

THOMAS TANG WRITING COMPETITION 2019
PROPOSED WRITING PROMPT

#MeToo is a global movement against sexual harassment and abuse. It has been the moving force behind the fall of powerful individuals who used their power as a sword and a shield: their position allowed them to harass their victims while also avoiding any consequence. Sexual harassment and abuse is not limited to Hollywood; in the legal system, several judges have gained notoriety for their acts of sexual harassment.

In Arizona, observing sexual harassment from members of the bench or other lawyers can have ethical implications. A lawyer's duty of professionalism is embodied in the *Oath of Admission to the Bar* and the *Lawyer's Creed of Professionalism of the State Bar of Arizona*. Arizona Supreme Court Rule 31 defines "unprofessional conduct" as substantial or repeated violations of the Oath or Creed, and Rule 54(i) states that unprofessional conduct is grounds for discipline. The duty of professionalism is further emphasized in Rule 41, Duties and Obligations of Members, in subsection (g).

In some instances, a lawyer who engages in sexual harassment can violate the Arizona Rules of Professional Conduct, ER 8.4(d), when such conduct is prejudicial to the administration of justice. If a lawyer knows that another lawyer has violated the Rules of Professional Conduct, ER 8.3 requires the lawyer to report this violation to the State Bar if it raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Please discuss one or more of the following questions.

- 1) Arizona does not have anonymous reporting. How can an individual's right to face his or her accuser be balanced with the need to protect the often more-vulnerable victims?
- 2) What can be done to address the culture of secrecy and acceptance in the legal community as it relates to sexual harassment?
- 3) Once someone has been found to have violated the rules of professionalism by engaging in sexual harassment, what steps should be taken? How can we balance punitive measures with rehabilitation?

Maintaining the Integrity of the Legal Profession

I. Anonymous Reporting

With the rise of the global #MeToo movement, there has been an increased push to better protect victims of sexual harassment. Even though Arizona has not codified anonymous reporting procedures through statute, the Arizona Rules of Professional Conduct, or otherwise, many private employers (firms) and even the federal judiciary have already balanced an individual's right to face his or her accuser with the need to protect the often more-vulnerable victims when updating their employment policies and are increasingly concluding that victims should be better protected.¹ Similarly, some federal and state executive bodies like the EEOC already allow charges to be filed on behalf of someone else who has been the victim of discrimination, allowing victims to remain anonymous.² Thus, given society's current attitude towards sexual harassment, balancing these competing interests in favor of victims can be justified today simply by looking at, following, and citing how other firms and even the federal judiciary are responding to the #MeToo movement.³

The Constitutions of the United States and Arizona may also provide some guidance as to how to weigh these interests. Because sexual harassment in the workplace is generally treated as a civil wrong in America,⁴ the Confrontation Clause of the United States Constitution as well as article 2, section 24 of Arizona's Constitution rarely come into play, seeing as those respective provisions apply only to criminal prosecutions. Thus, an individual generally does not have a constitutional right in sexual harassment matters but only a discretionary right. Furthermore, article

¹ See Kimberly Robinson, *Sexual Harassment Policies Adopted for Federal Judiciary*, BLOOMBERG (Mar. 12, 2019) <https://news.bloomberglaw.com/us-law-week/sexual-harassment-policies-adopted-for-federal-judiciary-1>; see also Heidi Alexander, et al., *Standing Firm Against Harassment*, LOMAP, <https://masslomap.org/sexual-harassment-policy-guidelines-law-firms/> (last visited May 1, 2019).

² *Confidentiality*, EEOC, <https://www.eeoc.gov/employees/confidentiality.cfm> (last visited May 1, 2019).

³ *Facts About Sexual Harassment*, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last visited May 1, 2019).

⁴ Deborah England, *Is Sexual Harassment in the Workplace a Crime?*, CRIMINALDEFENSE LAWYER, <https://www.criminaldefenselawyer.com/resources/is-sexual-harassment-workplace-a-crime.htm> (last visited May 1, 2019).

2, section 2.1 of Arizona's Constitution provides a list of enumerated rights for victims.⁵ This shows that the state legislature has also already done some balancing and is at least somewhat concerned with protecting victims in certain situations. Accordingly, being tougher against the accused can be justified in this regard as well.

Essentially, balancing the accused's interest with the interests of a vulnerable-victim should be done on a case-by-case basis, examining the specific facts of each case. The party who needs to be better protected may change depending on the circumstances of the misconduct and case. For example, an "aggrieved" law clerk filing frivolous claims against a judge has a much lower need or interest to be protected than others. This is why it is important for the balancer to fully investigate the allegations, try to distinguish real complaints from meritless ones, and learn all of the facts. By doing this, you are protecting the interests of both the accused and the victim. At this point, it can also be determined if it is even necessary to reveal the victim's identity.

In the end, because no constitutional rights are violated by doing so, balancing the competing interests in a light most favorable to victims can easily be defended. It can also be argued that protecting the victim creates a better environment in the workplace, minimizes bad publicity for a firm, lessens the victim's fear of retaliation, and preserves the integrity of the judiciary. Especially given the enormous impact of the #MeToo movement in today's society, the offensive nature of sexual harassment itself, the generational shift in attitude towards sexual harassment, and because the law requires that employers provide a hostile-free work environment for their employees, being inclined to protect victims is more reasonable than ever today.

⁵ "To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse. . . ." ARIZ. CONST. ART. II, § 2.1. "To refuse an interview, deposition, or other discovery request by the defendant. . . ." *Id.* Granted, these provisions apply only to victims in criminal proceedings.

II. Steps to Take

After someone has been found to have violated the rules of professionalism by engaging in sexual harassment, the first and most important step is to take immediate and corrective action by doing whatever is necessary to end the harassment. While there should be a focus on preventing the misconduct from ever happening again, protecting the victim and making him or her whole is the most important thing. The next step is to determine the appropriate remedy, *i.e.*, whether a message should be sent by handing out a punitive punishment or whether the perpetrator should try to be rehabilitated instead. Because being a lawyer is about helping others, every remedy should have at least *some* rehabilitative purpose behind it. Still, balancing these aims is important and depends on the facts of a case.

These facts should be examined in light of a few factors. First, the severity of the conduct. If the perpetrator's conduct is particularly egregious or constantly recurring, then the punishment should be more punitive rather than rehabilitative. Another factor is whether the perpetrator exploited their status as an attorney. If the harassment was done during the course of a lawyer's work or by manipulating their status as one, then a punitive punishment is justified. If the harassment is out of the scope of being an attorney (similar to a DUI), then a rehabilitative consequence may be more appropriate. The next factors to survey include examining the disciplinary history of the perpetrator and whether he or she is apathetic to the situation. One final factor to look at is the end goal of the remedy. What message should be sent to the rest of the State Bar when punishing a harassing lawyer guilty of violating the rules of professionalism? These factors should all be examined in light of the goal to maintain the integrity of the legal profession. Once these factors are weighed, an appropriate remedy can then be determined.

#MeToo: Turning a Hashtag into Action

Sexual assault plagued society since the beginning, but the world did not begin to understand its prevalence until a hashtag appeared on social media. The #MeToo movement raised significant awareness of sexual abuse and harassment, particularly in the workplace. However, awareness alone is not enough to reduce the numbers of sexual abuse and harassment in society and in workplaces. Awareness must be translated into action: steps must be taken to encourage reporting, ensure proportional punishment, and provide protection for all parties.

Sexual harassment and abuse are difficult to navigate due to the conflicting interests of the accused and the victim. United States tradition protects the right of the accused to face the witnesses against him; a right that conflicts with the interest in protecting victims. However, anonymous reporting provides a balance between the interests of the accused and the accuser. Ideally, anonymous reporting should allow a victim to produce a written statement regarding the sexual abuse. The facts reflected in the written statement should be conveyed to the accused without disclosing any identifiable information or the statement itself. The statement should only be disclosed to the accused *if criminal charges are brought*. The right to confront witnesses stems from the Sixth Amendment of the United States Constitution. Thus, the right is arguably strongest in criminal proceedings. As a result, it is logical to give full access to the written report to the accused in criminal proceedings.¹ However, in civil or ethical proceedings, the right to confront witnesses is less powerful, warranting greater protections to the victim. In such situations, the accused is entitled to know the nature of the accusations and the basic facts of the report, without obtaining access to the report or any identifiable information of the reporter. The aforementioned

¹ To be sure, I do not take a position on the written report's role in the criminal proceeding (e.g. whether it substitutes live testimony of the victim, etc.)—I only argue that the Sixth Amendment protects the accused's right to access the report in such proceedings.

process protects victims by creating an environment more conducive to reporting while still respecting the rights of the accused.²

Addressing the environment of secrecy and acceptance is impossible without taking measures to directly address sexual assault when it occurs. Arguably, decades old cases of sexual assault come to light presently because these cases were not addressed in real-time. If victims are not certain that their stories will be investigated, there is no reason to come forward at all. Therefore, the only way to combat acceptance is to not be accepting. Each report or allegation should be investigated, and where sexual harassment or assault has occurred, the perpetrator should be sanctioned accordingly. For example, a first-time offense may result in a fine or probation. A second-time offense may result in probation contingent on completing an educational seminar. A third-time offense may require a rehabilitation program in addition to other appropriate sanctions.³ However, a tiered punishment system should consider all relevant factors, including the seriousness of the offense. That is, an individual who commits a particularly egregious offense should not be fined simply because it is a first-time offense. Sexual harassment and abuse encompass a variety of behaviors, and the punishment system needs to be stable enough to encourage reporting but flexible enough to address the facts and circumstances of each case.

Furthermore, addressing an environment of acceptance and secrecy requires more than addressing perpetrators: potential victims must be empowered. The environment of secrecy and acceptance is the byproduct of a much larger institutional injustice: workplaces with extreme

² Allowing victims to report anonymously and in writing encourages victims to report sexual abuse without fear of retaliation in the workplace. However, such a system is subject to abuse in rare but extreme cases (e.g. when an employee is denied a promotion and is angry). As a result, there should be a mechanism in place for investigating and dealing with false reporting.

³ Patterns of abusive behavior warrant educational or rehabilitative programs, as punishment alone may not be enough to deter behavior. For example, an overly friendly worker may not recognize that their behavior (e.g. long hugs) is offensive or uncomfortable. Therefore, simply punishing this individual is unlikely to change their behavior, and educational programs can help with situational awareness.

power differentials. Ordinarily, these power differentials occur across racial and gender lines. Accordingly, sexual assault often occurs at the hands of those with the most power against minority races and genders. As such, educational programs targeted at potential victims can encourage reporting and teach strategies for addressing uncomfortable situations. Moreover, workplaces should strive for a more balanced power structure by creating opportunities and encouraging involvement of minorities at the top.

Lastly, it is important not to lose sight of the potential for false reporting. It is true that instances of sexual abuse far exceed instances of false reporting; however, it would be a grave injustice to pretend that false reporting never occurs.⁴ Much is at stake for those accused of sexual assault—especially in light of social media. While victims need to be heard and their stories need to be investigated, *everyone*, no matter how egregious their charges, is innocent until proven guilty. The alternative to leniency is not assuming that every report is inevitably true. Ensuring a fair investigation does not mean labeling someone an abuser at the onset of the report. Hearing victims does not mean silencing the accused. Sexual abuse is a sensitive subject, and addressing it requires balancing of all interests. In a country founded on “liberty and justice for all,” we owe the accused a fair opportunity to prove their innocence, no matter what the accusation.

⁴ See generally Michael J. Stern, *I used to prosecute sexual assault cases. Here's what I learned and how it could help us*, USA TODAY (Oct. 17, 2018), <https://www.usatoday.com/story/opinion/2018/10/17/sexual-assault-allegations-wait-facts-former-prosecutor-column/1659190002/> (discussing the importance of recognizing the damage of false reporting to both victims and the accused).