SPECIAL ETHICAL CONSIDERATIONS FOR LAWYERS IN THE AGE OF #METOO

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The #MeToo movement has been an important wake up call to corporate America, bringing to light that many workplaces are simply not safe or respectful towards women. The stream of women coming forward and speaking up about sexual harassment they have endured in the workplace is seemingly endless. With this very public movement in the news headlines on a daily basis, many employment lawyers report a significant uptick in claims of workplace sexual harassment.

Law firms, corporate legal departments and individual attorneys are not immune to this trend and should take note of the special ethical concerns face by attorneys and law firms when a lawyer is accused of engaging in sexual harassment.

The New York Code of Professional Conduct specifically makes it an ethical violation for a lawyer or a law firm to unlawfully discriminate in the practice of law. 22 NYCRR §1200.00, Rule 8.4(g). In July 2016, the ABA Model Rules were specifically amended to make harassment and discrimination an ethics violation. These rules and others which could subject a New York lawyer to professional discipline are discussed below.

ABA Model Rule 8.4(g) – Adopted August 8, 2016

On August 8, 2016, the ABA Model Rules were amended to include a rule that specifically makes it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law. Specifically, Model Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation,

> gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.4(g), Misconduct (2017) - American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct*.

Prior to the adoption of this rule in 2016 the ABA Model Rules did not contain any express "black letter" prohibition on lawyers engaging in workplace harassment or discrimination. The only reference to harassment or discrimination was contained in a comment to the Model Rules (Comment 3 to Rule 8.4) which read:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Comment 3 to Rule 8.4(g), Misconduct (2002) - American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct*. (Emphasis added).

One of the main reasons for moving the anti-discrimination provisions out of the comment and into the black letter of the model rule was the fact that the comments to the rule are only guidance, it was felt there was a need for a black letter rule that would be enforceable in disciplinary proceedings.

In addition, prior to the 2016 addition of section (g) to Rule 8.4, the language of Comment 3 to Model Rule 8.4 only addressed bias or prejudice when "representing a client" and only when that bias or prejudice was "prejudicial to the administration of justice." The new rule

is broader in scope as it prohibits "harassment or discrimination …in conduct that is related to the practice of law."

Compare, Comment 3 to Rule 8.4(g), Misconduct (2002) - American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct* and Rule 8.4(g), Misconduct (2017) - American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct*.

Now, not only has the specific prohibition against discrimination and harassment been added to the Model Rule, but the comments to the Model Rule have also been revised and expanded upon to specifically address sexual harassment in the workplace. To that end, Comment 3 has been revised and Comment 4 added. Comment 3 to the ABA Model Rules now reads:

> Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

Comment 3 to Rule 8.4(g), Misconduct (2017) - American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct*.

New Comment [4] explains:

> …Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Comment 4 to Rule 8.4(g), Misconduct (2017) - American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct*.

New York Rule 8.4(g) "Misconduct" – Effective

Unlike the ABA Model Rules, the New York Rules of Professional Conduct have, for many years, made unlawful harassment and discrimination an ethical violation. However, when viewed in light of the new Model Rule, the New York Rule is limited in several respects. New York Rule of Professional Conduct 8.4(g) provides:

> A lawyer of law firm shall not unlawfully discriminate in the practice of law, including in hiring, promoting, or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such a tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

22 NYCRR §1200.00, Rule 8.4(g).

The New York Rule – unlike the ABA Model Rule – makes no specific reference to "harassment." This omission makes no substantive difference because, the Supreme Court held in *Meritor State Bank v. Vinson*, 477 U.S. 57 (1986), that harassment is merely a form of "discrimination." Therefore, harassing conduct is – in and of itself – discrimination when it is based on a protected classification.

There are, however, several substantive differences between the New York Rule and the ABA Model Rule.

First, the New York Rule requires that prior to filing a complaint with the Departmental Disciplinary Committee about harassment or discrimination by an attorney, if there is another

tribunal – other than the Departmental Disciplinary Committee – with jurisdiction to hear a complaint, if timely brought, a complaint must first be brought before that other tribunal.

Other "tribunals" before which a complaint of unlawful employment discrimination may be brought include the U.S. Equal Employment Opportunity Commission (complaint must be filed within 300 days of discriminatory conduct in NY), the New York State Division of Human Rights (complaint must be filed within 365 days of discriminatory conduct), New York State Supreme Court (complaint must be filed within 3 years of discriminatory conduct).

In contrast, under the new ABA Model Rule, a complaint can immediately be filed with the disciplinary authority. An individual subject to discrimination or harassment at the hands of an attorney need not first file an administrative charge with the EEOC, the state EEO agency (if available) or file a lawsuit in State Court prior to having the matter reviewed by the disciplinary authority.

In addition the New York Rule requires that the discrimination (or harassment) be unlawful to constitute an ethical violation. Thus, discriminatory or harassing conduct that does not rise to the level of "unlawful" discrimination will not constitute a violation of the disciplinary rule. Thus, sexually harassing conduct that is not deemed "severe or pervasive" will not constitute an ethics violation. Until January 2016, sexual harassment was not deemed unlawful if the employer did not have at least four employees. Specifically, Title VII of the Civil Rights Act of 1964, the federal statute prohibiting sexual harassment in the employment context applies only to employers with 15 or more employees. Prior to January 19, 2016, Section 296 of the NY Executive Law, the New York State law prohibiting sexual harassment in employment, applied only to employers with 4 or more employees. The New York State Executive Law was amended, effective January 19, 2016 to permit sexual harassment claims against any New York

State employer, regardless of the size of the employer. Prior to January 19, 2016, employees of small law offices (those with only 1, 2 or 3 employees) had no legal remedy and no basis for filing a disciplinary proceeding based on sexually harassing conduct they experienced in the workplace.

Unlike the New York Rule, the new ABA Rule does not require the harassing or discriminatory conduct to be "unlawful." It requires only that it constitute harassment or discrimination on the basis of one of the protected classifications (sex, race, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status).

Given the limitations that the New York Rule places on an individual's ability to file a disciplinary complaint against an attorney based on workplace sexual harassment, it is not surprising that none of the disciplinary decisions from any of the appellate divisions in New York State issue disciplinary action based on an attorney's violation of New York Rule of Professional Conduct 8.4(g).

However, this does not mean that sexually harassing conduct by a lawyer is not likely to result in the issuance of professional discipline, either for the lawyer engaging in the harassing conduct, other lawyers in the law firm or legal department, or for the law firm itself.

New York Rule of Professional Conduct 8.4(g) specifically makes it a violation of the ethics rules for a "lawyer" or "law firm" to unlawfully discriminate in the practice of law. In addition, in New York, law firms, in addition to individual lawyers, may be subject to disciplinary enforcement. *See*, New York Rules of Professional Conduct, Rule 5.1.

Corporate legal departments and government legal departments are not insulated from potential organizational liability. The New York Rules of Professional Conduct define "law firm" to include, but not be limited to:

> a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

In New York, if a law firm does not exercise reasonable care to ensure that individual attorneys within the firm do not engage in unlawful discrimination or violate any other Rules of Professional Conduct, or does not take reasonable care to eliminate any discriminatory conduct or otherwise unethical conduct, disciplinary action may be taken against the firm.

In addition to the firm being subject to disciplinary action, there is also the potential for attorneys who manage or supervise other attorneys in a legal organization to be subject to discipline individually as the result of the discriminatory or harassing conduct of another attorney in the firm over whom they have managerial or supervisory responsibility. The New York Rules do not impose vicarious responsibility on managing partners and supervising attorneys. However, they do require those individuals to adequately supervise attorneys and to take reasonable efforts to ensure that those they manage or supervise comply with the Rules.

<u>New York Rule of Professional Conduct 5.1(a)</u>

Specifically, New York Rule of Professional Conduct 5.1(a) provides:

> A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

22 NYCRR §1200.00, Rule 5.1(a).

<u>New York Rule of Professional Conduct 5.1(b)</u>

New York Rule of Professional Conduct 5.1(b) provides:

(1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisor authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

22 NYCRR §1200.00, Rule 5.1(b).

New York Rule of Professional Conduct 5.1(d)

In addition, under limited circumstances a lawyer can be held responsible for a violation of the Rules by another lawyer in the firm. New York Rule of Professional Conduct 5.1(d) provides:

A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i.) Knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii.) In the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

22 NYCRR §1200.00, Rule 5.1(d).

Accordingly, it is important for a partner in a law firm or an attorney with managerial responsibility, or an attorney who has supervisory authority, who knows of harassing or discriminatory conduct by another attorney in the firm, or who reasonably should have known, to take prompt action upon discovering that an attorney in the law firm has engaged in harassment

or discrimination. At a minimum, such action should include reporting the harassing or discriminatory conduct to the firm managing partner or corporate human resources department for investigation and action.

New York Rule of Professional Responsibility 5.2(b) provides that a "subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." 22 NYCRR §1200.00, Rule 5.2(b). The immediate supervisory attorney would likely be deemed to be subordinate to the firm management in this context. Thus, the supervising attorney may be insulated from ethical responsibility by referring the complaint for investigation and corrective action by the law firm/legal department/corporate human resources department. However, where the internal process does not yield a "reasonable" response – since the attorney is obligated to take "reasonable" action – the supervisor or managerial attorney maybe obligated to take further action. Because a supervisory attorney must ensure that a reasonable resolution results, it may be necessary for the law firm or corporate legal department's process to provide the supervising attorney with information on the investigation and remedy, even though such processes ordinarily are kept strictly confidential.

If the firm has no investigatory or remedial system in place, however, the supervising attorney would appear to have a personal responsibility to investigate and take remedial action, or risk being ethically responsible for the discrimination or harassment by a subordinate attorney.

Ethical Considerations When Sexual Harassment Also Constitutes A Crime

In some cases the conduct that constitutes sexual harassment may also be conduct that constitutes criminal activity in violation of New York State Penal Law. For example, sexual

harassment that involves forcible touching, sexual abuse, or coercion may be subject to criminal prosecution. Among others, the New York Penal Law includes the following criminal offenses:

Criminal Forcible Touching

> A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose:
>
> 1. forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire

NY Penal Law § 130.52 (LexisNexis 2018).

Harassment in the Second Degree

> A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:
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> 1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
>
> 2. He or she follows a person in or about a public place or places; or
>
> 3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

NYS Penal Law § 240.26 (LexisNexis 2018).

Sexual Abuse in the Third Degree

> A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent;

NY Penal Law § 130.55 (LexisNexis 2018).

Stalking in the Fourth Degree

> A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct:

1. is likely to cause reasonable fear of material harm to the physical health, safety or property of such person, a member of such person's immediate family or a third party with whom such person is acquainted; or

2. causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct; or

3. is likely to cause such person to reasonably fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease that conduct.

NY Penal Law § 120.45 (LexisNexis 2018).

Coercion in the Second Degree

A person is guilty of coercion in the second degree when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage, or compels or induces a person to join a group, organization or criminal enterprise which such latter person has a right to abstain from joining, by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will:

1. Cause physical injury to a person; or

2. Cause damage to property; or

3. Engage in other conduct constituting a crime; or

4. Accuse some person of a crime or cause criminal charges to be instituted against him or her; or

5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or

7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

8. Use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships.

NY Penal Law § 135.60 (LexisNexis 2018).

New York Rules of Professional Conduct 8.4 (b) makes it professional misconduct for a "lawyer or a law firm to engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness of fitness as a lawyer." 22 NYCRR 1200.00, Rule 8.4(b). Thus, a conviction for a criminal offense such as forcible touching, harassment or coercion relating to workplace harassment can be the basis for the imposition of professional disciplinary action.

Indeed, in *In re Sims*, 825 N.Y.S.2d 475 (1st Dept. 2006), that is exactly what occurred. In *Sims*, Attorney Sims was found guilty of the petty disorderly persons offense of harassment in violation of New Jersey Statutes Annotated §2C:33-4(b) following a trial wherein he admitted to "pinching his secretary's buttocks on at least two occasions." *In Re Sims*, at 476. Following the conviction in New Jersey, Attorney Sims was disciplined by the Supreme Court of New Jersey for under Rule 8.4(b) of the New Jersey Court Rule of Professional Conduct, which makes is professional misconduct for an attorney to commit an act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer.

Following the discipline issued in New Jersey, disciplinary proceedings were commenced against Attorney Sims in New York, where he was also admitted to the practice of law. The Departmental Disciplinary Committee for the First Department of the Appellate Division of the

Supreme Court in New York sought an order censuring Attorney Sims, predicated upon the criminal conviction in New Jersey and New York Rule of Professional Conduct 8.4(b). *Id*. The New York State Appellate, First Department granted the petition and sustained the issuance of discipline, holding that,

> The conduct for which [Sims] was disciplined in New Jersey constitutes misconduct in New York. The provision under which [Sims] was censured in New jersey RPC 8.4(b) … is essentially identical to the language of the Code of Professional Responsibility DR1-102(a)(3), (22 NYCRR 1200.3), which states that a lawyer 'shall not engage in illegal conduct that adversely reflects on the lawyers honesty, trustworthiness or fitness as a lawyer.'" *Id*. at 477.

Thus, any criminal conviction for conduct that also constitutes sexual harassment may result in attorney discipline.