

President's Working Group on Sexual Harassment in the Legal Profession Final Report

Group Members:

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President's Charge

The direction given to the group by President Chris Rogers was as follows:

The #Me Too and #Time's up movements remain at the forefront of the national conversation. The issues of harassment and discrimination affect the legal profession in many ways, from attorneys' own work environments to changing legal needs of clients to the community at large. I am convening a work group to look at the ways in which the State Bar can realistically help to address and advance the important issues raised by these movements. The group will work over the summer, with a report completed by August 31, to identify specific, actionable and measurable steps we as an organization can take to best address these issues and make an impact. The goal will be to take the ideas and recommendations generated by the working group and present them through our strategic planning and budget processes to determine how they integrate with our strategic goals and objectives. We will then identify who will move these tasks forward, with what resources and in what timeline.

The work group convened by President Rogers included: Amy Wochos, Chair, Kori Ashley, Kathryn Bullon, Andrew Chevrez, Kathy Chung, Brandon Evans, President Elect Jill Kastner, Nilesh Patel, and Sam Wayne. Larry Martin served as the staff liaison to the group.

Working Group Goals

At its first meeting, the group discussed what the scope of its work should be, given the President's charge, as well as the limited time and resources involved. The group decided that it would focus solely on sexual harassment. Although other types of harassment occur, and although research indicates that issues of discrimination and equity are intertwined with harassment issues, the issue of sexual harassment was distinct and important enough to warrant being the sole focus of this group.

The group also agreed to focus solely on sexual harassment within the Wisconsin legal community. This includes all lawyers licensed in Wisconsin, legal support staff, court officials, and court staff. As will be discussed later in this report, both harassers and their targets can also encompass clients, witnesses, experts, and other individuals who interact directly with the legal system and this report is intended to include those groups of individuals. However, the group decided not to address sexual harassment issues beyond the Wisconsin legal community nor to focus on sexual harassment in other professions, other than for reference purposes.

Finally, the group determined that it would not address sexual harassment as a practice area topic. That is, the group focused on how the State Bar could address issues of sexual harassment within the Wisconsin legal community and not on how the State Bar could assist practitioners on how to advise their clients on sexual harassment and #Me Too issues. The group noted that other entities of the Bar, such as the Labor and Employment section and the Pinnacle department, had already created several programs on #Me Too issues aimed at practitioners, and endorse those efforts.

The group created a statement on what it sees as the overarching goals of its work:

Create awareness among our members, and other participants in the legal system, about what constitutes sexual harassment, how it impacts the legal profession, best practices to prevent sexual harassment or sexually offensive behaviors in the legal workplace and other professional settings, to develop tools to appropriately address it when it happens, and to support and empower victims of sexual harassment, with the ultimate goal of eliminating it in the Wisconsin legal profession.

Scope of the Problem – Data on Sexual Harassment in the Legal Profession

While there are numerous resources available describing and discussing sexual harassment in the legal profession (see, for example, the resources collected by the American Bar Association at https://www.americanbar.org/groups/women/resources/discrimination/discrimination_resources.html#discrimination_resources), there appear to be few attempts to actually collect either quantitative or qualitative data on the subject. In the past, data collection on sexual harassment appears to have been limited to questions about harassment as part of broader surveys regarding discrimination, retention, equity, and/or bias. For example, a 2010 report titled “The Initiative on the Advancement and Retention of Women” by the Women Lawyers of Utah found that 10% of women respondents reported they had been sexually harassed at work, but the report did not further explore the issue. Similarly, a 2015 survey by the Florida Young Lawyers Division found that 17% of women respondents reported having experienced harassment in the workplace, but that report also did not develop the issue further. This group could find no nationwide study or a study specific to the Wisconsin legal community.

The most in depth data collection on the issue came this year from the Women’s Bar Association of Massachusetts, which partnered with the Rikleen Institute for Strategic Leadership to “develop[] and distribute[] a detailed survey to provide a more nuanced understanding of behaviors that take place in the law firm environment...” This survey collected both statistical data and anecdotal examples illustrating the responses to the questions. The results give a clearer picture of what women are experiencing in the legal profession today. While the Massachusetts report is not necessarily representative of the national or even Wisconsin experience, it certainly provides a window into the potential scope of the problem.

Two examples of the data collected from female legal professionals in this survey are the following:

21.56% of respondents said they had experienced or witnessed unwelcome physical contact at work; 68.02% of those respondents said they had not reported the incident(s).

Examples of such reported behavior included “unwanted and unsolicited hugging, back-rubbing, groping, shoulder rubs, kissing, and lewd comments.” Many respondents reported “witnessing inappropriate behavior by male colleagues towards younger female associates or staff members.” When asked why she had not reported inappropriate touching, one respondent stated: “Prior complaints about male partner behavior were not heeded. Firm prioritized workplace experience of partners over associates. Size of firm and power dynamic ... rendered associates without power and required compliant behavior to keep employment.” Other similar complaints are described in the report.

25.38% of respondents had felt that someone was trying to engage them in unwelcome discussions (including through comments or actions) of a sexual nature; 73.91% of those did not report the behavior.

Examples included: Male lawyers demeaning young women in front of male colleagues or clients through sexual references; discussions of extra-marital affairs, sexual escapades, or sexual fantasies; frequent vulgar or sexualized jokes and remarks that objectify women; and prying into the personal and sex lives of women colleagues. One woman who admitted not reporting a culture of vulgar and sexualized jokes stated: “I was a young associate in a virtually all-male department and afraid I would be perceived as not ‘fitting in.’”

It should also be noted that the examples given illustrate the negative impact these behaviors and their consequences had on the respondents. One respondent reported, about being propositioned and then bullied when she rebuffed the advances: “It created emotional, financial and professional turmoil in my life which continues ... I hope that this survey demonstrates how much even lawyers feel hopeless and incapable of standing up to sexual harassment in a law firm.”

The full report is available at:

<https://wbawbf.org/sites/default/files/WBA%20Survey%20of%20Workplace%20Conduct%20and%20Behaviors%20in%20Law%20Firms%20FINAL.pdf>

The Massachusetts survey was only sent to female lawyers in that state and while it provides a startling picture, it also illustrates the need for a survey that examines the impact of sexual harassment in the varied settings of the Wisconsin legal profession.

Scope of the Problem – A General Overview on Sexual Harassment in the Legal Profession

Although data collection on the issue has been limited, numerous articles, reports, and programs have laid out the broader parameters of sexual harassment in the legal profession. Based on a review of the literature, this group found the following:

Sexual harassment can occur and should be addressed in all of the following settings:

- Judicial clerkships
- Law firms
- The courthouse
- Client meetings
- In-house counsel departments
- The statehouse
- Law schools
- Volunteer activities
- Employer-sponsored “social” outings
- Other professional settings.

Potential harassers can include:

- Judges
- Legislators
- Partners
- Clients
- Coworkers at any level
- Supervisors in any setting

Victims of harassment can include anyone in the profession, but are more likely to be:

- Women
- Young lawyers/associates
- Court and legal staff (Court reporters, paralegals, assistants)
- Law clerks
- Interns

Experiencing sexual harassment has real and identifiable consequences for the victims, which can include:

- Loss of assignments
- Loss of mentors
- Reputational loss among colleagues or other peers
- Switching employment
- Derailed career prospects
- Emotional/mental health distress generally
- Emotional/mental health distress adversely impacting ability to practice
- Physical harm
- Negative impact on personal/familial/spousal relationships

Following its review of available data and information, the group found that sexual harassment negatively affects the legal profession and that the State Bar should address it through a multi-pronged approach. The general topic areas for action items developed by the group are:

- Educate the legal profession about what constitutes harassment in a colloquial sense and also in terms of legal definition and legal liability. Identify types of actions that are always inappropriate, but also those that are generally appropriate or appropriate with consent.
- Establish a defined standard for the Wisconsin legal community - a more comprehensive and nuanced standard than actionable legal liability.
- Empower victims of sexual harassment to come forward. This will require defining and facilitating safe spaces, identifying and training trusted and affirming confidants, and ensuring confidentiality and that systems are in place to protect confidentiality, if requested; all or any of which may be within one's employment setting or available from a third-party source, such as the Bar or another organization.
- Empower victims of sexual harassment to hold harassers accountable outside the judicial process, such as enforcement of professional standards (norms) and ethical standards (defined by professional responsibility rules) and consequences for violating either. This will require buy-in from the firm/organization/workplace, etc., and ideally a template for internal review and resolution by stakeholders (who will vary depending upon the parties involved).
- Develop tools for recognizing, preventing, and swiftly responding to incidents of harassment, including ensuring/encouraging fair and impartial processes to protect the rights of all involved.

Suggestions for future action

With those topic areas in mind, the group identified a number of suggestions for future action. Given the President's charge, the group did not address who would be tasked with implementation, nor did it set any timeframes for implementation other than to categorize each as a short, medium, or long term action item.

- Educate on the issue
 1. Identify a new group to further study and address this issue and corollary issues, such as overlap with discrimination and gender inequity. The new group could be a subgroup of a current committee or group or a standalone group. Among other things, this group should:
 - a) Identify and illustrate what constitutes common forms of sexually offensive or sexually harassing behaviors in the workplace or in the legal profession. This is also an opportunity to distinguish between harassment and perfectly acceptable statements and relationships. (short term action item)
 - b) Identify and illustrate the consequences and damage from sexually offensive and sexually harassing actions. Provide concrete examples of retaliation, ways victims must cope with the unwanted actions, or cope with the effects of those actions (i.e. switch employment, suffer in silence, appear to acquiesce or condone the behavior, etc.). (short term action item)
 2. Identify authors and topics for a series of articles about sexual harassment and sexually offensive behaviors in the workplace and in the legal profession. Potential articles could address behaviors and actions that are inappropriate as well as those that are appropriate. Articles could also address how to effect cultural change, positive and negative reactions to the anti-sexual harassment movement, solutions for actively working to end sexual harassment, and ways to respond to concerns and attitudes that may impede changes or create new challenges. Articles should be submitted to multiple State Bar of Wisconsin publication channels, such as the Wisconsin Lawyer, InsideTrack, or Section and/or Division blogs. (short/medium term action item).
 3. Explore how the State Bar can conduct data collection of members' experiences or attitudes about sexual harassment and sexually offensive behaviors, as well as their experiences witnessing such behaviors. One potential model is the survey developed by the Women's Bar Association of Massachusetts – Survey of Workplace Conduct and Behavior in Law Firms. (medium/long term action item).
- Advocate for structural changes
 1. Propose a policy position for adoption by the Board of Governors (after vetting through relevant BOG committees), to define sexual harassment and sexually offensive behaviors in the context of the Wisconsin legal profession and State Bar operations, and commit to working toward eliminating incidents of those behaviors. A proposed position statement is included for consideration. (short term action item).

2. Identify and advocate for the adoption and vigorous and fair enforcement of whistleblower protections and anti-retaliation laws to protect those who report incidents of sexual harassment or sexually offensive behavior (long term action item).
3. Identify and promote informal reporting programs as a way to eliminate/respond to inappropriate behavior in legal workplaces. (medium/long term action item).

- Prevention & Accountability

1. Identify topics and potential speakers for CLE programming, either standalone or as part of a conference. Potential topics include:
 - a) ABA zero tolerance toolkit (turnkey program on preventing sexual harassment in the legal profession);
 - b) New research showing how people respond to harassment training /better ways of training employees;
 - c) Responses when harassment has occurred, including discussion of Title VII of the Civil Rights Act of 1964, the Wisconsin Fair Employment Act, and most importantly, Wisconsin Supreme Court Rule (“SCR”) 20.8.4(i);
 - d) Convene a Best Practices Roundtable with firms and organizations that have already implemented training and prevention programs;
 - e) Looking at the intersection of harassment, discrimination, and equity.

Note: both the Diversity and Inclusion Committee and the Wislap Committee have expressed interest in developing a program for AMC 2019. (medium/long term action item).

2. The Wislap Committee has already self-identified as a resource for both those who have encountered sexual harassment and also for those accused of sexual harassment, and are currently training volunteers to address the issue. Therefore, identify ways to promote Wislap as a resource in this area and inform our members about the availability of this resource. (short term action item).
3. Recruit subject matter experts to develop materials for law firms and other legal organizations that want to implement training and policies to prevent and address sexual harassment, to be available through Practice 411. Note: This Working Group spoke with Christopher Shattuck, Director of Practice 411, who said he does not have such resources and would welcome having them available. (medium term action item).
4. Request an Ethics opinion or analysis on whether SCR 20:8.4(i) requires attorneys to report sexual harassment to the Office of Lawyer Regulation, when it is committed by those subject to its jurisdiction. Further, request an Ethics opinion or analysis of whether SCR 20:8.4(i) prohibits attorneys from consenting to non-disclosure/confidentiality agreements when they directly experience or witness sexual harassment by an attorney. Lastly, request an Ethics opinion or analysis on whether SCR 20:8.4(i) makes non-disclosure/confidentiality agreements

void against public policy in Wisconsin, if those agreements prevent an attorney from disclosing or reporting sexually harassing conduct by an attorney (medium term action item).