

Me Too: Eliminating Sexual Bias and Harassment at your Law Firm

By Philip Bogdanoff

The “Me Too” movement has illuminated the dark practice of sexual bias and misconduct in various industries and professions. In the case of movie producer Harvey Weinstein, 84 women came forward and stated that Mr. Weinstein harassed them, including allegations of rape, sexual harassment and assault. What is most shocking is that this sexual misconduct went unreported for decades. In the legal profession, 19 women accused Ninth Circuit Federal Appellate Court Judge Alex Kozinski of sexual harassment, including unwanted physical contact, inappropriate sexual comments, and uninvited kissing. This sexual harassment went unreported for over three decades. The victims included former law clerks, law students, attorneys, law professors, and even a federal court of claims judge. Is this case an isolated incident or does the legal profession have an ongoing problem with sexual harassment and bias?

In a 2009 survey of female attorneys in Utah, 37 percent of women in law firms responded that they experienced verbal or physical behavior that created an unpleasant or offensive work environment and approximately 10 percent of women in law firms indicated that they had been harassed based upon their sex. In a 2015 survey of 464 female attorneys by the Florida Bar Association, 43 percent of the attorneys indicated that they had experienced gender bias and 17 percent stated that they had experienced sexual harassment during their careers. A female attorney was told by her male supervisor that “if the receptionists were unavailable to answer the phone, the responsibility would fall to me because men should not answer phones.” Another attorney responded that after she was hired that a member of her firm suggested that she have sex with two of her supervisory attorneys because they were nice enough to give her a job when legal jobs were scarce. One attorney indicated during a law school internship that she was inappropriately touched by a male attorney but did not report the incident. Further, several attorneys indicated that they experienced sexual bias by male clients. A male client referred to a female attorney as the “cute assistant” even though she was the primary client contact on the case. One

client refused to allow a female attorney into a conference room during a meeting about the case because of her gender. The law firm promptly fired the client.

Stephanie Scharf, a partner in the law firm of Scharf Banks Marmor LLC and Chair of the American Bar Association Commission on Women in the Profession, has seen that sexual harassment is a major problem in the profession. A recent American Bar Association study suggests that close to half of women attorneys have suffered sexual harassment and that employers need to protect their employees from this type of abuse. Ms. Scharf states that, “many people can be victims of sexual harassment in the legal profession.” She believes that “sexual harassment is typically an abuse of power over another person, and both lawyers and legal administrators can be victims of this type of misconduct.”

Nationwide, there are hundreds of disciplinary cases where male attorneys have been disciplined for harassing their female clients, office staff or other attorneys. In one disciplinary case a male attorney sent the following communication to a female attorney, “MALE LAWYERS PLAY BY THE RULES, DISCOVER TRUTH AND RESTORE ORDER. FEMALE LAWYERS ARE OUTSIDE THE LAW, CLOUD TRUTH AND DESTROY ORDER.” A California lawyer was ordered to donate \$250 to a women’s bar group after telling opposing counsel it wasn’t “becoming of a woman or an attorney” to raise her voice during a deposition. In an Ohio case, an attorney was suspended from the practice of law when he continued to make explicit sexual remarks to his female law clerk. In another case, a divorce attorney was disbarred where he routinely solicited his female clients for sex. On Oct. 26, 2018, the Maine Supreme Judicial Court adopted Rule 1.8 (J), that specifically prohibits an attorney from having sex with a client unless there was a preexisting relationship before the attorney-client relationship commenced. What steps can you take as an attorney to prevent sexual harassment and bias in the legal profession?

1. Recognize that sexual harassment is a problem in the profession.

First, acknowledge that there is a problem of sexual bias and harassment in the legal profession. Judge Kozinski sexually harassed females for over three decades because, as a federal judge, he had power over these attorneys. His victims feared that reporting the sexual harassment would ruin their careers. Olympic gymnast McKayla Maroney, at the sentencing of sexual predator Larry Nassar, stated, "Whenever there is a position of power, there is the potential for abuse." Attorneys must recognize that the legal profession is ripe for sexual harassment and sexual bias based upon this imbalance of power in the profession.

2. Understand that victims are reluctant to report harassment.

Second, recognize that sexual harassment and bias is secretive and done in a private setting. Also, the sexual predator is often a respected member of their profession. Whether it is Harvey Weinstein, Bill Cosby or Judge Kozinski, sexual predators isolate their victims and commit the abuse in a private setting such as motel rooms, judicial chambers or private law offices. As a result, most females are reluctant to report the abuse fearing that the law firm will believe the predator and not the victim of the harassment. When I have spoken about sexual harassment during my seminar presentations, many female attorneys have indicated that they do not want to file a disciplinary complaint against a respected male attorney.

Gregory Chiarello, a partner in the employment law firm of Outten and Golden and a co-chair of the firm's sex discrimination and harassment practice group, shared some thoughts with me. He has represented numerous legal professionals who have been subject to sexual harassment and states that victims of harassment often are hesitant to report the abuse for fear that their career will end by a "slow death on the vine." These fears include receiving less favorable work assignments, an inability to achieve partnership status, and more critical evaluations of their work by senior members of their firm. Mr. Chiarello states that, "unfortunately, even when the harassment rises to the level of sexual assault, clients often still may be hesitant to report the sexual abuse internally or externally because they fear retaliation in the workplace. As a result, serious harassment often may go unreported for years."

3. Provide training on sexual harassment to everyone at your firm.

In the Florida survey, the female attorneys were asked what steps they would take to eradicate sexual bias and harassment from the legal profession. They indicated that law firms and bar associations should provide more training on this issue. Further, they recommended that law firms and bar associations create a mentoring network for female attorneys where they can get advice on how to manage problems with sexual bias and harassment in the legal profession. Since the victim of sexual harassment can be an administrative assistant, paralegal, or other support personnel, this training should be provided to every employee of the firm whether male or female and not limited to attorneys. A handful of states already require sexual harassment training. The state of New York now mandates employers provide employees with annual sexual harassment training and employers must provide a written anti-harassment policy to employees.

4. Advocate a zero-tolerance policy on sexual harassment.

The managing partners of the law firm must emphasize to every member of the firm that there is a zero-tolerance policy on sexual harassment and that this conduct will not be tolerated. The employees of the firm must be encouraged to report sexual harassment and that all allegations of misconduct will be taken seriously. There should be an unbiased investigation of the complaint and in a larger firm there may be a need to have an independent investigation of the allegation. Most importantly, employees must be informed that they will not be penalized if the allegations are found to be unsubstantiated. Finally, a law firm must discipline an attorney who commits this type of misconduct even if the attorney is a senior member of the firm.

5. Summary: Attorneys *can* make a difference.

Every employee of a law firm must be able to complete their assigned task without the threat of sexual harassment or bias. The "me too" movement has shown that sexual misconduct occurs where there is an imbalance of power between the predator and the victim. As professionals in the legal profession, each of us must do our best to level the playing field and protect victims from this abuse. It is time to eradicate this immoral mark on our profession.



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