EMPLOYEES IN THE WORKPLACE

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 was a “serious problem” constituting a discriminatory and unprofessional practice. 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 and more pervasively, women of color.

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. Now that close to 50 percent of law school graduates are women, 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. However, while gender discrimination remains a critical issue overall for women in the profession and likely will take years to correct, 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, 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 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, there were 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. The firm moved to compel arbitration as per an arbitration agreement, which was granted, and the arbitrator eventually ruled in the firm’s favor. 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. 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. Most recently, associate Elina Chechelnitsky sued the firm of McElroy, Deutsch, Mulvaney & Carpenter, claiming she was fired for complaining about sexual harassment and gender discrimination at the firm. 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. That case was unsurprisingly settled out of court in July 2015.

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.

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. 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. 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,
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” actionable under the applicable legal standard.21

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.22 While this issue has been heavily litigated in the states and the Supreme Court in Clackamas v. Gastroenterology Associates. 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.23 In Fitzgerald v. Ford Marrin Esposito Wittmeyer & Gleser, 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.”24 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.”25

The court found that the “teasing,” “joking and nonsensical sexual talk” did not warrant a finding of a hostile work environment.26 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 communications and inappropriate gender-based epithets directed toward the plaintiff sufficiently demonstrated a hostile work environment.27

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.”28

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.29

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.30 Some of these states’ rules and comments, like Florida and Indiana,31 have been interpreted 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,32 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.

3. Id. (findng that 49 percent of women of color reported the same).
7. See infra 29.
15. Id.
24. Fitzgerald, 153 Flspue.2d at 222.
25. Id.
26. Id. at 233, 235.
27. Fitzgerald, 29 F. Appx. at 742.
28. 983 F.2d 509, 527 (3d Cir. 1993).
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. 84(g) (22 NYCRR 1200.0) (applying to “hiring, promoting [and other] conditions of employment for...(continues)