

THE DILEMMA FACED BY ATTORNEYS SUBJECT TO SEXUAL HARASSMENT

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## INTRODUCTION

There is no dispute that attorneys are held to a higher standard than the average individual.<sup>1</sup> In fact, attorneys and many other professionals must abide by established rules or guidelines. For instance, attorneys, doctors, and psychologists must respectively abide by the ABA Model Rules (Model Rules), the AMA Code of Medical Ethics, and the APA Ethical Principles of Psychologists and Code of Conduct.<sup>2</sup> These codes of conduct function to hold each individual in their respective profession to a higher standard of care, diligence, and

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<sup>1</sup> See HG LEGAL RESOURCES, *Adoption Attorneys: A Higher Standard of Ethics* (2018), <https://www.hg.org/article.asp?id=18825> (explaining that attorneys, in their professional and personal capacities, are governed by the Model Rules).

<sup>2</sup> See generally MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2017); CODE OF MED. ETHICS OF THE AM. MED. ASS'N (AM. MED. ASS'N 2016); ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (AM. PSYCHOLOGISTS ASS'N 2017), <http://www.apa.org/ethics/code/>.

professionalism.<sup>3</sup> These codes, while lengthy, contain important provisions, including client confidentiality<sup>4</sup> and prohibitions against sexual harassment.<sup>5</sup>

In light of recent social media movements and public backlash surrounding sexual misconduct, victims of sexual misconduct have begun to come forward in increasing numbers. This movement begs an important question for individuals in the legal profession: what happens when a client commits sexual misconduct against his or her attorney? While most large and

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<sup>3</sup> See MODEL RULES OF PROF'L CONDUCT preamble (AM. BAR ASS'N 2017) (noting various responsibilities attorneys must take on, including professionalism and diligence); CODE OF MED. ETHICS OF THE AM. MED. ASS'N preamble (AM. MED. ASS'N 2016) (highlighting the professional nature of doctors); ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT preamble (AM. PSYCHOLOGISTS ASS'N 2017), <http://www.apa.org/ethics/code/> (emphasizing the heightened standard of care and professionalism).

<sup>4</sup> See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT r. 4.01 (AM. PSYCHOLOGISTS ASS'N 2017), <http://www.apa.org/ethics/code/>; CODE OF MED. ETHICS OF THE AM. MED. ASS'N r. 3.2.1 (AM. MED. ASS'N 2016); MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2017).

<sup>5</sup> See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT r. 3.02 (AM. PSYCHOLOGISTS ASS'N 2017), <http://www.apa.org/ethics/code/>; CODE OF MED. ETHICS OF THE AM. MED. ASS'N r. 9.1.3 (AM. MED. ASS'N 2016); MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2017).

medium sized law firms have policies regarding client-attorney sexual misconduct, most small firms do not; thus, this Article will largely focus on small firms and solo-practitioners.<sup>6</sup>

Part I of this Article will first detail the recent events that have given rise to victims accusing their alleged attackers on a national platform. Part I will also analyze the Model Rules applicable in a sexual misconduct context and explain in what capacity they can be used by the attorney. Part II will then explore the dilemmas attorneys face when presented with client-attorney sexual misconduct. Lastly, Part III will conclude with an analysis and recommendation that the ABA, in promoting the safety and security of attorneys, adopt some form of ombudsman office or special counsel mechanism for attorneys to confidentially report sexual misconduct committed by their clients.

## I. BACKGROUND

### A. *Current Events Surrounding Sexual Harassment*

What seemingly started as a twitter campaign, the “#metoo” movement has transformed into a public advocacy platform, allowing victims of sexual misconduct to come forward against

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<sup>6</sup> Subsequent to the Baker & McKenzie scandal, most large law firms have written sexual harassment policies. See Find Law, *Sexual Harassment: What if it Happened at Your Firm* (2017), <http://careers.findlaw.com/legal-career-assessment/sexual-harassment-what-if-it-happened-at-your-firm.html> (accordingly, many small firms of less than thirty lawyers do not have written policies regarding client-attorney sexual misconduct).

their assailants.<sup>7</sup> Since early 2016, accusations against high profile celebrities, politicians, and CEOs have continuously been brought to light.<sup>8</sup>

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<sup>7</sup> Originally created in 2006 by a victim of sexual violence, the “#metoo” phrase has reignited the slogan of the anti-sexual harassment movement. See Christen Johnson and KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIBUNE (Mar. 13, 2018), <http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html>.

<sup>8</sup> A few of those named in public claims of sexual misconduct include: President Donald J. Trump, Actor Kevin Spacey, Senator Al Franken, Roy Moore, CEO Steve Wynn, and CEO Wayne Pacelle. See BBC News, *Kevin Spacey Timeline: How the Story Unfolded* (Dec. 11, 2017), <http://www.bbc.com/news/entertainment-arts-41884878> (noting Netflix has terminated Spacey’s role on *House of Cards* in response to the allegations); Sheryl Stolberg, Yamiche Alcindor, and Nicholas Fandos, *Al Franken to Resign from Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html> (confirming the Senator would be stepping down as a result of allegations against him). See also Travis Andrews, *Wynn Resorts CEO Steve Wynn Steps Down After Sexual Misconduct Allegations*, WASH. POST (Feb. 6, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/02/06/wynn-resorts-ceo-steve-wynn-steps-down-after-sexual-misconduct-allegations/?utm\\_term=.9d5050c45fe2](https://www.washingtonpost.com/news/morning-mix/wp/2018/02/06/wynn-resorts-ceo-steve-wynn-steps-down-after-sexual-misconduct-allegations/?utm_term=.9d5050c45fe2); Danielle Paquette, *Humane Society CEO Resigns After Sexual Harassment Allegations*, WASH. POST (Feb 2, 2018), [https://www.washingtonpost.com/business/economy/humane-society-dismisses-sexual-harassment-complaints-against-ceo-citing-lack-of-credible-evidence/2018/02/02/d5b163c4-083b-11e8-8777-2a059f168dd2\\_story.html?utm\\_term=.ba0e47f05c9a](https://www.washingtonpost.com/business/economy/humane-society-dismisses-sexual-harassment-complaints-against-ceo-citing-lack-of-credible-evidence/2018/02/02/d5b163c4-083b-11e8-8777-2a059f168dd2_story.html?utm_term=.ba0e47f05c9a)

As a result, many professionals have either resigned or have been fired from their positions. For instance, Senator Al Franken, in conjunction with public outcry and recommendations from senior democratic leaders, was forced to resign from office before a formal investigation could be commenced.<sup>9</sup> Furthermore, the sexual misconduct accusations against Kevin Spacey forced the directors of the film “All the Money in the World,” of which Spacey starred in, to cut and re-film Spacey’s parts with less than one month before its release date.<sup>10</sup>

A notable difference between attorneys and the individuals recently accused of sexual misconduct, however, is the ethical duty to abide by the Model Rules, or similar state bar-specific codes of conduct. This raises a serious question: what mechanisms, if any, exist for an attorney in a situation where he or she was sexually harassed or assaulted by a current or former client? This, unfortunately, is not a unique or rare situation. Various studies, reports, and statistics indicate that at least 18% of clients harass their attorneys, and that upwards of 44% of

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<sup>9</sup> See Sheryl Stolberg, Yamiche Alcindor, and Nicholas Fandos, *Al Franken to Resign from Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017),

<https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html>.

<sup>10</sup> When news allegations against Kevin Spacey came to light, Director Ridley Scott recast and re-filmed more than four hundred scenes in which Spacey appeared in. See Carolyn Giardina, *Ridley Scott Reveals How Kevin Spacey Was Erased from ‘All the Money in the World’*, HOLLYWOOD REPORTER (Dec. 18, 2017, 1:49 PM), <https://www.hollywoodreporter.com/behind-screen/ridley-scott-reveals-how-kevin-spacey-was-erased-all-money-world-1068755>.

female attorneys have indicated they were sexually harassed by a client in the past.<sup>11</sup> Although the law requires employers, including law firms, to create compliant channels that encourage victims of sexual misconduct to come forward,<sup>12</sup> attorneys at small law firms or solo-practitioners often fear a multitude of social and economic reprisals, thus decreasing disclosure rates.<sup>13</sup> Additionally, the Model Rules explicitly provide provisions prohibiting attorney-client

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<sup>11</sup> See Find Law, *Sexual Harassment: What if it Happened at Your Firm* (2017), <http://careers.findlaw.com/legal-career-assessment/sexual-harassment-what-if-it-happened-at-your-firm.html>. See also Peter Jan Honigsberg, Marilyn Tham, and Gary Alexander, *When the Client Harasses the Attorney –Recognizing Third-Party Sexual Harassment in the Legal Profession*, 28 U.S.F. L. Rev. 715, 719 (1994).

<sup>12</sup> EEOC Guidelines, issued pursuant to Title VII of the Civil Rights Act provide that in cases of sexual misconduct by a third party (in this situation, where a client harasses their attorney), the employer may be liable where the employer has constructive knowledge of the harassment and fails to take immediate corrective action. See Peter Jan Honigsberg, Marilyn Tham, and Gary Alexander, *When the Client Harasses the Attorney –Recognizing Third-Party Sexual Harassment in the Legal Profession*, 28 U.S.F. L. Rev. 715, 720 (1994).

<sup>13</sup> See Find Law, *Sexual Harassment: What if it Happened at Your Firm* (2017), <http://careers.findlaw.com/legal-career-assessment/sexual-harassment-what-if-it-happened-at-your-firm.html> (noting law firm policies regarding sexual misconduct rarely encourage victims to come forward); Peter Jan Honigsberg, Marilyn Tham, and Gary Alexander, *When the Client Harasses the Attorney –Recognizing Third-Party Sexual Harassment in the Legal Profession*, 28

sexual misconduct; however, the Model Rules are largely silent as to what mechanisms, if any, exist when client-attorney sexual misconduct occurs.

### *B. The ABA Model Rules*

This section will discuss some Model Rules that may become relevant when a client is accused of sexually harassing his or her attorney. This section will also discuss the ways in which these rules can be used to the attorney's favor, if at all, in a situation involving client-attorney sexual misconduct.

The first relevant rule is Model Rule 1.2(c). Model Rule 1.2(c) allows the attorney to limit the scope of representation if the limitation is (1) reasonable and (2) the client gives informed consent.<sup>14</sup> On the surface, Model Rule 1.2(c) looks like an attractive rule that gives the attorney latitude in limiting their role with the client, but that is unlikely the case. The comments to Model Rule 1.2(c) state various examples of what limiting representation may look like; for example, specific authorizations to act on the client's behalf, limitations based on the attorney's skills or services provided, and limitations based on what the client's objectives are.<sup>15</sup> Nonetheless, if a client consents to limited representation, the attorney is not exempt from the duty to provide competent and diligent representation.<sup>16</sup> Thus, in a client-attorney sexual misconduct situation, limiting the scope of representation will not necessarily allow the attorney

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U.S.F. L. Rev. 715, 716, 736 (1994) (emphasizing that victims do come forward, fear social and economic reprisals).

<sup>14</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2017).

<sup>15</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.2(c) cmt. (AM. BAR ASS'N 2017).

<sup>16</sup> *Id.*

to step away from the client because the scope of representation is largely determined on the client's needs and the attorney's skills.<sup>17</sup>

Alternatively, an attorney can potentially look to Model Rule 1.16. Model Rule 1.16(b)(1) allows an attorney to withdraw from representation if the "withdrawal can be accomplished without material adverse effect on the interests of the client."<sup>18</sup> Additionally, the attorney may withdraw under Model Rule 1.16(b)(7) if another good cause for the withdrawal exists.<sup>19</sup> Although Model Rule 1.16(b) may present a path to terminating the attorney-client relationship for an attorney who has been sexually harassed by a client, the path is limited.<sup>20</sup> First, the withdrawal may not cause an adverse effect on the client; thereby limiting the time frame in which the attorney may withdraw. The courts have noted that when litigation has commenced or is scheduled to commence in close proximity to the attorney's motion for dismissal, the motion will more likely than not be denied.<sup>21</sup> For instance, in *Kriegsman v. Kriegsman*, the attorney filed a motion to dismiss for failure of payment by the client, thirty days

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<sup>17</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2017).

<sup>18</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(1) (AM. BAR ASS'N 2017).

<sup>19</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(7) (AM. BAR ASS'N 2017).

<sup>20</sup> See *Holmes v. Y.J.A. Realty Corp.*, 513 N.Y.S.2d 415, 416 (N.Y. App. Div. 1987) (noting that once representation has commenced, counsel's right to withdraw is not absolute).

<sup>21</sup> See *Kriegsman v. Kriegsman*, 375 A.2d 1253, 1256 (N.J. Super. Ct. App. Div. 1977) (denying an attorney's motion to dismiss when trial was to start in thirty days); *Ruskin v. Rodgers*, 299 N.E.2d 623, 633 (Ill. App. Ct. 1979) (denying the client's motion to dismiss counsel after the trial had already commenced).

before trial was to commence.<sup>22</sup> The motion was denied by the Court, stating it would prejudice the client, and the incoming attorney who would have to take the case on such short notice.<sup>23</sup> Although *Kriegsman* was a withdrawal for failure to pay, the opinion is still on point because it provides a standard of when dismissal from representation materially and adversely affects the client's interests. If, however, the termination of representation will materially and adversely affect the client's interests, Model Rule 1.16(b)(7) may be applicable to the attorney.<sup>24</sup>

While Model Rule 1.16(b)(7) is broad and may help an attorney withdraw from an attorney-client relationship, two more important factors must be considered: (1) notice to the client and tribunal and (2) permission of the tribunal.<sup>25</sup> Thus, even in a situation where withdrawal will not materially and adversely affect the client or where another good cause for withdrawal exists, the tribunal must be given notice, and upon that notice, the tribunal may deny permission to withdraw.<sup>26</sup>

The Model Rule often raised in conjunction with the notice and permission requirements under Model Rules 1.16(c) and (d), is Model Rule 1.6. Under Model Rule 1.6(a), client confidentiality *only* applies to information relating the representation of a client.<sup>27</sup> In the context

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<sup>22</sup> See *Kriegsman*, 375 A.2d at 1256.

<sup>23</sup> *Id.*

<sup>24</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(7) (AM. BAR ASS'N 2017) (noting an attorney may withdraw if another cause exists).

<sup>25</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.16(c)-(d) (AM. BAR ASS'N 2017).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (emphasis added).

of client-attorney sexual misconduct, the attorney-client privilege of confidentiality is not applicable under Model Rule 1.6(a) because the client-attorney sexual misconduct will most likely not relate to the scope of the representation.<sup>28</sup> Accordingly, if an attorney does file for withdrawal from the tribunal and the judge solicits information regarding why withdrawal is being sought, the attorney is not prohibited from discerning the situation.

### *1. Sexual Harassment from Attorney to Client*

The Model Rules prohibit attorney-client sexual misconduct. In doing so, the ABA promulgates two main rules: Model Rule 1.8 and Model Rule 8.4.<sup>29</sup> Model Rule 1.8(j) prohibits an attorney from having sexual relations with a client, unless a sexual relationship existed before the attorney-client relationship commenced.<sup>30</sup> Additionally, Model Rule 8.4(g) states it is professional misconduct to engage in acts the attorney knows or should know is harassment based on sex.<sup>31</sup> The ABA's definition of sexual harassment is "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."<sup>32</sup>

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<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2017) (noting confidentiality only applies to the representation of the client).

<sup>29</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.8, 8.4 (AM. BAR ASS'N 2017).

<sup>30</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2017).

<sup>31</sup> See MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2017).

<sup>32</sup> See MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. (AM. BAR ASS'N 2017).

If an attorney engages in sexual misconduct under Model Rule 8.4(g), or a similar state bar rule, the attorney may be held accountable through the appropriate local bar.<sup>33</sup>

More often than not, each bar association will have disciplinary rules and procedures.<sup>34</sup> A typical proceeding will generally follow the same format: (1) an investigator looks into the conduct reported, (2) the investigator reports his or her findings and issues a recommendation to the disciplinary board, and (3) the disciplinary board then reviews the recommendation and either dismisses the matter, requests additional investigations, or issues a reprimand.<sup>35</sup> If the board chooses to do so, it can file a formal complaint with the state supreme court, where the state supreme court would then appoint a referee to conduct hearings, make findings, and issue

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<sup>33</sup> See MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 2017) (noting the course of action taken when rules are violated).

<sup>34</sup> For instance, the Maryland Bar has an attorney complaint form that can be filled out and returned to the Office of Bar Counsel. See *Attorney Grievance Commission and Office of Bar Counsel*, MD. CTS., <https://www.courts.state.md.us/attygrievance/complaint>. (last visited Mar. 18, 2018). See generally MODEL RULES OF PROF'L CONDUCT r. 8.5 (AM. BAR ASS'N 2017).

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

recommendations.<sup>36</sup> Moreover, if the board or state supreme court decide to issue disciplinary measures, they may come in three forms: disbarment, suspension,<sup>37</sup> and reprimand.<sup>38</sup>

A complex system of investigations, recommendations, and disciplinary actions exist when an individual reports an attorney for sexual misconduct. However, sexual misconduct is not solely a one-way street; it is not uncommon for attorneys to be sexually harassed by their clients.<sup>39</sup> While having mechanisms in place for attorney-client sexual misconduct is a step in the right direction, more must be done to ensure attorneys, especially those employed at small firms and as solo-practitioners, have regulated mechanisms and procedures in place that can be followed in a client-attorney sexual misconduct situation.

## II. THE ATTORNEY'S DILEMMA: THE BLEAK REALITY

The dilemma presented in situations involving client-attorney sexual misconduct is twofold: (1) the personal conflict of interest and (2) withdrawal from the case and termination of

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<sup>36</sup> *Id.* at 66-67 (noting the board and attorney may appeal from a supreme court recommendation).

<sup>37</sup> *See* MORTIMER D. SCHWARTZ ET. AL., PROBLEMS IN LEGAL ETHICS 66 (11th ed. 2015) (during the term of suspension, the attorney is prohibited from practicing law, and the suspension may include the requirement that the attorney take and pass a legal ethics exam).

<sup>38</sup> If a reprimand is private, the decision will remain an unpublished, private communication, in writing from the agency to the attorney, however, if the reprimand is public, the decision will be public, naming the attorney and describing the improper conduct. *See* MORTIMER D. SCHWARTZ ET. AL., PROBLEMS IN LEGAL ETHICS 65-66 (11th ed. 2015).

<sup>39</sup> *See supra* note 11.

representation.<sup>40</sup> The aforementioned avenues available present the attorney with two extreme solutions: (1) continue representing the client if the attorney can ultimately provide competent and diligent representation or (2) ask the tribunal to withdraw and risk the tribunal either not granting the dismissal or asking for the reason(s) behind the request.<sup>41</sup>

To apply this largely theoretical analysis, consider the following: a young attorney, Taylor, works for a small firm which employs five or six associates at any given time.<sup>42</sup> The partner at the firm, Alex, sends Taylor to the local prison to interview a newly retained client. While Taylor is interviewing the client, the client makes sexually derogatory remarks to Taylor. Taylor finishes the interview and heads back to the firm. After returning, the Taylor discloses to Alex the details of the visit, along with the sexual remarks the client made. The conduct that took place clearly meets the ABA's definition of sexual harassment.<sup>43</sup> As it currently stands, the Alex and Taylor have two—or potentially three—different avenues to remedy the situation, none of which are ideal.

### *1. Reassignment*

With knowledge of the situation that took place, Alex could assign the case to a different associate. However, it is more likely than not that this situation will not be feasible in most

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<sup>40</sup> See generally MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1), 1.16 (AM. BAR ASS'N 2017).

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

<sup>42</sup> This example is completely hypothetical for analytic purposes and does not represent any known fact pattern or tribunal opinion.

<sup>43</sup> See *supra* note 31 (defining sexual harassment as unwelcome verbal or physical conduct of a sexual nature).

contexts because either (1) all available associates have a full case load; leaving the original associate assigned—in this case Taylor—to the case or (2) the solo-practitioner or firm cannot afford to lose the client.<sup>44</sup> Thus, the Alex and Taylor delve into the dilemma itself: continue to represent the client or file for dismissal.

## 2. *Continuing Representation*

Continuing to represent the client is acceptable under Model Rule 1.7. Model Rule 1.7(b)(1) allows for the continuation of representation when a conflict of interest exists, and only if the attorney is able to do so, provide competent and diligent representation for the client.<sup>45</sup> This presents a tough situation for the attorney—or in the hypothetical above, the Alex and Taylor—because after knowledge of sexual misconduct by a client towards the attorney, the attorney must work through those emotions and continue representation.

Why would a firm or attorney continue to represent a client who has committed sexual misconduct against the attorney? A large driving force in this decision combines a multitude of social and economic factors. For example, a solo-practitioner or a small law firm may be struggling to meet various financial burdens.<sup>46</sup> In this situation, sexual misconduct by a client

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<sup>44</sup> As of 2005, small law firms with less than five lawyers make up more than 75% of the U.S. market. *See 2016 U.S. Lawyer Demographics*, PRACTICEPANTHER, <https://www.practicepanther.com/2016-us-lawyer-demographics/>. (last visited Mar.18, 2018).

<sup>45</sup> *See* MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1) (AM. BAR ASS'N 2017).

<sup>46</sup> *See* Peter Jan Honigsberg, Marilyn Tham, and Gary Alexander, *When the Client Harasses the Attorney—Recognizing Third-Party Sexual Harassment in the Legal Profession*, 28 U.S.F. L. Rev. 715, 716, 733 (1994)

may weigh against the risk of losing the client's business, and if the loss of business cannot be tolerated, either by the small firm or solo-practitioner, the sexual harassment may go unreported or unpunished.<sup>47</sup>

Additionally, social factors such as fear of reprimands, can induce an attorney to continue to represent the client. For instance, if a reported allegation of client-attorney sexual misconduct leads the client to take his or her business elsewhere, the supervising attorney may slow the attorney's career advancement or even fire the reporting attorney.<sup>48</sup> Alternatively, the supervising attorney may instead react by not allowing the attorney to have exposure with important clients who bring in a large amount of business for the firm.<sup>49</sup> While these are just a few social consequences of reporting client sexual misconduct, they continue to permit sexual harassment to thrive in a client-attorney context.<sup>50</sup>

As professionals who spend increasing amounts of money on legal education, and who come out of law school with increasing amounts of debt, a 'livelihood versus a sexually hostile environment' should simply not be a dilemma an ethical attorney confronts in 2018.

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

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

<sup>49</sup> *Id.* at 734.

<sup>50</sup> *Id.*

### 3. *Withdrawal*

If the attorney cannot continue to competently and diligently represent the client, the attorney may file for dismissal under Model Rule 1.16(b)(1) and (b)(7).<sup>51</sup> The dilemma presented in this situation is informing the tribunal of the reasons behind the withdrawal and risk hindering the attorney's representation and future client base, or to vaguely tell the tribunal the reason for withdrawal and risk the tribunal denying the application.

An attorney is charged with vehemently, diligently, and competently representing their client and their client's best interests.<sup>52</sup> However, if the tribunal, upon the attorney's motion for withdrawal, inquires as to the reasons behind the motion, at what point does stating the details of the situation cross the line of failing to act in the client's best interests? If the attorney states the detailed reasons as to why he or she is seeking withdrawal—client-attorney sexual misconduct—then the attorney is portraying the client in a negative, albeit true, light, which may prejudice how the judge views the client throughout litigation or sentencing. Casting the client in a negative light can potentially be a violation of the Model Rules, and thus to avoid any accidental ethical violations, the best way to answer the tribunal's question as to “why,” is to state the answer as bland and as vague as possible. For example, “your honor, for reasons of personal

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<sup>51</sup> *See supra* section IB (describing how withdrawal under Model Rule 1.16 works and considerations to take into account when filing a motion to dismiss). *See also* MODEL RULES OF PROF'L CONDUCT r. 1.16) (AM. BAR ASS'N 2017).

<sup>52</sup> *See* RULES OF PROF'L CONDUCT r. 1.3 (D.C. BAR ASS'N 2018) (emphasizing an attorney must represent a client zealously and diligently). *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 2017) (noting competence and diligence rules attorneys must abide by).

conflict, I can no longer competently represent my client and my client's best interests." If the tribunal is not satisfied, however, the tribunal reserves the right to deny the motion.<sup>53</sup>

The dilemma then persists: state the details of the conflict of interest and risk violating the ethical obligations or continue to be vague and risk denial of the application.

### III. EASE OF APPLICATION: RECOMMENDATIONS GOING FORWARD

#### *A. Client Versus Attorney is Obsolete and Inefficient*

Determining who or what is more important in a legal context should not be what client-attorney sexual misconduct boils down to in a progressive society. In the hypothetical above, the Alex could have fired the Taylor for making the complaint, thereby reaffirming the client's importance to the firm; or Alex could have terminated the relationship with the client, reaffirming the importance of the Taylor, but also while losing the client and potentially losing necessary financials. However, this client versus attorney dichotomy is only pertinent if the associate discloses, which is highly unlikely because of fear of the drastic social and economic sanctions that can be taken against those who disclose.<sup>54</sup> Thus, not only are there not adequate mechanisms to deal with client-attorney sexual misconduct, having the mechanisms in place would hardly make a difference because the disclosure mechanisms available to attorneys within their employment are unsatisfactory, and in fact, hinder disclosure.<sup>55</sup>

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<sup>53</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.16(c) (AM. BAR ASS'N 2017) (noting the tribunal may still order continuation of representation).

<sup>54</sup> See *supra* note 13 and accompanying text.

<sup>55</sup> See *id.*

This does not even address solo-practitioners; in that context, there are no reporting mechanisms available because there are no supervising or partner attorneys to disclose to. In the context of solo-practitioners, the only mechanism available comes from Model Rule 1.16, where the solo-practitioner can file for dismissal from the case.<sup>56</sup>

### *B. Recommendations for a State and Federal Level Solution*

To avoid the continuing dilemma attorneys often find themselves in, this Article suggests the ABA endorse an independent advocate office to implement complaint procedures and mechanisms for attorneys in situations of client-attorney sexual misconduct. This independent advocate office can take various forms, but this Article will focus on (1) the creation of an ombudsman office and (2) the creation of an office of special counsel.

#### *1. Independent Ombudsman Office*

The ABA should endorse an independent ombudsman office to implement complaint procedures. This office, contrary to the office of special counsel,<sup>57</sup> would be created at the state level, following the close model of Access to Justice Commissions (ATJs).<sup>58</sup> ATJs are entirely

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<sup>56</sup> See generally MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2017) (noting when it is acceptable for an attorney to withdraw or terminate the attorney-client relationship).

<sup>57</sup> See *infra* Part III(B)(2) (explaining how an office of special counsel could effectively work in the context of the ABA).

<sup>58</sup> ATJs are collaborative entities involving the courts, the bar, and civil legal aid providers to help remove barriers to civil justice for low-income individuals. See AMERICAN BAR ASSOCIATION, *Access to Justice Commissions*,

state based entities; and because they are state based, ATJs have the ability to address the often-fragmented state system instead of focusing on the federal level.<sup>59</sup>

Similar to the development of ATJ commissions, each state can establish its own independent ombudsman office with support from the ABA and other organizations who support broadening the avenues available to attorneys in a client-attorney sexual misconduct situation. The independent ombudsman office would take the form of an independent office, whose personnel serve as report, disclosure, and advice mechanisms for attorneys who are stuck in the unfortunate situation of client-attorney sexual misconduct. These mechanisms will serve two main goals: (1) the gathering of accurate statistical information in a confidential environment to enable the ABA or Congress to develop more comprehensive mechanisms,<sup>60</sup> and (2) to allow a system for attorneys to report sexual misconduct in an environment where no repercussions will be filed against them.<sup>61</sup> The establishment of an independent ombudsman office can help state

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[https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/resource\\_center\\_f\\_or\\_access\\_to\\_justice/atj-commissions.html](https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_f_or_access_to_justice/atj-commissions.html) (last visited Mar. 31, 2018).

<sup>59</sup> *See id.* Washington State was the first state to create an ATJ and since its creation, they have become increasingly popular. *Id.*

<sup>60</sup> *See* Peter Jan Honigsberg, Marilyn Tham, and Gary Alexander, *When the Client Harasses the Attorney –Recognizing Third-Party Sexual Harassment in the Legal Profession*, 28 U.S.F. L. Rev. 715, 716, 733 (1994) (noting that it is hard to get accurate data on how frequent client-attorney sexual misconduct takes place because victims are scared to come forward).

<sup>61</sup> This will be similar to the U.S. Department of State’s Office of the Ombudsman, an office that handles work place conflicts when no formal processes exist and helps employees come to

bar associations improve procedures while advocating on behalf of attorneys involved in client-attorney sexual misconduct, a situation largely un-provided for in the Model Rules.

Because this is a state-based solution, each independent ombudsman office will look slightly different, however, they will encompass three core standards of practice: (1) independence, (2) confidentiality, and (3) impartiality.<sup>62</sup> Furthermore, before implementation, it will be imperative to understand how the ombudsman office will be created. There are no defined organizational structures to provide for the creation of an ombudsman office.<sup>63</sup> However, there are two main avenues in which an ombudsman office can be chosen; the ombudsman personnel can be hired internally, including current and former ABA attorneys, or the ombudsman personnel can be hired externally.<sup>64</sup> With the highly confidential nature of the attorney-client relationship, the ombudsman office will have to have licensed attorneys, preferably with experience in ethics or sexual misconduct. The ombudsman office need not be limited to one attorney, as there can be multiple attorneys who are experts in the respective fields previously mentioned. To ensure the office acts within its scope, the ombudsman office must

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mutually satisfactory outcomes. *See* U.S. Dep't of State, *Office of the Ombudsman*, <https://www.state.gov/s/ombudsman/> (last visited Mar. 31, 2018).

<sup>62</sup> *See* ADMIN. CONFERENCE OF THE U.S., ADMIN. CONFERENCE RECOMMENDATION 2016-5, THE USE OF OMBUDS IN FEDERAL AGENCIES (2016).

<sup>63</sup> *See* INT'L OMBUDSMAN ASS'N, <http://www.ombudsassociation.org/Resources/Frequently-Asked-Questions.aspx> (last visited Mar. 31, 2018).

<sup>64</sup> *Id.* (noting that internally hired ombudsman can be more attractive because they have the preexisting knowledge of how the organization works).

take professional trainings, such as those authored by the International Ombudsman Association.<sup>65</sup> These securities and processes will help the newly chosen ombudsman personnel transition into their role of providing a means for attorneys to seek help in situations of client-attorney sexual misconduct.

## 2. *Office of Special Counsel for Barred Attorneys*

Alternatively, the ABA should endorse a mechanism similar to the U.S. Office of Special Counsel (OSC). The OSC is an independent, federal investigative and prosecutorial agency.<sup>66</sup> Their mission is to protect federal employees from prohibited personnel activities.<sup>67</sup> To avoid confusion with the OSC, this office should be called Office of Special Counsel for Barred Attorneys (OSCBA). Once established, the OSCBA will take on two main tasks: (1) OSCBA's licensed attorneys will serve as a special advocate for attorneys by sharing the attorney-client relationship and by being present for all communications with client<sup>68</sup> and (2) OSCBA will act as

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<sup>65</sup> *Id.* (explaining the different training materials and courses provided). See INT'L OMBUDSMAN ASS'N, <http://www.ombudsassociation.org/Resources/Frequently-Asked-Questions.aspx> (last visited Jan. 26, 2018).

<sup>66</sup> Office of Special Counsel, *About*, <https://osc.gov/Pages/about.aspx> (last visited Mar. 23, 2018).

<sup>67</sup> *Id.* Some prohibited personnel activities include retaliation on employees for filing complaints and discrimination. See Office of Special Counsel, *Prohibited Personnel Practices (PPPs)*, <https://osc.gov/Pages/PPP.aspx> (last visited Mar. 23, 2018).

<sup>68</sup> Compare OSCBA with the U.S. Army Special Victim Counsel; there, attorneys represent victims of sexual assault and their primary duty is to the client and not any organization, entity,

an investigatory and disciplinary board for retaliation taken against attorneys who filed formal complaints either under the EEOC or with their place of employment.<sup>69</sup>

Although the OSC was created by an act of Congress, the ABA can still endorse the OSCBA and adapt it to fit the needs of client-attorney sexual misconduct. Through its working groups and House of Delegates, the ABA can create the OSCBA, and later challenge Congress to create the mechanism as part of federal legislation. Once created, the OSCBA will have a similar mission statement of the OSC; protect barred attorneys from (1) client-attorney sexual misconduct and (2) retaliation on employees for filing complaints with their employers.

First, in protecting attorneys from client-attorney sexual misconduct, the OSCBA will serve as a special advocate for attorneys by sharing the attorney-client relationship and by being present for all communications with client. This will only happen when instances of sexual misconduct are reported to the OSCBA, and when the attorney requests it. This serves as an initial protection mechanism in the event that, if the attorney does file for withdrawal under Model Rule 1.16, the client cannot file a reputable false claim against the attorney to the state bar association. This will also serve as a safety mechanism for an attorney who may feel

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or individual. *See* UNITED STATES ARMY, OFFICE OF THE STAFF JUDGE ADVOCATE, FORT KNOX, KENTUCKY, SPECIAL VICTIM COUNSEL PROGRAM,  
<http://www.knox.army.mil/garrison/supportoffices/sja/svc.aspx>.

<sup>69</sup> *See* OFFICE OF SPECIAL COUNSEL, *Prohibited Personnel Practices (PPPs)*,  
<https://osc.gov/Pages/PPP.aspx> (explaining one purpose for the OSC is to allow federal employees to lodge complaints against their employers for retaliation).

uncomfortable continuing representation of the client, but also not being able to afford to terminate the attorney-client relationship.

Recognizing attorney-client privilege is paramount to an attorney's duty to zealously advocate for his or her client,<sup>70</sup> small firm attorneys and solo-practitioners should create a provision in their contracts in order to enable an OSCBA attorney to be a part of all communications with the client and attorney.

Second, while the EEOC does serve as a mechanism for employees to file cases against their employers for discrimination,<sup>71</sup> the OSCBA will provide a quicker, non-formal, tailored mechanism for attorneys to pursue if the attorney is terminated subsequent to disclosure of sexual misconduct. This process will largely resemble the current process of investigation that takes place when an attorney is reported for an alleged ethical violation.<sup>72</sup> To protect the attorney, investigations and any sanctions issued on the employer will be kept confidential, thereby enabling more disclosure, instead of facilitating processes that hinder it.<sup>73</sup>

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<sup>70</sup> See RULES OF PROF'L CONDUCT r. 1.3 (D.C. BAR ASS'N 2018) (emphasizing an attorney must represent a client zealously and diligently).

<sup>71</sup> See generally U.S. Equal Employment Opportunity Commission, *About EEOC*, <https://www.eeoc.gov/eeoc/> (last visited April 1, 2018) (enforcing complaint procedures for employees who were subject to discrimination by reporting a form of discrimination).

<sup>72</sup> See *supra* notes 34–38 and accompanying text describing the general investigation process when a bar association receives a complaint against an attorney.

<sup>73</sup> See *supra* note 13 (reporting that the mechanisms currently available to attorneys in fact hinder the disclosure of instances of client-attorney sexual misconduct).

## CONCLUSION

Alleged sexual misconduct continues to be in the headlines running across newspapers, blogs, and the nightly news. Inadvertently, America has suppressed victims of alleged sexual misconduct from coming forward, out of fear of retaliation or because of the power imbalance located between the two individuals. Where the Model Rules provide for thorough mechanisms for clients who are sexually harassed by their attorneys, the Model Rules fail to protect attorneys when they are subject to sexual misconduct by their clients.

In an age where disclosure is favored, more must be done to allow attorneys, especially those in small firms or solo-practitioners, to disclose alleged abuse and misconduct without having to choose between paying overhead costs or losing a top client and potentially losing a business. The current structure of the Model Rules needs to be amended, or the ABA needs to adopt and help implement state based independent ombudsman offices or the OSCBA, to give attorneys the mechanisms they need to continually do their jobs diligently. Although these mechanisms require a lot of set up and experimentation, adding mechanisms that are not already in place is a step in the right direction. If the legal profession is regarded as one of the most highly respected professions there is, more must be done to protect the attorneys who are zealously advocating on behalf of their clients every single day.