

## EMPLOYEES IN THE WORKPLACE

## Expert Analysis

# Sexual Harassment in the Legal Profession: It's Time to Make It Stop

In 1992, the American Bar Association implemented a policy, spearheaded by the ABA Commission on Women in the Profession to take action on sexual harassment in the legal profession stating that it is was a “serious problem” constituting a discriminatory and unprofessional practice.<sup>1</sup> The ABA called upon members of the legal profession to provide leadership and education in eradicating sexual harassment, recognizing that it has major psychological and economic consequences for employees as well as significant costs to employers in lost productivity and turnover. At the time, sexual harassment was cited as one explanation for the gender gap in high-level legal positions. According to the 1992 ABA report, “[l]awyers play a special role in educating society about sexual harassment and eliminating it from the workplace.” Unfortunately, in the intervening 25 years, sexual harassment continues to plague women in the field of law<sup>2</sup> and more pervasively, women of color.<sup>3</sup>

Women make up only 28 percent of non-equity partners at major law firms, and make up only 18 percent of equity partners—only 2 percent higher than in 2006.<sup>4</sup> Now that close to 50 percent of law school graduates are women,<sup>5</sup> how is it possible that the number of women holding top legal jobs has barely moved? There are a few factors, but a major reason is women still do not feel welcome or valued in many legal work environments and the gender pay gap remains significant.<sup>6</sup> However, while gender discrimination remains a critical issue overall for women in the profession and likely will take years to correct,<sup>7</sup> sexual harassment must stop as it degrades and humiliates women, often forcing them to leave their jobs, and the profession. While studies have shown that sexual harassment, through training and policy enforcement, occurs far less today than it did in 1992,<sup>8</sup> the number should be zero. As lawyers, this should not be our legacy.

Lawyers take an oath when admitted to the bar to be the gatekeepers of the rule of law and to lead by example. We advise and counsel corporations, government agencies, not-for-profits, and in-house counsel to implement policies to curb sexual harassment. Our ambivalence and at times, delinquency in this area is unacceptable, especially

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because we are well aware of the concrete steps as a profession we can take to eradicate sexual harassment.

### The Enduring Problem

The epidemic of sexual harassment in the legal profession was made public with a few high-profile cases: in 1991 Anita Hill’s testimony during Clarence Thomas’s Supreme Court nomination hearings started the conversation, and a few years later law firms began to pay attention when Baker & McKenzie was ordered to pay \$7.1 million to victims of workplace sexual harassment.<sup>9</sup> Since then, these lawsuits against legal employers continue to be brought, but many cases are settled out of court or go to arbitration.

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In 2014, a former partner at California firm Irell & Manella, Juliette Youngblood, sued the firm for sexual harassment, alleging that a partner made inappropriate comments to her before terminating her.<sup>10</sup> The firm moved to compel arbitration as per an arbitration agreement, which was granted, and the arbitrator eventually ruled in the firm’s favor.<sup>11</sup> Also in 2014, associate Alexandra Marchuk sued the securities firm Faruqi & Faruqi for hostile work environment sexual harassment based on actions and comments by the partner Juan Monteverde.<sup>12</sup> A federal jury found the firm and Monteverde partially liable for creating a hostile work environment, and awarded Marchuk \$140,000 in damages plus attorney fees.<sup>13</sup>

Most recently, associate Elina Chechelnitzky sued the firm of McElroy, Deutsch, Mulvaney & Carpenter, claiming that she was fired for complaining about sexual harassment and gender discrimination at

the firm.<sup>14</sup> According to the filing, the firm required female associates to sign a release and confidentiality agreement before they were allowed to socialize with male attorneys, a practice as ineffectual as it was patronizing.<sup>15</sup> That case was unsurprisingly settled out of court in July 2015.<sup>16</sup>

### Impediments to Justice

There are structural, legal, and ethical impediments that make it difficult for victims of sexual harassment in the profession to seek legal redress. The power structure in firm partnerships often perpetuates sexual harassment by shielding harassers and silencing victims. Victims often don’t report because their supervisors may be the harassers or friends of the harasser, and often Human Resource departments, if they exist, have no autonomy. In addition, partners have a vested interest in protecting each other and turning a blind eye to instances of harassment.<sup>17</sup>

Further, many firms have been reluctant to successfully implement effective anti-harassment programs. A lack of proper reporting protocols, confidentiality, and enforcement leads to discouragement of complaints, delays in investigations, and retaliation against the complainant. Firms fall short in investigating or punishing the perpetrators of this conduct, particularly if the offender is a “rainmaker” or is in a firm’s leadership position.<sup>18</sup>

In fact, it is quite common for the victim to be asked to leave the firm after a complaint or an action has been brought. Not unlike rape cases, the victims of sexual harassment become the pariahs—and their own behavior suspect.<sup>19</sup> Often, other associates or partners do not want to work with them, their billable time drops off, and often they begin to fail at the firms that they had previously succeeded at. It is also quite common to settle these matters quietly, victims being forced to leave firms without a trace—and without references, unable to replace their positions, particularly as a senior associate on partner track.

From a legal perspective, lawyers inherently possess knowledge and training regarding legal standards, which can allow a firm, a judge or law department to tolerate less than illegal behavior—i.e., inappropriate sexual conduct, remarks and gender bullying. While employers in general are guilty of minimizing women’s complaints of crude remarks or innuendo, law firms are some of the least likely institutions to intervene unless they deem the behavior to reach a legal threshold. However,

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because this inappropriate behavior perpetuates the submissive status of women, decreases productivity, and is costly for both employers and employees, it is in the best interest of employers to reduce, correct, and prevent problems of sexual harassment before the harassment reaches the standard of “severe or pervasive”<sup>20</sup> actionable under the applicable legal standard.<sup>21</sup>

Sexual harassment claims are also difficult to bring, often hinging upon he-said, she-said testimony and invariably involving embarrassing personal details for the victim. That said, the threat of a public lawsuit has equally negative implications for legal employers, both reputational and financial. With the rise of binding arbitration clauses in most employment and partnership agreements, however, a public lawsuit is less of a threat. Without public humiliation as a deterrent, where named partners are shamed by the allegations, law firms have little incentive to make sure their policies and training are the best they can be.

Law firm partners have an additional hurdle when bringing a claim against a law firm. Title VII generally protects employees, not partners, from workplace discrimination.<sup>22</sup> While this issue has been heavily litigated in the states and the Supreme Court in *Clackmas v. Gastroenterology Assocs.* laid out the factors for deciding who is an employee versus a partner, this issue continues to present challenges for female law partners.

Even when employees are able to bring their claims to court, the courts are rarely a refuge. Judges have expressed reluctance to police their own profession, and avoid becoming involved in matters they think should be handled internally.<sup>23</sup> In *Fitzgerald v. Ford Marrin Esposito Witmeyer & Glesser*, the district court overturned a jury verdict by holding that sexually explicit comments which pervaded the workplace were “humorous” and “a form of relaxation from intense work.”<sup>24</sup> The district court also noted that the individuals who made such comments were “well educated, generally well-mannered and had remarkably likeable and attractive personalities.”<sup>25</sup>

The court found that the “teasing,” “joking and nonsensical sexual talk” did not warrant a finding of a hostile work environment.<sup>26</sup> This case was overturned by the U.S. Court of Appeals for the Second Circuit, which found that the lower court’s findings that sexual conversations and inappropriate gender-based epithets directed toward the plaintiff sufficiently demonstrated a hostile work environment.<sup>27</sup>

In *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, the U.S. Court of Appeals for the Third Circuit stated that courts should avoid the “unwarranted invasion or intrusion into matters involving professional judgments about an employee’s qualifications for promotion within a profession.”<sup>28</sup>

Further, judges’ own personal biases, along with gender, age and political affiliation, can greatly affect the outcomes of sexual harassment cases, usually with negative outcomes for plaintiff victims.<sup>29</sup>

On the ethical front, the profession has finally taken steps to better police itself, at least in regard to our ethics rules. The New York State Bar, along with at least 24 other states, revamped its Model Rules to add discrimination and harassment based on protected status to the list of categories of attorney misconduct.<sup>30</sup> Some of these states’ rules and comments, like Florida and Indiana,<sup>31</sup> have been inter-

preted broadly enough to cover discrimination and harassment that occurs in both business and social settings—often where sexual harassment occurs.

Other states, like New York,<sup>32</sup> limit the misconduct to the confines of the practice of law more narrowly. Building on that momentum, a proposal will go in front of the ABA House of Delegates this August to amend Model Rule 8.4 to add all forms of discrimination and harassment as additional categories of attorney misconduct. Prior to any amendment, Rule 8.4 has been solely concerned with attorney conduct that might adversely affect an attorney’s fitness to practice law or seriously interfere with the operation of the judicial system. The amendments under consideration by the ABA would actually subject attorneys to discipline for engaging in discriminatory conduct.

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## Conclusion

Ridding the profession of sexual harassment must be a priority of the profession. Reducing instances of harassment and making the workplace a more hospitable one for women is a win-win for retaining talented and successful women lawyers. Legal employers should protect victims of sexual harassment and implement a reporting structure that does not require complainants to report harassment to their direct supervisor, who in many instances have conflicts of interest or are the harassers themselves.

Failure to maintain confidentiality is also a huge problem for legal employers and discourages complaints; upholding a rigorous standard of confidentiality is necessary when investigating a claim in order to encourage honesty, incentivize rapid reporting, and limit retaliation. Finally, an anti-harassment policy that does not base itself on legal standards will allow legal employers to be made aware of dangerous patterns before they become a liability.

It is our collective duty as a profession to make sure that we are setting the standard for safe and welcoming workplaces, and to do everything we can to combat sexual harassment. Taking a hard look at ourselves and our work environments is necessary to ensure the attraction, retention, and success of women in the legal profession.



1. ABA House of Delegates, Recommendation 117 (Feb. 1992).  
 2. Janet E. Gans Epner, “Visible Invisibility: Women of Color in Law Firms,” ABA COMM. ON WOMEN IN THE PROFESSION 10 (2006), <http://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf> (finding that between 47 and 49 percent of women reported being subjected to harassment while working in a law firm setting).  
 3. *Id.* (finding that 49 percent of women of color reported the same).  
 4. Lauren Stiller Rikleen, Women Lawyers Continue to Lag Behind Male Colleagues: Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law

Firms, NAT’L ASSOC. OF WOMEN LAWYERS (October 2015) <http://www.nawl.org/p/cm/ld/fid=506>.

5. ABA Comm. on Women in the Profession, A Current Glance at Women in the Law (July 2014), [http://www.americanbar.org/dam/aba/marketing/women/current\\_glance\\_statistics\\_july2014.authcheckdam.pdf](http://www.americanbar.org/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf).

6. Lauren Stiller Rikleen, Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation, ABA PRESIDENTIAL TASK FORCE ON GENDER EQUITY & COMM. ON WOMEN IN THE PROFESSION 9-10 (2013), [http://www.americanbar.org/content/dam/aba/administrative/women/closing\\_the\\_gap.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf).

7. See *id.* at 29.

8. Shelley Amanda, “Sexual Harassment Trends In The Legal Industry: Policy Enforcement & Targeted Sexual Harassment Training Are Key,” THE NETWORK BLOG (Nov. 6, 2014), <https://www.tnwincc.com/10538/sexual-harassment-training-and-trends-legal-industry/>.

9. Jane Gross, “Jury Awards \$7.1 Million in Sex Case,” N.Y. TIMES (Sept. 2, 1994), <http://www.nytimes.com/1994/09/02/us/jury-awards-7.1-million-in-sex-case.html>; The Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. On the Judiciary, 102d Cong., 1st Sess. 157 (1991).

10. Compl., *Youngblood v. Irell & Manella*, No. BC465977, (L.A. Cnty. Super. Ct. July 22, 2011).

11. Stipulation & Order *Youngblood v. Irell & Manella*, No. BC465977 (L.A. Cnty. Super. Ct. Dec. 11, 2014).

12. Compl., *Marchuk v. Faruqi & Faruqi*, 13 Civ. 1669 (S.D.N.Y. March 12, 2013).

13. Jury Award, *Marchuk v. Faruqi & Faruqi*, 13 Civ. 1669 (S.D.N.Y. Feb. 5, 2015).

14. Compl., *Chechelnsky v. McElroy, Deutsch, Mulvaney & Carpenter*, 15-cv-01777 (S.D.N.Y. March 1, 2015).

15. *Id.* at ¶¶ 94-101.

16. Stipulation & Order, *Chechelnsky v. McElroy, Deutsch, Mulvaney & Carpenter*, 15-cv-01777 (S.D.N.Y. July 6, 2015).

17. Jane Gross, “When the Biggest Firm Faces Sexual Harassment Suit,” N.Y. TIMES (July 29, 1994), <http://www.nytimes.com/1994/07/29/us/when-the-biggest-firm-faces-sexual-harassment-suit.html?pagewanted=all>.

18. Julie A. Pace, “Harassment, Discrimination & Retaliation Time to Audit Your Firm,” ARIZ. ATT’Y, 10, 12 (Sept. 2007).

19. Deborah Edros Knapp et al., “Determinants of Target Responses to Sexual Harassment: A Conceptual Framework,” 22 ACAD. MGMT REV. 687, 702 (1997).

20. See generally Jana L. Raver and Michele J. Felgand, “Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance,” 48 ACAD. OF MGMT. J. 387 (2005).

21. Megan E. Wooster, “Sexual Harassment Law—the Jury Is Wrong As A Matter of Law,” 32 U. ARK. LITTLE ROCK L. REV. 215, 240-41 (2010).

22. *Clackmas v. Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 450-51 (2003);

23. See e.g. *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser*, 153 F.Supp.2d 219 (S.D.N.Y. 2001); *Sier v. Jacobs Persinger & Parker*, 714 N.Y.S.2d 283, 285 (App. Div. 2000) (reducing emotional distress award against law firm); *K.S. v. ABC Prof’l Corp.*, 749 A.D.2d 425 (N.J. Super. Ct. App. Div. 2000) (imposing a protective order preventing plaintiff from deposing partners about their sexual relationships with other firm employees); but see *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser*, 29 F. App’x 740 (2d Cir. 2002).

24. *Fitzgerald*, 153 F.Supp.2d at 222.

25. *Id.*

26. *Id.* at 233, 235.

27. *Fitzgerald*, 29 F. App’x at 742.

28. 983 F.2d 509, 527 (3d Cir. 1992).

29. Carol T. Kulik, Elissa L. Perry and Molly B. Pepper, “Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes,” 27 LAW & HUM. BEHAV. 69 (2003); Daniel L. Chen & Jasmin Sethi, “Insiders and Outsiders: Does Forbidding Sexual Harassment Exacerbate Gender Inequality?” (Duke Law Sch., Working Paper No. 226892, Oct. 2011).

30. ABA Comm. on Ethics & Prof’l Responsibility, Draft Proposal to Amend Model Rule 8.4.6 (Dec. 22, 2015).

31. FLA. RULES OF PROF’L COND. r. 84(d) (applying to conduct “in connection with the practice of law”); IND. RULES OF PROF’L COND. r. 84(g) (applying to conduct “in a professional capacity.”)

32. N.Y. RULES OF PROF’L COND. r. 8.4(g) (22 NYCRR 1200.0) (applying to “hiring, promoting [and other] conditions of employment”).