

#MeToo CLE Synopsis

Overall Goal of CLE:

“To cultivate an open and honest discussion of issues of sexual assault, harassment and gender diversity in the context of the #MeToo movement in order to develop practical takeaways for corporate and law firm leaders to effect positive change. In particular, looking closely at what lawyers are doing, and what they could be doing, to protect their clients or their organizations and, at the same time, essentially doing the right thing.”

Synopsis:

For decades, sexual harassment survivors remained silent about the harassment and/or assault because of a fear of severe consequences. Survivors of sexual harassment and sexual assault have a long list of reasons for not coming forward with their claims. Some survivors fear embarrassment, retaliation, threats, not being taken seriously, or suffering financial repercussions--such as being drowned in legal fees for a prosecuting or making a claim or losing one's job or potential promotions. Other sexual harassment and sexual assault survivors refuse to label their encounters as “sexual harassment” because it has a negative connotation suggesting they are victims and therefore weak.

However, 2017 was the year that brought the issue of the prevalence of sexual harassment and sexual assault into the mainstream consciousness, from the rise of the #MeToo and #TimesUp movements to the ensuing fall from grace of Hollywood mogul Harvey Weinstein, followed by other high-profile names not only in the entertainment industry, but also political figures, corporate CEOs and the Catholic Church.

Activist Tarana Burke coined the phrase “MeToo” in 2006, but in October 2017 it became viral after actress Alyssa Milano’s tweet: “If all the women who have been sexually harassed or assaulted wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem.” And they did.

The hashtag took off on social media, offering women and men, both young and old, a different outlet to describe their experiences of assault and harassment. Personal stories continue to flood social media today, sometimes with vivid details, sometimes with just the hashtag #MeToo or, now, #TimesUp.

#MeToo catapulted sexual harassment and abuse into the public consciousness. In addition, the #TimesUp movement was founded in January 2018 by several Hollywood celebrities in response to the Weinstein affect and #MeToo movement. The organizers of #TimesUp wanted to see the passage of laws for gender parity issues such as equal pay and equal work environments – as well as increased opportunities, particularly for women in low-wage industries and women of color. To fund this goal, the organizers created the #TimesUp Legal

Defense Fund, which is a source of legal and financial support for women and men who want to fight sexual misconduct through the justice system. In doing so, the #TimesUp Legal Defense Fund has provided countless resources to victims who would have otherwise never been able to effectively fight against the sexual misconduct they have experienced.

As a result of these movements, people of all ages and backgrounds are now coming forward to share their experiences and to be heard. Whether it be inappropriate sexual comments, demands, and other forms of harassment or actual physical abuse. Nevertheless, all victims typically fear for their jobs, professional reputations, and status within the community if they report harassment and abuse at the hands of employers, lawmakers, clergy, teachers, and generally people who exercise power and/or control over their victims.

This outpouring of personal stories of abuse and harassment has led to a rethinking of workplace and social interactions. Further, it has led to a change in legislation and a flood of litigation. The purpose of this panel discussion is to address how this new reality may impact not only your daily actions and strategies, but also the actions of your clients.

Impact of #MeToo:

The #MeToo was the first step: Identifying (naming) the problem. What's perhaps most interesting about the culture shift is not how often it occurred, but the focus being shifted from protecting the perpetrator to now a concern with the perpetrator getting away with continued harassing behaviors. Two years, and an innumerable number of high profile cases (Harvey Weinstein, Bill Reilly, Bill Cosby, Matt Lauer etc.), later, employers are clamoring for what to do next. Proactive employers want to know how they can mitigate their risks and damages. There is a palpable concern that the societal shift in what is acceptable behavior today does not match the expectations we held ourselves to even 12 months ago. Smart employers recognize that being held to today's standard for past conduct is going to be a challenge. The best way to close the gap is to act quickly to change the expectations we have within the workplace.

Some of the most significant impacts of the #MeToo movement, among others, include: Changes in the decision matrix and a movement towards doing what's right; A greater demand for transparency and the recognition that transparency is good for business; Risk tolerance levels; More calls and complaints on #MeToo issues; An increased perception of the need for a more diverse leadership team and increased concern and attention from corporate boards; Potential employees are now more likely to evaluate where they want to work based on potential #MeToo issues in the press about certain employers, and the younger workforce are now more than ever carefully considering the kind of work environment they want before making career decisions; Pressure from in-house counsel on law firms to assign diverse teams and the trend of corporations to hold law firms accountable by reporting on the hours spent by diverse individuals on their legal matters; and More corporations are conducting trainings about mutual respect,

attended by both men and women, which positive outcomes have been reported from both the individual and company levels.

Further, the movement has touched almost every industry in the past two years, and state legislatures have been under growing pressure to curb sexual assault and harassment in all workplaces. Some states have placed limits on nondisclosure agreements (NDAs). Legislators also have cited the #MeToo movement in passing legislation to improve the testing of rape kits and to extend the statute of limitations for victims who want to file civil lawsuits against their abusers. In some states, victims could not seek justice if they didn't report the assault within a few years of the incident. Now states are lifting or extending the amount of time victims have to file civil suits against their abusers, citing cases such as the revelations of widespread abuse within the Catholic Church. Many people abused as children waited years or decades to come forward. Further, nearly every legislature in the country has reexamined its own policies for dealing with workplace harassment. Legislators say serial sexual harassers have used nondisclosure agreements to continue to abuse victims, primarily women. In many cases, the agreements were folded into financial settlements designed to compensate former employees while barring them from speaking about the harassment and abuse they experienced.

In addition, we see challenges with bringing claims within the corporate world. Rules governing derivative claims generally require that a derivative plaintiff request that the board initiate action against the alleged wrongdoers or state with particularity why such a demand would have been futile. Many of the incidents reported in the news have involved conduct alleged to have occurred many years ago. In these instances, it may be difficult for shareholders to allege that the current board is conflicted because of the director's own potential exposure. Regardless of timing, however, boards can enhance their ability to defend against such claims by conducting investigations that are both thorough and independent, and by establishing controls to detect and remediate sexual misconduct and harassment.

Responding to/Addressing #MeToo Situations:

It is important to note that #MeToo allegations will range from the most egregious – rape or repeated forcible touching – to those that involve conduct reasonable people may consider “merely offensive”. Some allegations involve recent or even presently ongoing conduct, but many more allege conduct that occurred years or even decades ago. Some of these allegations involve conduct that federal law prohibits; other allegations, quite frankly do not.

Certainly, courts recognized before the #MeToo movement that no person should be required to “run a gauntlet of sexual abuse in return for the privilege of being allowed to work.” At the same time, federal law, while it prohibits sexual harassment in the workplace, does not make actionable every sexual interaction that occurs, even when those interactions are unwelcome. The law sees sexual harassment on a continuum, ranging from the “merely offensive” conduct that is not actionable to the severe or pervasive conduct that is. And it places

on the victim of harassment an obligation, in many situations, to speak up in a timely manner—to take steps to stop harassing conduct from becoming so serious that it would be actionable.

It is important to understand, in the #MeToo moment, the elements of a federal claim of sexual harassment. Much of the headline grabbing conduct would not, in fact, state a legally-viable claim, for reasons that will be explored during this CLE, which is a critically important point to understand.

But a law's interpretation can shift and change over time, and the #MeToo movement may lead judges (and juries, should a case proceed past summary judgment to trial) to think differently, and more empathetically, in the future about how workplace harassment affects employees of either sex and to assess, accordingly, whether it is actionable. Conduct that may have been viewed as relatively harmless even in the recent past may take on a more sinister hue in the context of the #MeToo movement. This is a time to reflect, assess, and determine how our anti-discrimination laws should be best understood to protect women, and men, in the workplace.

It's important to consider in these cases that the motive and/or events as recounted by the accusers may not be truthful or accurate, but rather for a purpose such as seeking their "fifteen minutes of fame" or attention or retaliation. Ferreting out these claims after a long period of time can be factually challenging to the defense lawyer. Documents and witnesses may no longer be available, or may never have existed at all.

The purpose of this CLE is to initiate a healthy discussion regarding the #MeToo movement and to identify how the movement has impacted the legal profession's response to particular situations where sexual assault, harassment and/or discrimination has taken place. In doing so, we will present various hypothetical/real-world situations where the effects of the #MeToo movement can be clearly observed, and also highlight how the #MeToo movement has played a significant role in reshaping the law and how it could and should respond to sexual harassment. Individuals, employers and companies, in the wake of #MeToo, have become more proactive in responding to allegations, even those that legally would be time-barred or considered "merely offensive".