# How Attorney Discipline Is Evolving In The #MeToo Era

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Since it began in 2017, the #MeToo movement has caused the downfall of many in power — including celebrities, leaders of industry, politicians, judges and lawyers.

The #MeToo movement has brought to the forefront examples of how women can be taken advantage of by people in power in many professions. Harvey Weinstein and Bill Cosby have been the poster men for that movement. Both Weinstein and Cosby have been charged criminally for their behavior; Cosby, our favorite TV dad from the 1980s, has been found guilty, while Weinstein's fate is yet to be determined.

Others, such as Charlie Rose, Matt Lauer, Kevin Spacey, Al Franken, Harold Ford Jr. and Mark Halperin, have lost high-profile positions and been shunned by many of their peers, but are nonetheless free to continue to work in their field. Not so for those in the legal profession.

Lawyers and judges, because they are in a position of power over others, can exert that power over the most vulnerable in our society. So they are held to a higher standard, and must abide by an ethical code of conduct in order to continue to practice law. As social mores change, so do disciplinary measures against lawyers who use their position of trust to take advantage of others.

A working group of federal judges and judiciary officials of the Ninth Circuit issued a 144-page report on June 4, 2018, finding that inappropriate conduct in the federal judicial branch is “not limited to a few isolated instances” and “significant reforms are needed.” This report was created, in part, as a result of revelations about the behavior of Ninth Circuit judge Alex Kozinski, who showed his law clerks and other employees pornography and subjected them to overtly sexual comments.

A few months earlier, in March, the American Bar Association issued "Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession," a manual to help legal employers and victims fight sexual harassment. It includes a preface by Anita Hill, who accused Clarence Thomas of sexual harassment during his confirmation hearings for the U.S. Supreme Court. While Thomas was ultimately confirmed, Hill started a national conversation which addressed individuals in a position of power taking advantage of persons in a vulnerable class.

The privilege of practicing law is dependent upon an attorney's ability to maintain a high moral character. The purpose of lawyer discipline is to protect the public and the administration of justice. Famous celebrities, well-heeled executives and successful political figures have the wherewithal to withdraw from the limelight, and then re-emerge to engage in professional pursuits and earn a living again, despite numerous claims against them. That is not true of most attorneys, who are dependent on their law license to support themselves and their families.

In an eloquent decision in 2003 which addressed discipline for an attorney who had been found guilty of various sexual crimes with four different client-victims, Justice Barry Albin of the New Jersey Supreme Court stated:

We have traveled a far way from tolerance of sexual misconduct in the workplace and in our profession. We recognize the psychological damage that can be inflicted on the victims of sexual abuse, who silently suffer and do not complain because they feel powerless to do so. The sexual abuse of a client is unacceptable in any profession and in any business setting, and cannot be tolerated in our profession, which holds as sacred the dignity of the individual. Clients place not just money in trust with their attorneys; they place in trust their most intimate secrets, fears, and yearnings. ... Attorneys who commit sexual crimes against their clients take from their victims something more profound than money or goods; they take from their victims their dignity and psychological well-being. Such conduct is grossly incompatible with the standards of professionalism expected of attorneys.[1]

The attorney in that case was suspended for three years. So how are states across the nation disciplining attorneys if they are found to have taken advantage of a vulnerable client: with disbarment, suspension or some other lesser sanction?

Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Disbarment terminates the individual's status as a lawyer. In some states, such as Pennsylvania and New York, disbarment is not permanent, and an attorney can reapply for admission after a period of time if they meet other jurisdiction requirements.

In New Jersey, the state Supreme Court is the body which metes out discipline for ethical infractions. Over time, discipline for attorneys who take sexual advantage of their clients has steadily become harsher. The question is: Will it continue in that direction after the emergence of the #MeToo movement?

In 1985, the New Jersey Supreme Court "reprimanded" an attorney who had sexual relations with an indigent client.[2] In that matter, attorney Sheldon Liebowitz was charged with criminal sexual assault against a female client whom he had been appointed to represent pro bono in a custody dispute. Liebowitz claimed that their relationship was consensual, a defense utilized by Weinstein, Cosby and most who have been accused of sexual misconduct. Certainly, when only two people know the facts, each can view their behavior through different prisms. However, the standard of conduct demanded of a lawyer must be objective and examined from the viewpoint of an informed and concerned citizen.

In the Liebowitz case, the court found the attorney's behavior coercive. It adopted the findings of a special master that Liebowitz was in a superior position as the client's assigned attorney and, at least for her, or someone in her position, there was an inherent element of coercion in his conduct. The New Jersey Supreme Court also found that the client could not have "truly consented to Liebowitz's sexual advances." Nonetheless, it only imposed a reprimand which, at that time, was the lowest form of discipline permitted under the New Jersey disciplinary system.

The next important case dealing with sexual harassment in New Jersey occurred in 2003, 18 years after Leibowitz. Attorney Stephen Gallo was charged with sexually assaulting and/or abusing three matrimonial clients and a self-represented litigant seeking a restraining order against one of his clients. The court suspended him for three years as a result of his criminal conviction of four counts of criminal sexual conduct.

Approximately 25 years after Liebowitz was decided, in 2010, the New Jersey Supreme Court considered what sanctions would be appropriate for an attorney, David Witherspoon, who offered discounted legal fees to three female bankruptcy clients and a family member of another client in exchange for sexual favors. The court emphasized that attorneys who preyed on clients who were financially dependent individuals would be dealt with more harshly than others, because such acts go to the heart of the attorney-client relationship.

The majority of the court declined to endorse the dissenting justice's opinion that Witherspoon should be automatically disbarred because it "would create a zero tolerance rule that would automatically disbar attorneys involved in noncriminal, nonthreatening, nontraumatizing, purely verbal sexual improprieties directed at other adults, simply because they are clients."[3] Witherspoon can be distinguished from Gallo in that no actual sexual act occurred and no criminal charges had been filed.

People, including attorneys, have sexual relationships when they have an inclination to do so and the opportunity for a partner. How then should such behavior be treated, knowing the factual circumstances can be as varied as human beings themselves? Should an attorney who has sexual relations with a client always be disbarred?

In 2003, the New Jersey Supreme Court created a commission to study this question. The committee recommended, and the Supreme Court agreed, not to adopt a bright line rule of disbarment for sexual relations with a client as recommended by ABA model Rule 1.8(j) because inappropriate sexual conduct could be addressed through the existing rules.

Will the #MeToo Movement cause states to revisit what type of discipline should be imposed on the such ethical offenses? Should such attorneys be disbarred, or should they merely be suspended?

Each state establishes its own rules for disbarment. The majority of states do not permanently disbar an attorney for unethical conduct; depending on the jurisdiction, a lawyer may reapply to the bar after 5 to 7 years. But in a small minority of states, a disbarred attorney is banned from the legal profession for life. New Jersey is one of those jurisdictions.

Several states have disbarred attorneys for engaging in sexual relations or engaging in sexual misconduct. The Kansas Supreme Court found multiple sexual misconduct complaints by clients sufficient to disbar an attorney in 1998.[4] In 2002, the Florida Supreme Court said that disbarment, not suspension, was the appropriate remedy for sexual misconduct with a client.[5] A Maryland attorney was disbarred in 2004 for taking advantage of the client's vulnerability, and entering into an inappropriate sexual relationship during the course of representation for divorce.[6]

On the other hand, many states suspend attorneys who have sexual relations with clients. One must keep in mind that since most states' readmission procedures can be quite rigorous, a lengthy suspension may be a de facto disbarment.

In 2011, the Supreme Court of Wisconsin dealt with an attorney entering into an improper, intermittent sexual relationship over several years with "an extremely vulnerable client" who suffered from a history of psychiatric disorders and alcoholism. That attorney was suspended for four years and eight months.[7] In 2010, the Iowa Supreme Court imposed a 30-day suspension on a lawyer who had an intimate, personal relationship with a client first in her divorce case and later in a criminal matter.[8]

The Alaska Supreme Court suspended a pro bono attorney for three years for his sexual misconduct with a matrimonial client which included sexting and exchanging lewd photos.[9] The Supreme Court of Ohio imposed a six-month suspension, stayed upon conditions, on an attorney who solicited his client to join him in his hot tub on several occasions.[10]

What is the future of discipline for this type of behavior by lawyers? The goal of ABA's recently published Zero Tolerance manual is to "update the understanding of workplace sexual abuse and harassment by expanding it to include nonsexual abusive behavior, such as bullying and protection for individuals who may be targeted because of their sexuality, gender identity, race and ethnicity, or, in other words, any other vulnerable class."

As the #MeToo movement shines a light on inappropriate sexual conduct and harassment which has been hidden for many years, these behaviors are less and less tolerated by the public. While automatic disbarment for sexual misconduct with clients may have been considered too harsh a sanction almost a

decade ago, it may be revisited in the current climate.

One could argue that the only appropriate measure of discipline that protects the public from an attorney's intolerable behavior and sends a "zero tolerance" message to lawyers who would consider preying on their clients is disbarment. On the other hand, mitigating factors may play a role in determining whether a full disbarment is too harsh.

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[1] In Re Gallo, 178 N.J. 115 (2003).

[2] In Re Liebowitz, 104 N.J. 1975 (1985).

[3] In Re Witherspoon, 203 N.J. 343 (2010).

[4] In Re Berg, 955 P.2d 1240, 264 Kan.254 (1998).

[5] Florida Bar v. Scott, 810 So.2d 893 (2002).

[6] Attorney Grievance Commission of Maryland v. Culver, 381 Md. 241, 849 A. 2d 423 (2004).

[7] Disciplinary Proceedings against Frederick J. Voss, 331 Wis. 2d 1, 795 N.W. 2d 415 (2011).

[8] Iowa Supreme Court Attorney Disciplinary Board v. Monroe, 784 N.W. 2d 784 (2010).

[9] Disciplinary Matter Involving Stanton, 376 P.3d 693 (2016).

[10] Cleveland Metro. Bar Assn. v. Paris, 148 Ohio St. 3d 55, 68 N.E.3d 775 (2016).

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