeguards against future abuse.<sup>23</sup> This Part will highlight several attorney discipline cases that demonstrate the scope and significance of the legal profession's failure to hold attorneys who sexually harass and abuse their clients accountable. Although there is much to learn from older cases, the focus of this Article is the period since #MeToo, which went viral online in 2017.<sup>24</sup> Therefore, the cases discussed below are relatively recent. I bring these particular cases to the reader's attention as examples of abhorrent attorney misconduct that garnered tepid disciplinary consequences. Given the low reporting rates for sex crimes,<sup>25</sup> it is likely safe to assume these cases represent only a fraction of the abuse that actually occurs. As disappointing as these cases are, it is important to also keep in mind that the vast majority of abusers like these are likely never caught and will continue to abuse.<sup>26</sup> Proof problems and unwarranted skepticism built on rape myths<sup>27</sup> likely further diminish the number of cases that reach discipline litigation.<sup>28</sup> The following cases should be taken as exemplars of a problem, the scope of which is still unknown, but likely larger than most attorneys would want to admit.

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<sup>23</sup> Compare Mischler, *supra* note 22, at 214-15 (stating that as of 1996 the number of reported attorney sexual misconduct claims to be relatively low and overstated in media and academia), with *infra* note 19, at 446, 449 (discussing how rape and other forms of sexual misconduct are underreported). And see Baker, *supra* note 22, at 250 (overviewing the Ethics 2000 Commission's concern about attorney-client sexual misconduct in light of an "excessive number of complaints beginning in 1998).

<sup>24</sup> For examples of the lessons of the #MeToo movement which this Article will address vis-à-vis the legal profession, see generally Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 Nw. U. L. REV. 825 (2019) (discussing private regulation of sex and sexuality where the state has failed); and Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE J.L.F. 105 (2018) (noting the importance of race and intersectionality in discussions about the #MeToo movement).

<sup>25</sup> See Karen G. Weiss, *Neutralizing Sexual Victimization: A Typology of Victims' Non-Reporting Accounts*, 15 THEORETICAL CRIMINOLOGY 445, 446, 449 (2011) (noting a low reporting rate for rape); Bonnie S. Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6, 7, 9, 31 (2003) (documenting low reporting rate for rape among college women).

<sup>26</sup> Victoria Brown et al. eds., *Rape & Sexual Assault*, 21 GEO. J. GENDER & L. 367, 375-76 (2020).

<sup>27</sup> Researchers have defined rape myths as "attitudes and beliefs that are generally false, but are widely and persistently held, and that serve to deny and justify male sexual aggression against women." Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCH. WOMEN Q. 133, 134 (1994). Examples of rape myths include, survivors are responsible for their rapes, women desire to be raped, and rape reports are often false. Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 762-67 (2011).

<sup>28</sup> Rape is underreported, and false reports of rape are rare. See generally Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335 (2010) (contrasting high rates of unreported rape and low rates of false reporting).

The cases below have one important thing in common: there is little or no dispute about the facts of the conduct that gave rise to the ethics charges.<sup>29</sup> These are generally cases in which either the respondent accepts the factual allegations, or the victim has recordings of the incidents. Despite having some of the strongest evidence that can be imagined in a sexual abuse or sexual harassment claim, these cases result in relatively minor disciplinary consequences. Another common feature of these cases is the particular vulnerability of the client-victims due to their financial circumstances, the nature of their legal case, gender, and other factors. Many of the cases below arise from domestic and criminal cases in which client-victims are particularly desperate. This fact highlights the severity of the attorneys' misconduct and the profundity of the power differential at play in these cases.

#### A. *Sexual Abuse*

Below is a discussion of cases that involve attorneys who sexually abused their clients by subjecting them to unwanted sexual contact, such as sexual assault by coercion.<sup>30</sup> Although the attorneys in these cases also subjected their clients to various forms of sexual harassment, these sexual abuse cases are separated from those that involve solely non-touching harassment, which are discussed in subpart B.

##### i. *Stout*

In a 2019 Oklahoma discipline case, attorney Richard E. Stout was charged with sexual misconduct against three clients in three separate matters in 2016 and 2017.<sup>31</sup> Stout's misconduct included sexually harassing communications, "unwanted sexual advances," and

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<sup>29</sup> See *infra* Sections I.A & I.B.

<sup>30</sup> This Article uses the phrase "sexual assault by coercion" in an effort to be as precise as possible. While cultural understandings of rape generally encompass all sex without freely given consent, there is no universally accepted legal definition of consent. Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 423 (2016) (noting that the meaning of consent is widely debated); see also Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 261 (2018) (arguing the legal definition of rape by non-consent fails to capture many forms of unwanted sex). State criminal laws vary widely, and in some states, rape still requires an element of physical force, threat of bodily harm, incapacity, or minor victim. *Infra* note 192.

<sup>31</sup> Okla. Bar Ass'n v. Stout, 451 P.3d 155, 156-57 (Okla. 2019).

apparently coerced sexual intercourse.<sup>32</sup> Stout was found to have violated the rules of professional conduct and sanctioned with three months suspension with several limiting conditions upon his return to practice.<sup>33</sup>

The case against Stout was separated into three counts involving three different clients. The first count was that Stout “made ‘unwanted sexual advances’” and “sent ‘sexually suggestive emails’” to his client C.B., a woman whom Stout represented in seeking guardianship of her minor nephew.<sup>34</sup> Stout also asked C.B. for “sexually suggestive photographs” and asked her to help him hide his inappropriate comments by deleting them.<sup>35</sup> C.B. “testified that she felt uncomfortable with [Stout’s] continued representation,” terminated his representation of her, and hired a new attorney.<sup>36</sup> Stout admitted to the ethics trial panel “that he sent sexually suggestive comments to C.B. by text message and social media, and that these actions were improper and created harm to his client.”<sup>37</sup>

The Oklahoma Supreme Court noted that Stout “admitted to his improper behavior and expressed deep remorse over the effect of his actions on C.B.” and participated in a three-day inpatient sex addiction treatment program.<sup>38</sup> The court also focused on the fact that Stout “voluntarily” contacted the state lawyer’s assistance program, downplaying that he did so only after he was served notice of the ethics complaint.<sup>39</sup> The court seemed to value the subjective experience of attorney Stout far more than the client he abused.

The second count against Stout was that he “sent sexually suggestive text messages” to client C.R. and instructed her to delete the messages after reading them.<sup>40</sup> Stout represented C.R. in a divorce matter.<sup>41</sup> “Because of the sexual overtones in the communications, C.R. did not feel like Mr. Stout was 100% focused on representing her in her divorce matter.”<sup>42</sup> C.R. did not terminate Stout’s representation of her,

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<sup>32</sup> *Id.* at 156-57. The facts as described in the case do not allow for a more specific characterization than this. There are myriad circumstances under which coerced sexual intercourse would amount to sexual assault, which may have been a more accurate way for the trial board and the court to describe this conduct.

<sup>33</sup> *Id.* at 160.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 156-57.

<sup>39</sup> *Id.* at 156.

<sup>40</sup> *Id.* at 157.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

despite him making her feel uncomfortable, because she did not want to delay her divorce by switching lawyers.<sup>43</sup> She did, however, take steps to limit contact with him, such as handling some aspects of the case pro se.<sup>44</sup> Stout admitted to his actions and, the court noted, “took full responsibility for his actions and said that at the time he engaged in this behavior his thinking was distorted from his sexual addiction.”<sup>45</sup> The court did not seem troubled or even puzzled by Stout supposedly taking full responsibility while also blaming his actions on a sex addiction.<sup>46</sup>

The third count against Stout was that he coerced client L.B. into sexual intercourse. L.B. retained Stout to represent her in defending against a criminal charge against her.<sup>47</sup> Stout met L.B. in her home, ostensibly because she had no way of getting to his office. According to the court, “L.B. did not have money at the time to pay [Stout’s \$7,500 retainer], and she wound up having sex with Mr. Stout that evening ‘because [she] was in a desperate situation.’”<sup>48</sup> Stout told the ethics board that he may have given L.B. a reduced fee in exchange for sex.<sup>49</sup>

Stout’s sexual abuse of L.B. took place under highly coercive circumstances. The abuse occurred in L.B.’s home, L.B. was charged with a crime for which she needed Stout’s help, and L.B. acquiesced to intercourse out of “desperate[ion].” However, the court seemed to take for granted that the intercourse was consensual and made no mention of coercion in its analysis or discussion.<sup>50</sup> Instead, the court focused heavily on the fact that Stout took responsibility for his actions and, when questioned, disclosed his misconduct with L.B. whom he stated would not have come forward to report him on her own.<sup>51</sup>

Ultimately, the Oklahoma Supreme Court, in its de novo review, agreed with the trial panel that Stout committed misconduct warranting suspension of three months.<sup>52</sup> The court also adopted the trial panel’s set of conditions upon Stout’s return to practice. Specifically, “(1) Mr. Stout shall not accept female clients and will not meet alone with a female at any time associated with his practice of law; (2) he will remain in treatment as recommended by his counselor; (3) he will remain in contact with Lawyers Helping Lawyers; and (4) he will maintain site

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 158-60.

<sup>47</sup> *Id.* at 157.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 159-60.

blocking protection on his electronic devices.”<sup>53</sup> These conditions originated with Stout at the trial panel level, where he requested to be sanctioned only with censure and these conditions.<sup>54</sup>

In reaching its conclusion, the court noted that “the principal objectives of a disciplinary proceeding are to protect the public and purify the Bar, not to punish the lawyer,”<sup>55</sup> and reviewed two recent discipline cases with similar facts, both of which resulted in six-month suspensions.<sup>56</sup> Consistent expression of remorse seemed to be the distinguishing factor between Stout’s case and another case in which the attorney did not engage in intercourse with his client but also apparently failed to express sufficient, consistent remorse.<sup>57</sup> The court’s analysis focused heavily on mitigation, downplaying aggravating factors such as consciousness of guilt through repeated efforts to hide the sexually harassing communications.<sup>58</sup> The court seemed to weigh heavily Stout’s claim that sex addiction caused him to harm his clients, even though Stout did not seek help for his alleged addiction until he was facing disciplinary consequences.<sup>59</sup>

ii. *Sarver*

In the 2018 Ohio case *Disciplinary Counsel v. Sarver*,<sup>60</sup> attorney Jason Allan Sarver coerced an indigent criminal defendant client into having sexual contact with him.<sup>61</sup> The board disciplined Sarver with six months of actual suspension—a two-year suspension with eighteen months stayed on multiple conditions.<sup>62</sup> Although the Ohio Supreme Court took a tougher approach than the ethics board and critiqued much of the board’s permissive and victim-blaming analysis, the court

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<sup>53</sup> *Id.* at 160.

<sup>54</sup> *Id.* at 159.

<sup>55</sup> *Id.* (citing Okla. Bar Ass’n v. Givens, 343 P.3d 214 (Okla. 2015)).

<sup>56</sup> The court referred to *Oklahoma Bar Association v. Smalley*, 432 P.3d 1048 (Okla. 2018), in which Mr. Smalley was given a six-month suspension for sexual misconduct against two separate clients, specifically for having sex with one client three separate times and for engaging in lascivious communication with another client. The court also referred to *Oklahoma Bar Association v. Hixson*, 397 P.3d 483 (Okla. 2017), in which Mr. Hixson was given a six-month suspension for sexual misconduct against a client, namely sending eighty-three pages of sexual text messages to his vulnerable, twenty-five-year-old client with a newborn baby.

<sup>57</sup> *Stout*, 451 P.3d at 159-60 (citing *Hixson*, 397 P.3d 483).

<sup>58</sup> *Id.* at 156-57, 160.

<sup>59</sup> *Id.*

<sup>60</sup> *Disciplinary Counsel v. Sarver*, 119 N.E.3d 405 (Ohio 2018).

<sup>61</sup> *Id.* at 408.

<sup>62</sup> *Id.*

ultimately accepted the board's sentence, which imposed a mere six months of actual suspension.<sup>63</sup>

Sarver met J.B. when he represented her boyfriend in 2012.<sup>64</sup> In September of 2015, J.B. reached out to Sarver because she believed she might be facing a felony charge.<sup>65</sup> The next day, Sarver and J.B. met to discuss the case over drinks and “had sex” in Sarver's car in the parking lot.<sup>66</sup> Sarver was then appointed to represent J.B. in that felony case.<sup>67</sup> Sarver and J.B. “had sex” seven more times during his legal representation. J.B. told investigators that Sarver had insinuated that he would help her in exchange for “sexual favors.”<sup>68</sup> She stated that she had felt unable to say no to his proposal—she felt “kind of forced into it” because she was facing seven felonies.<sup>69</sup> Sarver also lied to a judge by denying rumors that he was in a sexual relationship with J.B.<sup>70</sup>

Unlike many other abusive attorneys, Sarver was actually charged with a sex crime for his actions, in addition to professional discipline. Specifically, he faced two counts of coercive sexual conduct against J.B.<sup>71</sup> Those charges were later dismissed when Sarver pled guilty to three misdemeanor counts of trespassing and one count of obstructing official government business.<sup>72</sup> The trespassing charge arose from his authorized use of a neighbor's hot tub, and the obstruction charge was for advising J.B. to turn off her GPS to avoid arrest.<sup>73</sup>

J.B. was placed in the position of being approached by detectives and promised a reduced sentence if she would cooperate with an investigation against her own attorney for his misconduct in the form of coercing her into sex.<sup>74</sup> The board said that was a benefit to her because she got a better plea deal. The board seemed concerned with the consequence to Sarver, rather than the client-victim, reasoning:

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<sup>63</sup> *Id.* at 411-13.

<sup>64</sup> *Id.* at 407.

<sup>65</sup> *Id.* at 407-08.

<sup>66</sup> *Id.* It is difficult to accurately summarize the facts because they are filtered through several retellings. It is clear that intercourse occurred, and this author's view is that any such intercourse is abusive *per se*, regardless of whether it amounts to a sex crime under any particular state law. In this case, criminal sex offense charges were filed against the attorney, but those charges were reduced as part of a plea.

<sup>67</sup> *Id.* at 408.

<sup>68</sup> *Id.* at 407-08.

<sup>69</sup> *Id.* at 408.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

(1) not only was there no harm to the client but the client leveraged her relationship with [Sarver] to get a better plea deal by agreeing to testify against him; (2) he received a very public reprimand of sorts from the local media because his arrest and indictment, while he was a candidate for prosecutor, were front-page news; (3) he was over-indicted with 14 felonies and four misdemeanors including bribery and sexual battery charges; (4) he was arrested twice and spent two nights in jail; [and (5)] he was forced to withdraw his candidacy for county prosecutor.<sup>75</sup>

The Ohio Supreme Court rightfully criticized this reasoning and pointed out that Sarver’s conduct was abusive, coercive, unethical, and occurred within a significant power hierarchy.<sup>76</sup> The court noted that Sarver’s behavior violated several Ohio Rules of Professional Conduct, including 1.8(j), which bars attorneys from engaging in sexual contact with clients outside of a preexisting consensual relationship.<sup>77</sup> The court correctly pointed out that comments and caselaw on rule 1.8(j) make clear that a client’s apparent consent is not a defense to a violation of that rule, noting that: “Reported cases are filled with clients who have said that they submitted to their attorney’s sexual advances out of fear that refusing to submit would affect the quality of their representation at a time of vulnerability and dependence on the attorney.”<sup>78</sup>

The court also took issue with the board’s failure to hear testimony from J.B. and ignoring several facts that pointed to her subjective experience of the sexual contact with her attorney as coerced or nonconsensual:

[A]lthough J.B. told detectives that she believed Sarver was helping her in exchange for sexual favors and that she had submitted to his sexual advances because of her legal jeopardy—and notwithstanding relator’s statement at the hearing that J.B. still contended that the sexual

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<sup>75</sup> *Id.* at 409.

<sup>76</sup> *Id.* at 411-12.

<sup>77</sup> *Id.* at 409.

<sup>78</sup> *Id.* at 412 (citing *Disciplinary Counsel v. Detweiler*, 989 N.E.2d 41, 45 (Ohio 2013); *Disciplinary Counsel v. Moore*, 804 N.E.2d 423, 426 (Ohio 2004); *Akron Bar Ass’n v. Williams*, 819 N.E.2d 677, 679 (Ohio 2004); *In re Vogel*, 482 S.W.3d 520, 525 (Tenn. 2016); *Iowa Sup. Ct. Att’y Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 617 (Iowa 2015); *In re Berg*, 955 P.2d 1240, 1257 (Kan. 1998); *In re Rinella*, 677 N.E.2d 909, 915 (Ill. 1997)).

activity with Sarver was not consensual—the board never heard directly from her before making conclusions about the nature of her relationship with Sarver.<sup>79</sup>

In critiquing the board's characterization of Sarver's misconduct as a consensual sexual relationship, the Ohio Supreme Court noted that the discipline board "essentially blamed the victim, J.B., for the negative consequences that Sarver experienced," even though Sarver himself had made the decision to prey upon his indigent and desperate client.<sup>80</sup> Finally, the court rejected the board's conclusion that J.B. in fact benefitted from Sarver's abuse by "leverag[ing] her relationship with [Sarver] to get a better plea deal."<sup>81</sup>

The court strongly condemned Sarver's despicable behavior and rejected the board's problematic rationale.<sup>82</sup> However, despite its more enlightened analysis, the court ultimately imposed just six months actual suspension.<sup>83</sup> Even a court that seemed to understand the issues of power and coercion at play in this case and highlighted the resounding absence of the victim's voice in the proceedings, was unable to bring itself to impose meaningful discipline.

Justice Fischer, joined by Justice O'Connor and Justice DeGenaro, filed a separate opinion, concurring in part and dissenting in part, reasoning that a six-month suspension was insufficient.<sup>84</sup> Fischer's opinion noted that the board was unduly dismissive of the harm experienced by the victim. The dissent also highlighted that Sarver deceived the court multiple times during the course of his misconduct.<sup>85</sup> Yet, even after strongly reasoning that Sarver's abusive conduct harmed his client and posed a danger to the public, Fischer then stated that an appropriate sanction would be only one year of actual suspension.<sup>86</sup> Despite much analysis, the final consequence for Sarver was relatively minor (an actual suspension of six months) given the harm he inflicted on J.B. and the havoc he inflicted on the administration of justice and the integrity of the legal profession.<sup>87</sup>

Interestingly, Sarver was finally disbarred in 2020 after another discipline case was filed against him—not for sexually exploiting a

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (emphasis omitted).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 411-13.

<sup>83</sup> *Id.* at 413.

<sup>84</sup> *Id.* at 413-14 (Fischer, J., concurring in part and dissenting in part).

<sup>85</sup> *Id.* at 415.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

client, but for practicing law without an active license.<sup>88</sup> Thus, the discipline board and Ohio Supreme Court demonstrated that the direct consequences for disobedience against their own regulatory power are far worse than the direct consequences for sexually exploiting and harming vulnerable clients. In finding that disbarment was an appropriate sanction, the court noted that disbarment is the presumptive consequence for practicing under suspension.<sup>89</sup> This Article recommends a similar presumption for attorneys who exploit their clients for sex.<sup>90</sup>

### *B. Sexual Harassment and Grooming*

This subsection includes a discussion of discipline cases against attorneys who subjected their clients to sexual harassment or grooming comments and behaviors that do not involve sexual touching or intercourse.

#### *i. Bledsoe*

In the 2018 South Carolina case, *Matter of Bledsoe*, attorney John W. Bledsoe coerced a client, who had recently lost custody of her child, into showing him her breasts.<sup>91</sup> For this—and for making a costly drafting error in a separate case and delaying correction of that mistake—Bledsoe entered into a discipline agreement and was given public reprimand, as well as being mandated to complete an ethics and practice course.<sup>92</sup> The South Carolina Supreme Court issued a short opinion that accepted the discipline agreement and concluded with a statement that “respondent’s misconduct warrants a public reprimand.”<sup>93</sup>

The court’s decision was less than 650 words and did not disturb the Office of Disciplinary Counsel’s agreement with Bledsoe. The court briefly discussed the two separate incidents of misconduct: first the drafting mistake, then the sexual harassment and coercive voyeurism.<sup>94</sup> The opinion contained highly limited information about the subjective experience or life circumstances of the client-victim of what the court

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<sup>88</sup> Disciplinary Counsel v. Sarver, 170 N.E.3d 799, 800-01 (Ohio 2020).

<sup>89</sup> *Id.* at 805.

<sup>90</sup> *Infra* Section IV.B.ii.

<sup>91</sup> *Matter of Bledsoe*, 811 S.E.2d 775, 776 (S.C. 2018).

<sup>92</sup> *Id.* at 777.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

calls “Matter B,” sexual harassment and coercive voyeurism. The court’s summary of the facts was as follows:

At some point during his representation of Client B [who had recently lost custody of her child], respondent expressed to Client B that he was interested in a sexual relationship with her. Respondent asked Client B to show him her breasts. Client B showed respondent her breasts, but felt ashamed and humiliated. Respondent and Client B did not engage in a sexual relationship.<sup>95</sup>

This characterization of Bledsoe’s harassment as expression of interest in a “sexual relationship” conveys much about the court’s misunderstanding of sexual harassment and abuse.<sup>96</sup> The only discussion of the client-victim’s perspective is that she “felt ashamed and humiliated.”<sup>97</sup> This client-victim was in the incredibly painful position of having lost custody of her child, but the court did not discuss that fact in any depth.<sup>98</sup> Bledsoe’s sole role in this client’s life was to help her navigate the legal system, but he took advantage of her vulnerability to make sexually harassing comments and coerce her into showing him her breasts. For this harassment and exploitation of a vulnerable client, the discipline board and South Carolina Supreme Court agreed that a public reprimand was sufficient professional discipline.

*ii. Becker*

In the 2020 case, *Matter of Becker*, attorney Jonathan Lloyd Becker was disciplined for making several sexually harassing comments to a vulnerable child he was supposed to be representing.<sup>99</sup> Becker was found to have committed misconduct and sanctioned with an eight-month suspension that allowed for his return to practice without further restrictions.<sup>100</sup> Becker had been assigned to serve as an attorney for the child in a domestic violence civil protection order matter.<sup>101</sup> There were no allegations of sexual abuse, nor any facts pointing to a specific need to investigate that possibility. During the course of interviewing the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 776.

<sup>99</sup> 180 A.D.3d 1322, 1323- 25 (N.Y. App. Div. 2020).

<sup>100</sup> *Id.* at 1325.

<sup>101</sup> *Id.* at 1324.

twelve-year-old child, Becker made reference to the child's genitals, questioned the child about her "past sexual conduct," and gave the child "an explicit description" of a past case he handled as a prosecutor "involving an adult engaging in criminal sex acts with a minor."<sup>102</sup> Becker then "made a second reference to the child's genitals prompted by the child adjusting an article of clothing."<sup>103</sup> Finally, Becker told the child that she should not discuss the interview with anyone or he could "end up in trouble."<sup>104</sup>

Becker was charged with misconduct by the Attorney Grievance Committee for these behaviors as well as for inappropriately reviewing and saving content from the child's social media accounts.<sup>105</sup> Becker was ultimately found to have engaged in misconduct and subjected to an eight-month suspension from the practice of law, after which he was able to return to practice without preconditions.<sup>106</sup> The court approved this sanction after purportedly considering both mitigating and aggravating factors, including "the vulnerability of the child along with respondent's reluctance to acknowledge the wrongful nature of his misconduct."<sup>107</sup> However, the court's per curiam decision failed to mention the harm to this child, the public, or the profession, or the risk of Becker engaging in similar abuse in the future.<sup>108</sup>

The court described the facts of this case so vaguely that it is difficult to understand what actually happened. However, it is clear that Becker, who was appointed to represent a particularly vulnerable and traumatized twelve-year-old child in domestic violence court, took the opportunity to engage in a classic pattern of sexual grooming.<sup>109</sup> His actions included inappropriately discussing sex, the child's "sexual history," an adult engaging in sex acts with a child, and the child's genitals (in two separate contexts).<sup>110</sup> Becker's actions demonstrate he

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1323-24.

<sup>106</sup> *Id.* at 325.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1322.

<sup>109</sup> *Id.* at 1323-24. Grooming is a process of manipulation used by an abuser to gain access and trust in order to sexually abuse a vulnerable victim, often a child, and reduce the likelihood of being caught. According to experts, grooming often entails selection of a particularly vulnerable victim, access and isolation of that victim, developing secrets with the victim, desensitizing the victim to sexual topics, and an attempt to make this behavior seem natural or normal. Daniel Pollack & Andrea MacIver, *Understanding Sexual Grooming in Child Abuse Cases*, 34 CHILD L. PRAC. 161, 161-68 (2015); see also *Grooming: Know the Warning Signs*, RAINN (July 10, 2020), <https://www.rainn.org/news/grooming-know-warning-signs>.

<sup>110</sup> *Id.* at 1323-24

was conscious of his guilt because he told the child he could get in trouble if she told anyone what they talked about.<sup>111</sup> It is difficult to put into words the egregiousness of Becker's failure to act in his client's interests. Rather than fulfilling his obligations as an attorney, Becker sexually exploited and groomed the child for his own prurient gratification. The court's failure to recognize and name the grooming behavior or account for the risk it implies for Becker's future conduct highlights how out of touch with social mores around accountability for sexual abuse the attorney discipline process is. Instead, the court simply took Becker's word that he changed his office procedures around interviewing, imposed a brief suspension, and allowed him to resume his practice of law upon the conclusion of his suspension.<sup>112</sup>

## II. UNDERSTANDING THE HARM CAUSED BY THIS ABUSE

### A. *The Me Too Movement, #MeToo, and Time's Up*

The Me Too movement describes a decades-long campaign by survivors of sexual violence to build solidarity, healing, and accountability.<sup>113</sup> As early as 2005, community activist Tarana Burke began intentionally using the words "me too" to disclose abuse, validate, and connect Black and Brown survivors of sexual violence.<sup>114</sup> Importantly, Burke's Me Too work has centered the experiences and needs of survivors of color.<sup>115</sup> Burke has called Me Too "the start of a larger conversation and a movement for radical community healing."<sup>116</sup> The viral #MeToo phenomenon was characterized by a groundswell of first-person disclosures of sexual violence beginning in 2017. However, #MeToo has become a kind of shorthand that is used to describe a confluence of high-profile moments in society's ongoing reckoning with sexual violence.<sup>117</sup>

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<sup>111</sup> *Id.* at 1324-25.

<sup>112</sup> *Becker*, 180 A.D.3d at 1325-26.

<sup>113</sup> Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html?smid=url-share>.

<sup>114</sup> TARANA BURKE, UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT, 12 (2021).

<sup>115</sup> *Id.* at 242; Wexler et al., *supra* note 3, at 52.

<sup>116</sup> Tarana Burke (@TaranaBurke), TWITTER, <https://twitter.com/taranaburke/status/919704949751255040?> (last visited Apr. 19, 2022).

<sup>117</sup> Here are just a few examples: In June 2016, Chanel Miller publicly shared her victim impact statement (using a pseudonym at the time) after her rapist was sentenced to six months in prison for sexually assaulting her while she was unconscious, and the judge bemoaned the loss of the

In October 2017, after news of film producer Harvey Weinstein’s serial sexual abuse of women over whom he held professional power went public,<sup>118</sup> actor Alyssa Milano used Twitter to call on survivors of sexual violence to disclose their experiences.<sup>119</sup> Twitter users, including many celebrities,<sup>120</sup> responded to Milano’s call in droves using the hashtag #MeToo.<sup>121</sup> The hashtag quickly gained visibility as tens of thousands of survivors disclosed sexual abuse they had experienced.<sup>122</sup> Milano’s initial call was for survivors to come together and demonstrate the scope of the issue of sexual violence.<sup>123</sup> However, without the work of movement building and leadership, the hashtag was not a unified movement but a vehicle for millions of individual social media users to speak out for their own reasons, which seemed to include solidarity, catharsis, protest, retribution, and others.<sup>124</sup> Burke was troubled by a lack of Black stories in #MeToo,

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rapist’s Stanford University swimming scholarship. Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/brock-turner-appeal.html>. In August 2016, the first report of abuse by Larry Nassar against a gymnast was published. Those allegations led to a massive prosecution and conviction of Nassar, and passage of the Safe Sport Authorization Act. David Woods, *Four Years Later, How the Larry Nassar and USA Gymnastics Scandals Continue*, INDYSTAR (June 24, 2020), <https://www.indystar.com/story/sports/2020/06/24/larry-nassar-usa-gymnastics-scandal-still-ripples-four-years-later/3232953001/>. In November 2016, Donald Trump was elected president just one month after the release of a recording of him bragging about sexually assaulting women. Trump defeated the first woman to win a major party’s presidential nomination, Hillary Clinton. In response, activists organized the Women’s March to protest Former President Trump’s inauguration in January 2017. Susan Chira & Yamiche Alcindor, *Defiant Voices Flood U.S. Cities as Women Rally for Rights*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/women-march-protest-president-trump.html?smid=url-share>. In the summer of 2017, Kenyette Barnes and Oronike Odeleye launched #MuteRKelly, an effort to bring attention to numerous allegations that Kelly sexually abused Black girls and women for decades. Kelly was convicted on several of those allegations in 2021. @ajc, TWITTER (Sept. 27, 2021, 6:07 PM), <https://twitter.com/ajc/status/1442611800529244162>.

<sup>118</sup> Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

<sup>119</sup> “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” Alyssa Milano (@Alyssa\_Milano), TWITTER, [twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) (last visited April 19, 2022).

<sup>120</sup> Anna Codrea-Rado, *#MeToo Floods Social Media With Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html>.

<sup>121</sup> *Id.* Although many used the construction #metoo (all lowercase letters), this Article follows the convention of capitalizing every word in a hashtag to make it more legible for those with disabilities that affect visual perception and processing.

<sup>122</sup> *Id.*

<sup>123</sup> Milano, *supra* note 119.

<sup>124</sup> Codrea-Rado, *supra* note 120.

noting that the hashtag seemed to highlight the barriers facing survivors who are women and girls of color.<sup>125</sup>

As #MeToo exploded, Burke was undeterred from her movement-building work.<sup>126</sup> Initially, Burke expressed concern that #MeToo would overshadow what she had built.<sup>127</sup> Milano responded to Burke's concerns, crediting Burke, and stating that she was not previously aware of Burke's work.<sup>128</sup> While #MeToo brought mainstream visibility to Tarana Burke's Me Too movement, Burke's movement retained a distinct vision and character, built from grassroots organizing efforts by Black and Brown women and girls.<sup>129</sup> Burke has said Me Too was always intended to be a survivor-centered movement focused on empowerment and healing for Black women and girls.<sup>130</sup> While Burke has expressed support for the #MeToo phenomenon and artfully navigated the interrelationship between her movement and the hashtag, many BIPOC activists have maintained an uneasy relationship with what they see as a white-supremacist #MeToo.<sup>131</sup>

#MeToo reached far beyond social media, fueling a dizzying series of high-profile news stories exposing men for harassing and abusing those over whom they held power.<sup>132</sup> Some of those disclosures led to professional or legal consequences for those who had committed abuse for years with impunity.<sup>133</sup> For example, the allegations that spurred Alyssa Milano to first use the #MeToo hashtag resulted in a conviction for producer Harvey Weinstein.<sup>134</sup> On January 1, 2018, a group of entertainers launched the Time's Up movement in an apparent effort to use the momentum of #MeToo to elevate and support marginalized women survivors of workplace sexual harassment,

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<sup>125</sup> Burke, *supra* note 114, at 242-43.

<sup>126</sup> *Id.*

<sup>127</sup> Garcia, *supra* note 113.

<sup>128</sup> *Id.*

<sup>129</sup> Burke, *supra* note 114, at 242.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Wexler et al., *supra* note 3, at 49 (discussing high-profile reports of abuse by Travis Kalanick, Roger Ailes, Bill O'Reilly, and others).

<sup>133</sup> See, e.g., Erik Ortiz & Corky Siemaszko, *NBC News Fires Matt Lauer After Sexual Misconduct Review*, NBC NEWS (Nov. 29, 2017, 7:39 AM), <https://www.nbcnews.com/storyline/sexual-misconduct/nbc-news-fires-today-anchor-matt-lauer-after-sexual-misconduct-n824831> (reporting on NBC's ouster of Lauer for sexual misconduct); Jan Ransom, *Harvey Weinstein Is Found Guilty of Sex Crimes in #MeToo Watershed*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-trial-rape-verdict.html> (reporting on Weinstein's conviction for sex offenses).

<sup>134</sup> Ransom, *supra* note 133.

particularly low-wage women and women of color.<sup>135</sup> In an open letter, Time's Up organizers explained that their effort was in response to advocacy and organizing by Alianza Nacional de Campesinas.<sup>136</sup> Time's Up focused on legal action and advocacy, giving rise to the Time's Up Legal Defense Fund, which provides legal services to survivors of workplace harassment.<sup>137</sup>

While many experienced #MeToo as a watershed, its long-term implications remain to be seen. However, what is clear is the role that lawyers have occupied in seeking accountability for sexual violence. Where #MeToo inspired disclosures have resulted in civil lawsuits and criminal charges against abusers, lawyers have, of course, positioned themselves as representatives of the victims, the public, and the cause of justice.<sup>138</sup> #MeToo has even driven some self-reflection within the legal profession.<sup>139</sup> However, lawyers have yet to turn #MeToo inspired scrutiny, accountability, and reform on fellow attorneys who commit sexual violence against their clients with relative impunity.

### *B. The Harm of Attorney-Client Sexual Abuse & Harassment*

When attorneys sexually abuse and harass their clients, those clients suffer immediate and lasting harm. When the profession fails to impose meaningful accountability or redress for that harm, the profession as a whole suffers. By allowing sexually abusive attorneys to continue to practice law, the profession places future clients at risk. This subsection will detail the harm that the client, the profession, and the public suffer as a result of attorney-client sexual abuse and harassment.

#### *i. Harm to the Client-Victim*

When a client retains an attorney, that client is hiring a trained and licensed professional to represent their interests and placing trust in that professional. When the attorney exploits the client's trust for sexual amusement or gratification, the client is harmed by the abuse itself as well as the breach of trust. The client-victim suffers the often-devastating effects of a sexual assault, harassment, or coercive sexual

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<sup>135</sup> *Open Letter from Time's Up*, N.Y. TIMES, Jan. 1, 2018, <https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html>.

<sup>136</sup> *Id.*

<sup>137</sup> Yohana Desta, *Time's Up: How a Hollywood Initiative Is Tackling Sexual Predators*, VANITY FAIR (Jan. 2, 2018), <https://www.vanityfair.com/hollywood/2018/01/times-up-initiative-sexual-harassment-hollywood>.

<sup>138</sup> Ricker, *supra* note 1.

<sup>139</sup> *See supra* note 3.

contact, her underlying legal issue is neglected, and her rights potentially harmed.

While every victim's experience is unique, existing literature sheds significant light on the lasting harm experienced by sexual harassment and abuse.<sup>140</sup> Another harm that arises in cases of attorney-client sexual violence is the moral injury of a betrayal of trust, humiliation, and exploitation by someone in a position of power and trust.<sup>141</sup> This violation of trust has been described in analogous contexts, such as athletics,<sup>142</sup> education,<sup>143</sup> and religious practice.<sup>144</sup> Each of those contexts involves professionals placed in a special position of trust and power, similar to that which an attorney holds over their client. The betrayal of that position of trust is appalling.

In addition to experiencing the harm of the abuse itself, a victim abused by an attorney will almost certainly receive inferior legal services that may compromise their rights with respect to the legal case for which counsel has been retained. An attorney who is subjugating the client's interests to the attorney's own sexual gratification is not simultaneously capable of making responsible lawyering choices.<sup>145</sup> The attorney is likely to miss strategic opportunities and otherwise fail the interests of the client. The attorney cannot maintain client loyalty while engaging in sexual exploitation of that client.<sup>146</sup> An attorney whose judgment and integrity are so lapsed as to commit these offenses is likely to expose a client to legal harm as a secondary result of sexual harassment or abuse. Further, sexual harassment and abuse is profoundly deleterious to the rapport, trust, and collaboration necessary

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<sup>140</sup> See, e.g., Daniel Maggen, "When You're a Star": *The Unnamed Wrong of Sexual Degradation*, 109 GEO. L.J. 581, 615-17 (2021) (explaining the harm of sexual degradation); Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. LEGAL EDUC. 804, 809-13 (2017) (explaining the harm of unwanted sex); Luis E. Chiesa, *Sexual Lynching*, 29 CORNELL J.L. & PUB. POL'Y 759, 764-78 (2020) (discussing both the individual and social harm of rape, particularly against marginalized groups).

<sup>141</sup> John M. O'Connell, *Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule*, 92 COLUM. L. REV. 887 (1992).

<sup>142</sup> See, e.g., Deborah L. Brake, *Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds*, 22 MARQ. SPORTS L. REV. 395, 416 (2012) (noting that breach of trust defines the harm when a coach sexually abuses an athlete).

<sup>143</sup> See, e.g., Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 17 (2002) (discussing the violation of trust that occurs when a teacher sexually abuses a student).

<sup>144</sup> See, e.g., Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 194 (2004) (discussing clergy sexual abuse as a violation of parishioner trust).

<sup>145</sup> See *infra* Section III.A.

<sup>146</sup> Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131, 171-177 (1997/1998) (examining the effect that attorney-client sexual relations have on conflict of interest in the attorney-client relationship).

for a functioning attorney-client relationship. An attorney who is exploiting their client cannot expect that client to disclose important facts or trust counsel's advice. That client will necessarily receive inferior legal services as a result of that diminished trust.

Under the current attorney discipline regime, client-victims are likely to experience additional harm if they choose to report sexual abuse or harassment by their attorney to the bar. Specifically, a client-victim is likely to experience the harm of having their interests failed by a system not designed to consider the client-victim's needs, experience, and perspective as part of an ethics inquiry.<sup>147</sup> Although attorney discipline is not meant to vindicate the rights of client-victims,<sup>148</sup> that does not mean client-victims should be marginalized in ethics proceedings. Research indicates that procedural justice is meaningful to victims.<sup>149</sup> In a criminal justice context, sexual violence is underreported as compared to other crimes; but when victims do report, they do so for a variety of reasons including validation, accountability, and prevention of future harm to others.<sup>150</sup>

Going through the process of reporting or cooperating with an ethics investigation or prosecution only to see the abuser allowed to commit more harm would likely be profoundly upsetting for many client-victims. Disregarding victims' needs, experiences, and perspectives is particularly problematic when the system demands participation from the victim in the form of interviews or testimony, which have the potential to retraumatize the client-victim without any promise of meaningful justice. This disregard can be especially damaging when a client-victim has made a disclosure and cooperated with the process under the hope of justice or vindication.

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<sup>147</sup> See *infra* Part III.B.i and ii.

<sup>148</sup> AMERICAN BAR ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS § III.A (1986, amended 1992) [hereinafter STANDARDS FOR IMPOSING SANCTIONS], [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/sanction\\_standards.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.pdf). See also Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003) (discussing purpose of attorney discipline system without mention of redress of harm to victims).

<sup>149</sup> See Irina Elliott, Stuart D.M. Thomas & James R.P. Ogloff, *Procedural Justice in Contacts with the Police: The Perspective of Victims of Crime*, 13 POLICE PRACTICE & RSCH. 437, 446 (2012) (concluding results of Australian study "suggest that what is of particular importance to victims is the police willingness to do their best to achieve a desired outcome").

<sup>150</sup> Oona Brooks-Hay, *Doing the "Right Thing"? Understanding Why Rape Victim-Survivors Report to the Police*, 15 FEMINIST CRIMINOLOGY 174, 179 (2020) (summarizing literature on why victims report rape).

ii. *Harm to the Public & Profession*

The attorney discipline system is intended to protect the public and the profession from attorneys who are not fit to practice law.<sup>151</sup> As was discussed in Part I above, the discipline system is apparently failing to carry out its protective purpose in sexual misconduct cases.<sup>152</sup> Attorneys who sexually abuse and harass their clients harm the legal profession, and the systemic failure to hold these attorneys accountable and honor the perspective and needs of victims compounds that harm. Lawyers sexually abusing clients with impunity is egregious for many reasons, not least of which is that it interrupts fundamental access to justice. Retaining competent legal services is a fundamental part of exercising one's rights in our legal system. A system that allows this abuse and fails to adequately address it compromises the interests of justice not only for individual victims but for all those seeking to hire an attorney. By failing to do all that we can to make this profession safe for its clients, lawyers make it harder for potential clients to obtain legal services and access justice.

When lawyers sexually abuse and harass their clients, the integrity of the bar is directly diminished. That diminishment is compounded when such abuse and harassment is excused and abetted through lenient professional sanctions. Further, when the discipline system returns abusive attorneys to practice, those attorneys are empowered to commit more harm in the future. Although attorney discipline is public,<sup>153</sup> it is not often publicized. If the public were more aware of this issue, the profession's reputation might suffer even more.

Further, the direct harm to client-victims discussed above has secondary effects for the profession and the public. A profession that mistreats its clients and disregards their need for redress is not deserving of public trust. An attorney discipline system that is perceived by the public as unjust compromises the public's trust in the profession overall. A system that fails to issue significant consequences to attorneys, fails to fully account for harm caused by members of the profession, and fails to incorporate the victim's experience, needs, and perspective is not likely to be perceived as just or fair. The cases discussed in Part I raise important questions of bias and protectionism in the attorney discipline

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<sup>151</sup> Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 916, 916 n.33 (1994).

<sup>152</sup> "The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." STANDARDS FOR IMPOSING SANCTIONS, *supra* note 148, § III.A.

<sup>153</sup> STANDARDS FOR IMPOSING SANCTIONS, *supra* note 148, § III.A.

system. Ultimately, such questions undermine the integrity and trustworthiness of the legal profession, which seems to care more about protecting its members than accounting for the harm those members have done.

### III. CAPACITY OF THE CURRENT SYSTEM TO RESPOND TO THIS HARM

The attorney discipline system in its current professionalized form is relatively new. Prior to 1970, attorney discipline was generally handled by volunteer attorneys and administered by bar associations.<sup>154</sup> Prior to 1908, there was essentially no organized attorney discipline system to speak of; instead, judges handled attorney misconduct on an ad hoc basis.<sup>155</sup> The current system evolved out of a series of national reform efforts, including the 1970 Clark Report and the 1989 McKay Report.<sup>156</sup> Throughout the many reforms and updates that have been made to the attorney discipline system, there has been near universal agreement that the primary purpose of attorney discipline is not to punish the attorney found to have committed misconduct.<sup>157</sup> Instead, attorney discipline is designed to maintain the integrity of the profession and protect the public from incompetent and ill-intentioned attorneys.<sup>158</sup> Many courts have also noted that deterrence is an important—though not primary—purpose of ethics sanctions.<sup>159</sup>

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<sup>154</sup> See Devlin, *supra* note 151, at 919-22 (discussing attorney discipline systems in the United States before the 1970 Clark Committee report).

<sup>155</sup> See *id.* at 917-18 (discussing the evolution of attorney discipline systems in the United States).

<sup>156</sup> *Id.* at 927-28, 930 (discussing the 1970 Clark Report and the 1989 McKay Report and the influences they had on the current attorney discipline system).

<sup>157</sup> See Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677 (2003) (stating that “[c]ourts that have analyzed professional discipline typically have characterized its purpose as ‘protecting the public.’”); Devlin, *supra* note 151, at 916.

<sup>158</sup> Devlin, *supra* note 151, at 916, 916 n.33; State *ex rel.* Okla. Bar Ass’n v. Stout, 451 P.3d 155, 157-58 (Okla. 2019).

<sup>159</sup> Devlin, *supra* note 151, at 385. For a detailed exploration of the purposes of attorney discipline, see ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS, 1-13 (Ellyn S. Rosen ed., 2d ed. 2019) and Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003).

A. *Existing Rules & Standards*

i. *Rules of Professional Conduct*

Sexual abuse of a client by an attorney not only is wrong—sometimes criminal—but also represents a slew of violations of rules of professional conduct. Similarly, sexual harassment of a client violates many rules of professional conduct, even when it does not violate criminal laws.<sup>160</sup> This subsection will discuss how this behavior violates existing ethical rules.

*Competence.* Sexual abuse or harassment of a client by an attorney implicates the attorney's duty of competence under Model Rule 1.1.<sup>161</sup> An attorney who is sexually abusing or harassing a client is not providing "competent representation to [that] client"<sup>162</sup> because the attorney is directly harming the client. Rule 1.1 is not a common basis for discipline against an attorney who sexually abuses or harasses their client. However, given the importance of the duty of competence and the inherent abrogation of that duty in cases of attorney-client sexual violence, Rule 1.1 should be cited in all such discipline cases.

*Personal conflict of interest.* Sexual abuse or harassment of a client by an attorney is a personal conflict of interest because the attorney is placing their own interest ahead of the client's and actively harming the client. An attorney cannot adequately represent a client's interests and victimize that client for sexual gratification within the same attorney-client relationship. Model Rule 1.7 bars concurrent conflicts of interest,<sup>163</sup> specifying that a concurrent conflict exists when "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer."<sup>164</sup> Comment 10 further explains: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."<sup>165</sup>

*Independent professional judgment.* Sexual abuse of a client by an attorney represents a failure of the lawyer's duty of independent professional judgment. Model Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render

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<sup>160</sup> See, e.g., MD. CODE ANN., Md. Rules § 19-301.7 cmt. 12 (West 2016) (stating ways in which an attorney can violate the rules of professional conduct without violating criminal laws).

<sup>161</sup> MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2021).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at r. 1.7.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at r. 1.7 cmt. 10.

candid advice.”<sup>166</sup> An attorney who is exploiting a client for sexual gratification is not exercising independent professional judgment.

*Integrity of the profession.* Model Rule 8.4 offers a catch-all definition of misconduct that includes several specific provisions that may apply in cases of attorney-client sexual violence. First, all forms of sexual violence towards clients violate Model Rule 8.4 (g), which bars harassment or discrimination based on a number of characteristics including, “[s]ex . . . sexual orientation, [or] gender identity . . . in conduct related to the practice of law.”<sup>167</sup> Second, this behavior violates Model Rule 8.4(d) which bars “conduct that is prejudicial to the administration of justice.” As discussed in Section II.B above, sexual violence against clients is necessarily prejudicial to the administration of justice. Finally, this behavior may or may not violate Model Rule 8.4(b) which bars “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness.” This Article argues that the applicability of criminal law should not be overemphasized as a basis of discipline in sexual misconduct cases involving client victims.

*Sexual conflict of interest.* Sexual abuse of a client by an attorney is a violation of Model Rule 1.8(j), which prohibits “sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”<sup>168</sup> A comment to the model rule indicates that attorney-client sexual contact compromises the attorney’s fiduciary responsibility and can violate an attorney’s “basic ethical obligation not to use the trust of the client to the client’s disadvantage.”<sup>169</sup> The concept of sexual conflict of interest is built upon other professional responsibilities, such as independent professional judgment and the protection of client confidences. Therefore, violations of Model Rule 1.8(j) may also be violations of those other professional duties and the rules associated with them.<sup>170</sup>

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<sup>166</sup> MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 2021).

<sup>167</sup> *Id.* at r. 8.4(g).

<sup>168</sup> *Id.* at r. 1.8(j). A nuance to rule 1.8(j) is articulated in comment 22: “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.” *Id.* at r. 1.8 cmt. 22.

<sup>169</sup> MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 20 (AM. BAR ASS’N 2021).

<sup>170</sup> *Id.* (“In addition, such a relationship presents a significant danger that, because of the lawyer’s emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.”).

Although this Article and the American Bar Association (ABA) posit that attorney-client sex generally violates many other ethical provisions,<sup>171</sup> the sexual conflict of interest provision provides clarity and eliminates the need to navigate challenging factual, evidentiary, and legal issues.

Twelve states do not have a sexual conflict of interest provision.<sup>172</sup> Despite critiques from scholars<sup>173</sup> and reform attempts,<sup>174</sup> those twelve states have declined to enact an express ban on attorney-client sex.<sup>175</sup> Instead, those states rely on a subjective, flexible standard<sup>176</sup> or do not mention attorney-client sex in their ethics rules.<sup>177</sup> Curiously, though Georgia does not ban attorney-client sex, it does prohibit attorneys from accepting sexual favors as payment for services.<sup>178</sup> This is a somewhat poetic illustration of the true priorities of the rules of professional responsibility.

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<sup>171</sup> See *id.* (suggesting other ethical rules that could be violated because of an attorney-client sexual relationship).

<sup>172</sup> GA. R. & REGS. St. Bar 1.8 (2022); LA. STAT. ANN. § 37-4-1.8 (2015); MD. CODE ANN., Md. Rules § 19-301.8 (West 2016); MASS. GEN. LAWS ANN. ch. 3, § 3:07-1.8 (West 2015); MICH. COMP. LAWS ANN. § RULES OF PROF. CONDUCT.1.8 (West 2022); MISS. CODE ANN. § MI. RULES OF CT. STATE-MI. RULES OF PROF. CONDUCT-r. 1.8(West 2022); N.J. STAT. ANN. § Part I:1.8 (West 2022); R.I. STATE CT. RULES R.I. GEN. LAWS § SUP. CT. RULES-ART. V-r. 1.8; S.C. CODE ANN. § IV-407-1.8 (2020); TENN. CODE ANN. § Sup. Ct. Rules-R. 8-RPC 1.8 (West 2022); TEX. JUD. BRANCH CODE ANN. § 9 r. 1.8 (West 2022); VA. CODE ANN. § 6-II r. 1.8 (West 2022).

<sup>173</sup> See, e.g., Malinda L. Seymore, *Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 YALE J.L. & FEMINISM 175, 175-77 (2003).

<sup>174</sup> Debra Cassens Weiss, *Texas Lawyers Reject Ban on Sex with Clients*, ABA J. (February 22, 2011), 5:36 PM, [https://www.abajournal.com/news/article/texas\\_lawyers\\_reject\\_ban\\_on\\_sex\\_with\\_clients](https://www.abajournal.com/news/article/texas_lawyers_reject_ban_on_sex_with_clients).

<sup>175</sup> See *supra* note 170 and accompanying text.

<sup>176</sup> See, e.g., S.C. CODE ANN. § IV-407-1.8(m) (2020) (“A lawyer shall not have sexual relations with a client when the client is in a vulnerable condition or is otherwise subject to the control or undue influence of the lawyer, when such relations could have a harmful or prejudicial effect upon the interests of the client, or when sexual relations might adversely affect the lawyer’s representation of the client.”); MD. CODE ANN., Md. Rules § 19-301.7 cmt. 12 (West 2016) (“A sexual relationship with a client, whether or not in violation of criminal law, will create an impermissible conflict between the interests of the client and those of the attorney if (1) the representation of the client would be materially limited by the sexual relationship and (2) it is unreasonable for the attorney to believe the attorney can provide competent and diligent representation. Under those circumstances, informed consent by the client is ineffective.”).

<sup>177</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 3, § 3:07-1.8 (West 2015) (indicating Massachusetts has no rule banning attorneys from having sex with their clients).

<sup>178</sup> GA. R. & REGS. St. Bar 1.5 cmt. 1A (2022) (stating that attorneys may not accept sexual favors as payment for services).

*ii. Standards for Imposing Lawyer Sanctions*

The ABA Standards for Imposing Lawyer Sanctions provide guidance on how to enforce ethics rules.<sup>179</sup> Sexual misconduct is not directly addressed in the Standards.<sup>180</sup> However, the ABA Center for Professional Responsibility's *Annotated Standards for Imposing Lawyer Sanctions* publication provides relevant annotation.<sup>181</sup> That annotation states that courts generally impose suspension for sexual conflicts of interest and criminal sexual misconduct on adult victims (including clients).<sup>182</sup> Interestingly, Standard 5.1, which addresses criminal acts, recommends disbarment for certain criminal acts of dishonesty, drug trafficking, and intentional homicide, but not for rape or any other sex crime.<sup>183</sup> Thus, on their face, the Standards take selling drugs more seriously than raping a client.

Nonetheless, there are several other standards that could be used to support severe sanctions for attorney-client sexual misconduct. For example, disbarment is appropriate when the lawyer represents a client "knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client."<sup>184</sup> When a lawyer sexually exploits a client for the lawyer's gratification, the lawyer is engaging in representation with adverse personal interests, with the intent to benefit the lawyer, and causing serious injury to the client. The Standards also state that disbarment is appropriate when a lawyer violates a professional duty "with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."<sup>185</sup> Again, sexual predation on a client causes harm, is done for the lawyer's own benefit, and violates many professional duties.

*B. Obstacles to Fair Outcomes*

Despite the theoretical strength of existing ethics rules as applied to attorneys who sexually harass and abuse their clients,<sup>186</sup> ethics boards

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<sup>179</sup> See STANDARDS FOR IMPOSING SANCTIONS, *supra* note 148.

<sup>180</sup> *Id.*

<sup>181</sup> ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS, 184-85, 268-71 (Ellyn S. Rosen ed., 2d ed. 2019).

<sup>182</sup> *Id.*

<sup>183</sup> STANDARDS FOR IMPOSING SANCTIONS, *supra* note 148, § 5.11.

<sup>184</sup> *Id.* § 4.31.

<sup>185</sup> *Id.* § 7.1.

<sup>186</sup> As noted above, Model Rule 1.8(j) is not universally adopted by states. See *supra* text accompanying note 172.

and courts have failed to use those rules to hold abusive attorneys fully accountable, as illustrated by the examples provided in Part I and similar cases.<sup>187</sup> The following subsections will explore the primary reasons for that failure.

*i. Protectionism*

Discipline cases against attorneys who sexually harass and abuse their clients are shaped by overidentification between adjudicators and disciplinary respondents. In cases like those discussed in Part I above, much emphasis is placed on the respondent's subjective experience, including remorse.<sup>188</sup> Empathy towards the client-victims is limited.<sup>189</sup> The ABA Standards for Imposing Lawyer Sanctions encourage this marginalization of the victim's point of view in several ways. Specifically, the ABA's list of mitigating and aggravating factors is set up to encourage taking the attorney's perspective and considering the attorney's subjective experience, but not doing the same with the victim. The list of mitigating factors includes several that pertain to the subjective experience or perspective of the attorney, including personal or emotional problems, good faith remedial efforts, cooperative attitude, character, chemical dependency, and remorse.<sup>190</sup> The list of aggravating factors includes just one that pertains to the subjective experience or perspective of the victim: vulnerability of the victim.<sup>191</sup>

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<sup>187</sup> See *supra* Part I. See also, e.g., Akron Bar Ass'n v. Fortado, 152 N.E.3d 196 (Ohio 2020) (issuing a one year stayed suspension for attorney who engaged in a "sexual relationship" with a client who was particularly vulnerable due to mental illness, loss of visitation with her children, past sexual exploitation, and financial distress); Iowa Supreme Ct. Att'y Disciplinary Bd. v. Jacobsma, 920 N.W.2d 813 (Iowa 2018) (issuing a thirty-day suspension for an attorney who had "sexual relationship" with a client); Disciplinary Counsel v. Mason, 128 N.E.3d 183 (issuing a six month actual suspension for an attorney convicted of solicitation and who had "sexual relationship" with divorce client); Matter of Disciplinary Proc. Against Hanes, 951 N.W.2d 426 (increasing suspension from two years to four years after disciplinary authority sought ninety-day suspension for attorney convicted of sexually assaulting prospective client).

<sup>188</sup> E.g., State *ex rel.* Okla. Bar Ass'n v. Stout, 451 P.3d 155, 156-60 (Okla. 2019) (amplifying discipline board's focus on respondent's expressions of "sincere" and "deep" remorse, sex addiction, and cooperation with authorities).

<sup>189</sup> E.g., Matter of Becker, 180 A.D.3d 1322 (N.Y. App. Div. 2020) (imposing eight-month suspension with no mention of child client-victim's subjective experience or emotional reaction to being sexually harassed by lawyer); Matter of Bledsoe, 811 S.E.2d 775 (S.C. 2018) (approving sanction of public reprimand with no analysis of client-victim's subjective experience or the fact that she felt "ashamed and humiliated" after being coerced into showing respondent her breasts); Stout, 451 P.3d at 156 (imposing a three-month suspension for sexual harassment and abuse of two clients with minimal mention of client-victims' perspective).

<sup>190</sup> STANDARDS FOR IMPOSING SANCTIONS, *supra* note 148, § 9.32.

<sup>191</sup> *Id.* § 9.22 (Am. Bar Ass'n 1986, amended 1992).

This systemic inequity between offending lawyer and client-victim synergizes with overidentification arising from the self-regulating nature of the legal profession.<sup>192</sup> Discipline boards are comprised primarily of attorneys who judge the misconduct of their peers.<sup>193</sup> Non-attorney members must be selected and approved through established legal institutions. Therefore, even lay board members have been deemed acceptable by members of the legal profession. Whereas ethics boards and the bench are dominated by lawyers, client-victims are generally non-lawyers and naturally “other” to the majority of board members and judges. Thus, discipline boards and the appellate courts that review ethics decisions may tend towards lighter sanctions for attorneys in part because they relate to attorney-respondents more than victimized clients. This imbalance likely compounds with other stereotypes and biases that operate throughout the justice system<sup>194</sup> to disadvantage people of color, disabled people, LGBTQ+ people, women, and others with marginalized identities. Given that the legal profession is dominated by white men<sup>195</sup> with relatively high economic status,<sup>196</sup> ethics boards are likely shaped by those identities.

ii. *Minimization of Harm*

Although the Standards for Imposing Lawyer Sanctions recommend stronger sanctions when attorneys cause serious harm,<sup>197</sup> the ethics rules and standards do not adequately prioritize or support the needs of sexual violence survivors who come forward to report their

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<sup>192</sup> See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1247-50 (2003) (explaining ways in which law is a self-regulating profession).

<sup>193</sup> E.g., ILL. ANN. STAT. ch. 110A, para. 753, TEX. R. DISCIPLINARY P. 2.02.

<sup>194</sup> See Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1576-80 (2013) (surveying bias in various parts of the legal system, including among lawyers and judges).

<sup>195</sup> ABA data indicate that in 2021, 63% of all lawyers were men and 85% were non-Hispanic white, while 5% were African American, 5% were Hispanic, 2% were Asian, and <1% were Native American. *ABA National Lawyer Population Survey*, AM. BAR ASS'N (2021), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/2021-national-lawyer-population-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf).

<sup>196</sup> The U.S. Bureau of Labor Statistics reports median annual pay for lawyers at \$148,030 and median annual pay for all occupations at \$58,260. U.S. Bureau of Lab. Stat., *National Occupational Employment and Wage Estimates: United States, MAY 2021 OCCUPATIONAL EMPLOYMENT AND WAGE STATISTICS*, [https://www.bls.gov/oes/2021/may/oes\\_nat.htm](https://www.bls.gov/oes/2021/may/oes_nat.htm) (Mar. 31, 2022) (listing lawyer data under occupation code 23-1011 and data for all occupations under occupation code 00-0000).

<sup>197</sup> E.g., STANDARDS FOR IMPOSING SANCTIONS, *supra* note 148, § 4.3 (recommending admonition for conflicts of interest that cause little or no injury, suspension for conflicts of interest that cause injury, and disbarment for conflicts that cause serious injury).

abusive attorneys.<sup>198</sup> The voice of the victim is too often minimized, and ethics boards fail to conduct thorough fact-finding regarding harm to clients who are sexually harassed and abused by their attorneys. Without robust factual findings, harm cannot be properly assessed when imposing sanctions at the board level, and appellate courts are limited in their ability to fully consider harm in their review of sanctions. As a result, appellate courts reviewing sexual misconduct sanctions often spend only a few words discussing the victim's statements about what happened or the harm the victim experienced.<sup>199</sup>

In addition to minimizing the victim's voice and falling short of a full accounting of harm, many ethics boards are unwilling to describe actual acts of sexual misconduct with precision or detail. Often, it is difficult to understand what the respondent attorney actually did to the client because such vague language is used. Sexual misconduct is described using euphemistic, indirect language such as "sexually suggestive photographs" or "unwanted sexual advances."<sup>200</sup> When a court, as in *Stout*, says an attorney made "unwanted sexual advances," it is not clear what that means.<sup>201</sup> Depending on the court's understanding of sexual consent, a "sexual advance" might include anything from a verbal suggestion or request for sexual contact to rubbing, grabbing, groping, kissing, or other physical touch.<sup>202</sup> Similarly, adjudicators use language that implies consent without facts to support that implication. For example, in one case, the court said an attorney was "interested in a sexual relationship"<sup>203</sup> with his client, and in another, the court said a client "wound up having sex" with her attorney.<sup>204</sup> This glaring imprecision may hide the severity of an

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<sup>198</sup> Ebright, *supra* note 4, at 72.

<sup>199</sup> See *supra* note 189.

<sup>200</sup> Okla. Bar Ass'n v. Stout, 451 P.3d 155, 156 (Okla. 2019).

<sup>201</sup> *Id.* at 156.

<sup>202</sup> Although a dictionary definition of sexual advance focuses on verbal statements, *Advance*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003), courts have used "sexual advance" to refer to physical acts, including sexual assault. See, e.g., *Matter of Robertson*, 78 N.E.3d 1090 (Ind. 2016) (disciplining an attorney for appearing in court intoxicated and making unspecified "repeated physical sexual advances" towards the court's receptionist); *Panepinto v. Grievance Comm. of Eighth Jud. Dist.*, 192 A.D.3d 21, 23 (N.Y. App. Div. 2020) (suspending a lawyer and state senator for one year for misconduct including unspecified "unwanted verbal and physical sexual advances" towards a staff member); *State v. Newman*, 965 N.W.2d 182 (Wis. Ct. App. 2021) (criminal case in which court refers to "numerous unwanted sexual advances . . . including grabbing [victim]'s genitals"); *Omnitech Inst., Inc. v. Norwood*, 861 S.E.2d 145, 146 (Ga. 2021), cert. denied (Feb. 1, 2022) (sexual harassment case in which court refers to plaintiff's allegation of "multiple unwanted sexual advances toward her, including grabbing and rubbing against her").

<sup>203</sup> *Matter of Bledsoe*, 811 S.E.2d 775, 776 (S.C. 2018).

<sup>204</sup> *Stout*, 451 P.3d at 157.

attorney's misconduct, thus further minimizing the actual harm done to the client. Vague factual findings and euphemistic language regarding misconduct and harm also interfere with transparency of the discipline process—appellate courts cannot accurately evaluate sanctions when the offending behavior and harm are not clearly and accurately described.

*iii. Proportionality & Regressive Precedent*

Another force that weakens disciplinary consequences in attorney-client sexual misconduct cases is the doctrine of proportionality, which requires courts to ensure sanctions are proportional to misconduct by imposing sanctions similar to what has previously been imposed in similar cases.<sup>205</sup> This approach to proportionality discourages courts from significantly departing from the level of sanctions previously imposed for similar misconduct. However, by using past cases to justify sanctions in sexual misconduct cases, courts run the risk of importing regressive social norms and beliefs into their contemporary analysis and judgment. What is considered appropriate and proportional discipline today may be very different from what would have been considered appropriate and proportional one, two, three, or more decades ago.

For example, in the 2018 *Sarver* case, the Ohio Supreme Court conducted its proportionality test using several comparable cases, including one from as early as 1996.<sup>206</sup> In that 1996 case, attorney Michael Booher “engaged in sexual activity” with a client in the jail meeting room while Booher was representing the client in a felony case by court appointment.<sup>207</sup> For this misconduct, Booher was given a one-year suspension from the practice of law.<sup>208</sup> After reviewing Booher’s case and several others, the court imposed on Sarver six months of actual suspension for coercing his indigent criminal defendant client into sex.<sup>209</sup> However, the court made no mention of the fact that standards of behavior and accountability have evolved since the

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<sup>205</sup> *E.g.*, Iowa Supreme Ct. Att’y Disciplinary Bd. v. Jacobsma, 920 N.W.2d 813, 816 (Iowa 2018) (seeking to achieve consistency of sanctions as compared to prior cases); Disciplinary Counsel v. Bartels, 87 N.E.3d 155, 156 (Ohio 2016) (considering sanctions imposed in similar cases when issuing sanctions); *In re Cross*, 500 P.3d 958, 967 (Wash. 2021) (explaining that sanctions must be proportional as compared to sanctions in similar cases).

<sup>206</sup> Disciplinary Counsel v. Sarver, 119 N.E.3d 405, 410 (Ohio 2018) (citing Disciplinary Counsel v. Booher, 664 N.E.2d 522 (Ohio 1996)).

<sup>207</sup> *Booher*, 664 N.E.2d at 522.

<sup>208</sup> *Id.* at 522-23.

<sup>209</sup> *Sarver*, 119 N.E.3d at 413.

1990s.<sup>210</sup> Constraining today's sanctions with a proportionality analysis involving outdated precedent serves to perpetuate the status quo and slow progress towards real accountability for attorney sexual misconduct.

iv. *Consent Confusion*

Another critical source of trouble in discipline cases involving attorneys who sexually abuse and harass clients is a misunderstanding of the power dynamics that undermine sexual consent in an attorney-client relationship. It is difficult to offer a succinct definition of sexual consent because the concept is both socially and legally fraught.<sup>211</sup> However, for the sake of discussion, this Article will use a notion of consent consistent with what Aya Gruber calls the “uncontroversial sexual consent transaction,” which consists of “(1) A’s internal decision to have sex; (2) A’s external manifestations of that decision; and (3) B’s (reasonable) belief, based on the external manifestations and context, that A is willing to have sex.”<sup>212</sup> This construct of consent presumes that A is capable of freely formulating an internal decision to have sex.<sup>213</sup> If one party fears adverse consequences if they do not consent, that party is not free to consent. For example, if B has a socially prescribed position of power and A depends upon B to regain access to her children or save herself from incarceration, A is not truly free to decline sex with B.

The relationship between attorney and client is one of responsibility and professional care.<sup>214</sup> Lawyers are granted a significant amount of power within the legal system, which is one reason clients hire lawyers. When a client is suffering particularly difficult circumstances or facing dire legal consequences, the lawyer’s power is magnified. As the comment to Model Rule 1.8(g) says: “The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The

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<sup>210</sup> *Id.* at 410-413.

<sup>211</sup> See generally Gruber, *supra* note 30 (discussing the wide variety of social and legal understandings of sexual consent); Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 335 (2013) (criticizing consent as the marker of rape and proposing a sexual autonomy model); Wendy Adele Humphrey, “*Let’s Talk About Sex*”: *Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F. L. REV. 35 (2016) (tracking the history and implications of a “yes means yes” affirmative consent standard in a Title IX context).

<sup>212</sup> Gruber, *supra* note 30 at 429.

<sup>213</sup> *Id.* at 425.

<sup>214</sup> See MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 20 (AM. BAR ASS’N 2021) (noting that the attorneys owe a fiduciary duty to clients and occupy “the highest position of trust and confidence.”)

relationship is almost always unequal . . .” Within that unequal relationship, especially when a client is particularly vulnerable, sexual consent cannot be given freely.

However, some state criminal laws have much narrower conceptualizations of non-consent.<sup>215</sup> Ethics adjudicators might use those narrow conceptualizations to excuse or diminish attorney sexual abuse of clients merely because that abuse does not meet a conservative criminal law definition of non-consent. Under that narrow definition, sexual assault occurs only through physical force, threat of bodily harm, or against a minor or incapacitated victim, or similar circumstances.<sup>216</sup> However, that standard fails to capture a wide swathe of harmful sexual predation that has no place in the legal profession. Although the sexual conflict of interest rule generally provides that clients are unable to freely consent to sex with an attorney,<sup>217</sup> the leniency of sanctions issued in these cases would indicate that violations of the ban are not taken seriously.<sup>218</sup>

For example, in *Sarver*, the disciplinary board asserted that the client-victim was benefitted by the abuse against her.<sup>219</sup> The board said, “not only was there no harm to the client but the client leveraged her relationship with [Sarver] to get a better plea deal[.]”<sup>220</sup> The court correctly disagreed that being sexually harassed and abused by her attorney was a benefit to Sarver’s client, J.B. However, the court ultimately imposed just six months actual suspension.<sup>221</sup> It is difficult to understand how a court could truly believe that six months suspension was adequate discipline for an attorney who coerced his vulnerable client into sex multiple times (along with a slew of other misconduct). Even while proclaiming that Sarver seriously abused J.B., the court treated the misconduct as relatively minor.

As a self-regulating profession, lawyers can recognize that a conservative criminal law understanding of consent is an insufficient guiding light in determining the harm of attorney-client sexual exploitation. The attorney ethics process need not be constrained by definitions taken from criminal law, workplace law, education law, or any other context. Importantly, sexual misconduct need not be criminal in nature to warrant professional discipline. As a profession, we reserve

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<sup>215</sup> See Gruber, *supra* note 30, at 429-30. *E.g.*, KAN. STAT. ANN. §§ 21-5503-05 (2020); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (West 2021); N.C. GEN. STAT. §§ 14-27.1-27.5(2015).

<sup>216</sup> *Id.*

<sup>217</sup> MODEL RULES PRO. CONDUCT r. 1.7 cmt. 20 (AM. BAR ASS’N 2020).

<sup>218</sup> See *supra* Part I.

<sup>219</sup> *Disciplinary Counsel v. Sarver*, 119 N.E.3d 405, 409 (Ohio 2018).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 413.

the right to regulate the behavior of our members. Attorneys are expected to refrain from all sorts of conduct that is legally permissible in other contexts. For example, attorneys are required to avoid conflicts of interest,<sup>222</sup> ensure their substantive competence before accepting a case,<sup>223</sup> and disclose adverse authority to the court.<sup>224</sup> In its self-regulating authority, the bar can decide that it does not allow sex with current clients under any circumstances. However, for that declaration to carry meaning, it must be enforced accordingly.

Rather than engage with—and be sidetracked by—the sexual consent debate occurring in other areas of law, the legal profession has the ability to draw its own boundaries of propriety using its own standards. As a profession, we should be outraged by the deep harm caused by sexual predation, whether by non-consent, coercion, or abuse of power<sup>225</sup> within the attorney-client relationship. Even when behavior does not violate criminal law, sexual exploitation of a client by an attorney should be considered a gravely serious form of misconduct.

#### IV. ELEMENTS OF A BETTER APPROACH

As indicated in Part I above,<sup>226</sup> the aspirations of #MeToo have failed to reach the attorney discipline system. Given that failure, affirmative steps must be taken to bring the self-regulation of attorneys into line with current social norms and values. This section will outline several proposals to improve professional accountability when attorneys sexually harass and abuse their clients, assist victims, and prevent such harms from occurring in the first place.

##### A. *Clarity: Ban Sex with Clients*

The first step towards a safer environment for clients is to enact a categorical ban on attorney-client sex. The fact that there is still any ambiguity over whether attorneys should be allowed to have sexual contact with clients is an embarrassment to the profession. Every state must unambiguously ban sexual contact between attorneys and

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<sup>222</sup> MODEL RULES PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020).

<sup>223</sup> *Id.* at r 1.1

<sup>224</sup> *Id.* at r 3.3(a)(2).

<sup>225</sup> Michal Buchhandler-Raphael, *Sexual Abuse of Power*, 21 U. FLA. J.L. & PUB. POL'Y 77, 79 (2010) (discussing the wide range of behaviors termed “sexual abuse of power” that are not well-captured by existing laws).

<sup>226</sup> *See supra* Part I.

clients.<sup>227</sup> A bright line sexual conflict of interest rule is critical not only as a statement about the values of our profession, but also to limit the influence of both legal and factual disputes around whether a client consented to sex with the attorney. Disputes over consent can be difficult to resolve and a bright line rule would significantly reduce such disputes. This is important for all cases, but particularly when the client fits into stereotypes that may make them “less credible” as a witness in a disciplinary proceeding.<sup>228</sup>

In theory, a percentage of clients may genuinely want to have sex with their attorneys. These theoretical clients have animated many opponents of per se bans on attorney-client sex.<sup>229</sup> However, even if clients exist who desire and would be truly unharmed by sexual contact with their attorneys, the potential disaffection of these theoretical clients is a small price to pay for the benefits of a per se ban. The theoretical harm posed to these allegedly amorous clients and their attorneys is negligible when compared to the harm that is being done to clients by attorneys who are sexually harassing and abusing them with relative impunity. The balance of interests weighs in favor of the clarity, evidentiary, and cultural value of an unambiguous ban.

It is important to note that a per se ban on attorney-client sexual contact is not a panacea to the problem of attorneys sexually abusing their clients. Such a ban existed in several of the exemplar cases in Part I above.<sup>230</sup> For example, Ohio had this ban, and Sarver still abused his client with minimal consequences.<sup>231</sup> The value of an outright ban is that it sends a message that attorney-client sex is not a gray area. A ban also creates an administrable parameter for bad behavior and makes it easier to impose accountability in some cases. However, because a ban alone will not solve the problems outlined in this Article, the following

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<sup>227</sup> The single well-developed exception to the sexual conflict of interest doctrine is when a lawyer has a long-established sexual relationship with someone who then becomes a client, such as when one spouse or sexual partner performs legal work for the other. MODEL RULES PROFESSIONAL CONDUCT r. 1.8(j) (AM. BAR ASS’N 2020). Whether attorneys should be allowed to provide legal services to their sexual partners, such as spouses, at all raises questions of competence, objectivity, and professionalism that are beyond the scope of this Article.

<sup>228</sup> See, e.g., Gillian Chadwick & Steffany Sloan, *An Evidence-Based Approach to Coercive Control in “High-Conflict” Custody Litigation*, FAM. L. Q. (forthcoming 2022) (summarizing the literature on skepticism towards the credibility of victims of gender-based violence).

<sup>229</sup> See, e.g., Bower & Stern, *supra* note 8, at 541 (arguing that Model Rule 1.8(j) is overinclusive); Mischler, *supra* note 22, at 210-11 (criticizing the ethical ban on attorney-client sex); Feiser, *supra* note 22, at 54-55 (“Some claim that while preventing attorney exploitations and abuses of the legal relationship are laudable goals, any per se ban on sexual relationships necessarily sweeps too broadly into personal relationships . . .”).

<sup>230</sup> See *supra* Part I.

<sup>231</sup> *Disciplinary Counsel v. Sarver*, 119 N.E.3d 405, 413 (Ohio 2018).

subsection will address more steps that must be taken to make the attorney-client relationship safer from sexual violence.

### *B. Accountability*

Clients are entitled to expect that they will be free from all forms of sexual abuse and exploitation at the hands of their attorneys. Cases like those discussed in Part I indicate that attorney-client sexual violence is not being adequately addressed by the existing attorney discipline system,<sup>232</sup> despite multiple ethical rules that address this misconduct,<sup>233</sup> and ABA guidance that suggests serious consequences are appropriate for this misconduct.<sup>234</sup> The profound harm addressed in this Article calls for a bold solution.<sup>235</sup> One such bold solution is to create mechanisms to reliably drive serious disciplinary consequences for attorneys who sexually prey on their clients. Because American Bar Association guidance like the Standards for Imposing Lawyer Sanctions plays a pivotal role in shaping ethics policy across the country, the ABA has the opportunity to chart a new course for accountability on attorney-client sexual misconduct.<sup>236</sup> Whether led by the ABA or not, states have the power to directly implement changes through their disciplinary procedures, and courts can make change by evolving their approach to judicial review of attorney sanctions.

#### *i. Strict Liability for Attorney-Client Sexual Contact*

The first step in improving disciplinary accountability for sexual misconduct against clients is to eliminate any doubt that sexual contact between attorney and client is misconduct per se and attorneys are responsible for that misconduct. Assuming implementation of a universal ban, as proposed in Part IV.A. above, violations of that ban should always be considered disciplinary offenses. Instead of becoming stymied in the morass of consent-versus-non-consent on a case-by-case basis, attorney discipline proceedings must begin with the presumption that attorney-client sex is deeply harmful to the client, the profession, and the public. With that axiom in place, attorneys who have sexual contact with their clients under any circumstances are committing an

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<sup>232</sup> See *supra* Part I.

<sup>233</sup> See *supra* Part III.

<sup>234</sup> *Id.*

<sup>235</sup> See *supra* Part II.B.

<sup>236</sup> ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS, xi (Ellyn S. Rosen ed., 2d ed. 2019) (noting that many jurisdictions follow ABA guidance in shaping their disciplinary systems).

ethical offense.<sup>237</sup> One way to frame that ethical offense would be that clients do not have capacity to consent to sex with their attorneys. However, non-consent need not be the sine qua non of attorney sexual misconduct. A more comprehensive approach would be to consider attorneys strictly liable for the disciplinary offense of attorney-client sexual contact.

ii. *Presumptive Disbarment for Attorney-Client Sexual Contact*

Building on the notion of strict liability, disciplinary authorities should impose presumptive disbarment for attorneys who have any sexual contact with their clients. Although overly prescriptive sanctions are sometimes disfavored,<sup>238</sup> the systemic shortfalls described in this Article require an approach outside the status quo. Discretionary sanctions have failed. In order to address the laxity in discipline for this form of sexual misconduct, presumptive discipline levels should be imposed as a matter of policy.

The presumption of disbarment would apply in all cases of attorney-client sexual contact. Policy makers who find such a presumption draconian could make the presumption rebuttable—resulting in suspension rather than disbarment—upon a showing by clear and convincing evidence that (1) the attorney-client relationship was characterized by equity (such as in financial status and client’s ability to easily retain other counsel if desired) or dominance by the client (such as a client who attacked the attorney), (2) the client was not particularly vulnerable to influence by the attorney, (3) the sexual contact was subjectively wanted by the client, and (4) the client experienced no lasting harm from the sexual contact. Factual findings would be required on each of those points and the attorney’s testimony alone could not constitute clear and convincing evidence of any of these elements as the attorney is not competent or reliable on these points.

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<sup>237</sup> Except, perhaps, as discussed in note 215 above.

<sup>238</sup> See ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS at xx (noting that the standards are intended as a framework and not intended to prescribe a specific sanction for every type of misconduct). See also, e.g., Iowa Supreme Ct. Att’y Disciplinary Bd. v. O’Brien, 971 N.W.2d 584, 591 (Iowa 2022), as amended (Mar. 21, 2022). Iowa Supreme Court has “no standard sanction for particular types of misconduct.” *Id.*

iii. *Presumptive Actual Suspension for Non-Contact Sexual Harassment*

Similarly, non-contact sexual harassment against clients, such as verbal sexual harassment, should carry presumptive discipline of actual suspension.<sup>239</sup> Presumptive actual suspension would still provide adjudicators with significant discretion to impose suspension ranging from days to years. Given the breadth of behavior represented by non-contact sexual harassment, it is appropriate for adjudicators to have some leeway to impose different suspension lengths. However, in light of the issues raised in Part III.B.ii above, adjudicators should not rely upon regressive precedent in making a proportionality assessment. Instead, ethics boards and courts must filter precedent through current standards of decency and accountability. Default sanctions for sexual misconduct would serve to recalibrate the proportionality scale for both physical and non-physical offenses by providing strong baseline sanctions levels.

C. *Justice: Prioritizing Survivors*

While the attorney discipline process is not intended to directly vindicate victims' rights,<sup>240</sup> it is intended to maintain integrity of the profession and protect the public from unfit and dangerous attorneys. Part of maintaining integrity of the profession is assuring the public the attorney discipline system is fair and effective. Maintaining integrity of the profession means creating a process by which a client who has been subjected to sexual violence by their attorney has the opportunity to air grievances, be treated fairly, and obtain some level of justice. The legal profession has a moral imperative to fully acknowledge and account for the harm that is done in attorney-client sexual misconduct cases—not in the interest of retribution, but integrity and truth-telling. Currently, client-victims' voices are marginalized in the attorney discipline process and their suffering is minimized. That needs to change. To create that change, the system must make the client-victim's experience, perspective, and needs considered central to attorney discipline in sexual misconduct cases in the following ways.

First, the system must place more importance on the client-victim's *experience* in attorney discipline proceedings for sexual misconduct. The client-victim must have the opportunity to be heard and their story must be valued. This can happen in a multitude of ways.

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<sup>239</sup> Actual suspension is distinguishable from stayed suspension.

<sup>240</sup> See *supra* note 148.

For example, boards and courts could be required to consider and make specific factual findings with respect to the client-victim. Those findings might include specific vulnerabilities, such as racial and gender identity, immigration status, age, indigency, the type of underlying case, state of mind, and harm resulting from the misconduct. States might provide the client-victim with specially trained pro bono counsel or a victim advocate to assist the client-victim in the proceedings. The ABA could issue guidance encouraging jurisdictions to make such changes.

Second, the attorney discipline system must elevate the client-victim's *perspective*. Mechanisms must be put in place to correct for the overidentification between ethics adjudicators and attorneys who perpetrate sexual violence discussed in Part III.B.i and ii above. A requirement that adjudicators make specific factual findings pertaining to the victim (as discussed in the preceding paragraph) would also be useful in encouraging adjudicators to relate to the client-victim's perspective. Additionally, the ABA could amend the list of aggravating factors in the Standards for Imposing Lawyer Sanctions to add factors that center on the victim's perspective. Such factors might include: a minor victim, psychological coercion, and severity of emotional, financial, and legal harm to the victim.<sup>241</sup>

Third, to build a truly fair attorney discipline response to sexual violence against clients, client-victim's *needs* must be addressed. The attorney discipline system must recognize and mitigate the toll that reporting, being interviewed, and testifying has on victims.<sup>242</sup> Sexual abuse and harassment victims are often highly reticent to report their abusers to anyone, whether law enforcement or a disciplinary board.<sup>243</sup> The reasons for that reticence are myriad and include fear of being disbelieved, fear of becoming embroiled in a burdensome and painful process, and lack of hope for any meaningful resolution.<sup>244</sup> Victims who do disclose sexual harassment and abuse by attorneys are doing a great service to the legal profession and should be treated accordingly. As such, the attorney discipline system must provide fully funded victim services to support those who make the courageous decision to report. Those services include mental health counseling, support groups, medical treatment, legal services, and other services.

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<sup>241</sup> Existing references to harm in the Standards for Imposing Lawyer Sanctions have proven insufficient. Given the traction that the ABA's aggravating and mitigating factors have gotten in caselaw, adding harm as an aggravating factor may be more effective. STANDARDS FOR IMPOSING SANCTIONS, *supra* note 148, § 9.22.

<sup>242</sup> Brooks-Hay, *supra* note 150, at 176.

<sup>243</sup> *Id.* at 175-76.

<sup>244</sup> *Id.* at 176.

Skeptics may argue that given the purposes of the discipline system, the victim's experience, perspective, and needs should not guide these proceedings. However, both protection of the public and the integrity of the profession are served by centering the victim's voice in the attorney discipline process. The victim is an important member of the public who has been harmed by the attorney's misconduct. The legal profession cannot expect the public to feel trust in lawyers or the legal system when the profession's mechanism of self-regulation ignores and marginalizes the victim. A victim-centered process will strengthen the integrity and values of the profession by ensuring that we truly acknowledge and account for the harm that has been done by the attorney in question.

*D. Prevention: Probation, Conditions & Abuse Prevention Protocols*

The reforms discussed in subparts A and B above will improve the legal profession's response to sexual violence committed by attorneys against clients. However, the best solution to attorney-client sexual violence is to prevent it from happening. The causes of sexual violence are complex and multifaceted.<sup>245</sup> Prevention may seem daunting, but the promise of ending sexual violence before it begins is invaluable. As such, it would be worth investing time and resources into researching and developing prevention strategies. One such strategy would be mandatory education on sexual violence against clients. That could be accomplished through state continuing legal education requirements as well as ABA requirements for law schools.

However, education alone will not be enough to solve this high-stakes problem. The legal profession must consider more active prevention strategies. Particularly with respect to child sex abuse, the legal profession should look at prevention strategies emerging in other industries. For example, in the sports context, the U.S. Center for Safe Sport imposes the Minor Athlete Abuse Prevention Policies (MAAPP), which include a number of affirmative rules that govern adult behavior towards minors.<sup>246</sup> The MAAPP include requirements that all text messages between an adult and a minor athlete include at least one other adult party and that all meetings between adults and minor athletes take

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<sup>245</sup> See Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2133–37 (2018) (discussing the complex etiologies of sexual assault).

<sup>246</sup> U.S. CTR. FOR SAFE SPORT, MINOR ATHLETE ABUSE PREVENTION POLICIES (2019), [uscenterforsafesport.org/wp-content/uploads/2019/07/Minor-Athlete-Abuse-Prevention-Policies.pdf](https://uscenterforsafesport.org/wp-content/uploads/2019/07/Minor-Athlete-Abuse-Prevention-Policies.pdf).

place in a setting that is observable and interruptible.<sup>247</sup> These protocols aim to prevent child sexual abuse by reducing opportunities for adults to groom and abuse children. Reflecting on the *Becker* case discussed above, a requirement that a second adult be present during interviews would have interrupted the attorney's opportunity to abuse his child client.<sup>248</sup>

Given the social and legal challenges of the attorney-client relationship, there are several potential obstacles to such protocols in the practice of law.<sup>249</sup> However, the stakes are high enough to justify investing in the research and dialogue necessary to explore and potentially implement such protocols as appropriate. The legal profession's profound failure to address attorney-client sexual violence will not be remedied with status quo thinking. At a minimum, lawyers must study potential prevention strategies with an open mind. Here, the ABA has the opportunity to play a pivotal role by assembling the expertise and resources to explore and recommend sexual abuse prevention protocols for lawyers.

#### CONCLUSION

The legal profession's failure to adequately sanction attorneys who sexually harass and abuse their clients represents a significant shortcoming that must be addressed. This Article proposes a number of specific suggestions to begin to bring the legal profession in line with its purported values around justice, equity, and fairness by improving accountability for attorneys who sexually harass and abuse the clients they have been entrusted to represent. Some of the suggestions are bold because bold action is required to remedy this so far intractable problem. The Article argues for universal adoption of the sexual conflict of interest rule and imposition of strict liability and presumptive disbarment for attorneys who have sexual contact with their clients. The Article also proposes presumptive actual suspension for attorneys who commit sexual harassment against clients and a victim-centered attorney discipline process. These measures will drive more serious consequences and take better care of client-victims in attorney-client sexual misconduct cases, thus bringing the attorney discipline system closer to achieving its stated purposes of protecting the public and

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<sup>247</sup> *Id.*

<sup>248</sup> *Becker*, 180 A.D.3d 1322.

<sup>249</sup> Skeptics might immediately negate this idea, citing attorney-client privilege, confidentiality, and the need to build rapport. While those are legitimate issues, they are not insurmountable on their face.

maintaining the integrity of the profession. Finally, the Article proposes the exploration of affirmative prevention mechanisms to help reduce the opportunity for lawyers to sexually abuse and harass their clients, particularly child clients. By enacting these reforms, the legal profession can begin to live up to its role as advocates for justice on the issue of sexual violence.