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SUMMATION - A WORK IN PROGRESS

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SUMMATION - A WORK IN PROGRESS

Introduction

An experienced criminal defense lawyer will tell you, a good summation begins to take shape when you first meet the client, as you begin to understand the nature of the charges you will be defending. A trial lawyer who writes his or her entire summation after the close of evidence, really does not understand the process. Simply put, a good summation is a work in progress. It is shaped and continues to be shaped from the time you meet your client until the trial ends.

What is included in a summation will of course vary from case to case, the particular defendant in the hot seat, the strength or weakness of the Government's case and whether or not any particular affirmative defense has been put forward. So too will the substance and content of a summation vary with the degree of confidence and experience of the lawyer delivering it.

THE "STYLE" OF A SUMMATION - BE YOURSELF

Humor

Every trial lawyer has his or her own style and a unique personality. Not everybody can be funny. If you are not funny, do not try and be funny.

While humor can be effective, it must be selectively used, with great care taken not to offend. The serious nature of a criminal trial should never be compromised and the jury never allowed to conclude that the defense posture is frivolous or lighthearted.

Varied skills

Not every trial lawyer is blessed with the same verbal skills and not all trial lawyers have a great command of the English language. While some litigators are very comfortable on their feet and are able to proceed with the use of a thin outline, others may require a script to guide them as they stand before a jury at summation. Choosing a style comfortable for you is the key to a comfortable performance. The nervous energy that all of us feel in the well of a courtroom can be minimized by preparation, practice and by choosing a style that is comfortable for you. Even when your summation is completely written out, the practitioner should be sufficiently familiar with what is on the written page so as not to feel trapped by notes and so that your delivery style is calm and personalized.

KNOW AND UNDERSTAND YOUR CASE

The "theme" of your summation

Every summation should have a "theme" - a beginning, a middle and an end, a consistent theme that works through the beginning, the middle and the end. Once you pick a theme, stick to it. Picking your theme is as important as what you say and how you say it.

Your "theme" must be workable

Most criminal defense lawyers recognize that in some cases there simply may not be a lot you can effectively argue, when for example the weight of the evidence against your client is overwhelming. Even in a tough case, once the decision has been made to proceed to trial, the defense you choose must give you something to work with. In those cases where the decision to proceed to trial is made because no reasonable plea offer is available, there may still be a "concept" defense which although thin, will nevertheless give the experienced practitioner something to discuss in summation that does not do damage to the defense credibility.

QUESTIONS TO ADDRESS

Were the Government's witnesses credible; is the forensic evidence suspect; is there an "element" of the crime that has not been established by proof beyond a reasonable doubt; is there an affirmative defense to the crime which although not fully supported by the evidence, may still be the only viable defense.

Regardless of the defense posture and despite what may appear to be overwhelming evidence, a consistent, well reasoned argument that is at least marginally supported by some evidence may be the centerpiece of the defense argument or the only available argument to construct your summation around.

TAKING THE "STING" OUT OF THE PROSECUTOR'S SUMMATION

Every criminal case has a heart that one side or the other will seek to exploit in their respective closing arguments. The heart of the trial must be understood and it must be dealt with head-on in summation or you have no hope of prevailing.

Who is the defendant? - What is the nature of the crime charged? - Who are the witnesses? - What is the quality of the evidence? - How sympathetic is the victim?

In simple terms knowing your case is the key to developing a successful defense, or at the very least, a defense that carries an opportunity for success.

Is the defendant particularly notorious; or is the defendant an ordinary person but is the crime charged particularly notorious so as to create an unlevel playing field before the trial even starts.

Is the victim particularly vulnerable or sympathetic; does the crime itself carry with it such a degree of public outrage that a jury may demand that somebody be punished even if the evidence is weak. These are questions that need to be considered when shaping your summation and when selecting a summation theme.

Concessions can be good

Very often, the outcome of a trial may focus on one fact, issue, or rule of law, with the majority of the evidence not really in dispute. When a criminal defense lawyer is in the position of "conceding" that which need not be disputed, it can help establish and maintain credibility in the courtroom and if carefully and

effectively planned can render much of the prosecution's arsenal of evidence ineffective.

Thus for example, if the affirmative defense of "entrapment" is to be interposed as the defense, the "facts" that established the commission of the crime are generally not really relevant, as the verdict will be determined not by "what" happened but "why" it happened. Accordingly, in an entrapment defense, evidence that merely establishes the commission of the offense need not be challenged at trial and should not be challenged in summation, as the only issue in play in that case would be the "conduct" of Government agents and any proof relevant to the issue of the defendant's "pre-disposition" to commit the crime in question. Accordingly, an example of what a good defense summation might sound like in a case where the defense of "entrapment" is interposed may read as follows:

> **"Ladies and gentlemen virtually everything that the Government told you it would prove beyond a reasonable doubt, is really not in dispute.**
>
> **My client did participate in an effort to rig the bidding process with regard to the Government contracts in question.**
>
> **My client did meet with various people and at times he did engage in conversations that in a normal case might allow you to conclude that the crime in question had in fact been committed. Indeed, as the evidence that is not in dispute shows, my client even went so far as to submit a particular bid following the explicit instructions of the Government agent who we submit caused my client to commit this crime.**
>
> **Accordingly ladies and gentlemen, what happened in this case is not something you should waste your time discussing when you begin your deliberations. We do not challenge the fact that a bid was submitted and that my client knew when he**

submitted the bid that it would be the "lowest" bid and therefore, absent the inappropriate conduct of the Government agents who "entrapped" my client into committing these crimes the Government might well have proven its case".

"The issue in this case therefore, - the "only" issue in this case that remains to be resolved is whether my client was "pre-disposed" to commit the crime or whether he was not pre-disposed to do so and was entrapped into committing this offense by a Government agent".

By "conceding" most of the evidence that may have taken weeks for the Government to introduce, you will have softened the impact of what might otherwise appear to be strong evidence and you have suggested that the jury focus on the only issue that could possibly result in a defense verdict.

It is important to note, that if in your summation you intend to concede much of the Government's proof, your efforts at trial should be consistent. Accordingly, vigorously cross-examining witnesses who offer evidence that you intend to embrace or ignore, makes little sense. Remember, a really "good" summation begins to take shape before a trial begins and continues to build throughout the trial. While parts of the theme can be modified or changed in response to unpredictable trial dynamics, (i.e. a witness self-destructs or key evidence is excluded), the "theme" of a summation must be understood before the trial begins and trial strategy developed to help explore and support that theme. A work in progress assumes some change and modification, it also assumes however, that the general outline of your summation is fairly well thought out before the trial begins.

USE OF EXHIBITS AND/OR GRAPHICS

A picture can be worth a thousand words

In some cases a particular exhibit or a particular snippet of trial testimony captures the linchpin of the argument being advanced and can by itself create a reasonable doubt or demonstrate the weakness of the Government's case or a failure of proof on a key element in the case. Using a document, exhibit or other piece of evidence as a summation exhibit can be very effective, assuming of course that one has fully thought through the argument being advanced and also considered any valid response to your argument that can leave your case shattered. Remember, in virtually all jurisdictions, the prosecution has the final word in summation, so carefully think through the any available come-back when you choose an exhibit to build your summation around.

Using the trial record

Every good trial lawyer will tell you that quoting from the trial transcript can be an effective way of making your point in summation, especially when the testimony you quote is developed through the questioning of a Government witness whose credibility will undoubtedly be vouched for by your adversary. While reading "long" stretches of testimony is often boring and not effective, reading a snippet of testimony which you place in proper context can be very effective, especially if set up well. The following example suggests the process:

> **"Ladies and gentlemen, the reason why you must acquit - the reason why you must conclude that the Government has failed to establish its case beyond a reasonable doubt, is found in the testimony of the Government's own witness who told you under oath that he could not be sure that the weapon recovered from the defendant's apartment was the weapon used to commit the crime charged. This is not opinion ladies**

and gentlemen, this is not argument, this is evidence that was developed in the course of this trial and it is undisputed.

Thus, on page 384 of the transcript the following testimony appears during the questioning of Detective James Preston, the Government's ballistic expert":

Question: Did you test the weapon recovered from the defendant's apartment against the bullet fragments recovered from the victim.

Answer: Yes.

Question: After conducting your tests would it be a fair statement that you concluded beyond question that the weapon recovered from my client's apartment was not the weapon used to shoot the victim?

Answer: Yes counselor you are correct.

"Ladies and gentlemen that is the testimony. That is the testimony that was provided by the Government's own expert. Regardless of how the prosecutor chooses to characterize that testimony, that testimony requires you to acquit the defendant."

In a trial where this kind of evidence is clear and relevant, this snippet of testimony should be enlarged into a poster-size placard and used as a summation exhibit. Pointing to the actual words when making your point hammers home the point. The fact that the testimony is in black and white and a part of the official trial record that the jury can see, makes the point that much more dramatic.

Use of Graphics

In defending a case that is document rich, or in a case where the defense argument relies on certain records to explain why the defendant may have lacked the specific criminal "intent" required to commit the crime charged, reference to exhibits in summation can help persuade a jury to "focus" on those particular defense-friendly records when deliberating. By identifying specific exhibits in summation, defense counsel can guide the deliberations in a way that steers the jury into considering the defense theory and defense arguments. If important defense-friendly exhibits are not singled out in summation, the hundreds or thousands of records introduced in a long complex white-collar criminal case may prevent jurors from finding or focusing on that which the defense believes to be important.

Where the trial budget permits, using graphics to enhance or dramatically highlight a particular exhibit may cause jurors to better remember a particular exhibit from among many, because it was brought to their attention in final argument in a dramatic and impressionable way. Where the budget does not permit graphic assistance, other less costly ways to accomplish the same objective are available. For example, having copies of a particular exhibit distributed to jurors while you focus on them in summation will allow each juror to see the language being quoted and it will help each juror understand that your words are not derived from a fertile imagination but from the very face of the exhibit in evidence. So too can walking a copy of certain exhibits past each juror in summation be effective if it is the type on the exhibit or photo can be seen and understood without needing up close study.

Caution

Wherever possible, put away or take back a particular exhibit once that part of your summation passes or jurors will fool with them or be distracted by them as you move on to cover other topics or issues.

A good summation requires that you control the attention of the jury throughout the argument. Creating distractions that undermine that objective is counter-productive. Managing your time, your argument and the demonstrative exhibits you choose to use is the key to an effective presentation.

REPETITION CAN BE OBNOXIOUS, BORING OR VERY EFFECTIVE

All of us wince when listening to a public speaker making the same point over and over again. If you have nothing else to say in a summation except repeat arguments previously made, you should sit down. Most experienced trial lawyers will tell you that nothing can undermine a good, pointed, effective summation than repeating your arguments over and over again until everyone in the courtroom is bored to tears and the effective part of the summation lost in a sea of needless repetition.

Accordingly, a summation should have a beginning, a middle and an end. It is important however, to "end" when you come to the end and not continue to wander aimlessly about the courtroom because you think you may not have spoken long enough or you believe that you are doing such a good job that nobody wants you to stop.

Repetition can be effective if used properly and selectively

Despite the general caution against repeating oneself in summation, there are those select cases where key points should be repeat, because from the defense perspective the entire case may rise or fall on the jury understanding that the whole case turns on a particular issue.

Thus, for example if the defense to a homicide case is self-defense or legal justification, repetition can be effective. An example of effective "repetitive" argument is set out below.

Example #1 - a homicide case with a defense of justification:

> **"Ladies and gentlemen my client acted in self-defense when he shot Mr. Jones who at the time was coming at him with a raised hammer..."**
>
> **"Ladies and gentlemen my client is not guilty of the crime of murder or manslaughter, because the force he used was that which a reasonable person would consider appropriate under the circumstances my client found himself in at the time..."**
>
> **"Ladies and gentlemen you cannot convict my client of the crime of murder or manslaughter even though someone died, because as his Honor will instruct you the law allows for the use of force even 'deadly' force under certain circumstances that we submit existed in this case..."**
>
> **"Ladies and gentlemen you will conclude from the evidence that my client did not have a 'duty to retreat' and accordingly if you conclude that the force he used was reasonable under the circumstances, you must find him not guilty even though he killed someone, because that act of violence was legally justified under the law..."**

Even though the "same" point may have been made five times, the fact remains that someone died in the case and for a jury to conclude that an act of violence that would otherwise be "murder" was legally justified, is a defense that must be hammered home again and again. So too is it important to note that the opportunity to say that the defendant's actions were legally "justified" arises in different contexts where although the basic argument is repeated, it is nevertheless being crafted around different issues that the jury will be asked to consider.

Jury Nullification

As a rule, you may not argue for Jury Nullification, i.e. asking a Jury to acquit, even though the proof of guilt is overwhelming. Thus, you may not say, the defendant may be guilty, but he is such a nice man, you should convict him

anyway. By artfully stressing evidence favorable to the accused or evidence of serious police misconduct however, you may be able to imply that the Jury should acquit despite the compelling evidence, but be careful and mindful of your professional ethical obligations, (see: Prof. Resp. Crim. Def. Prac. 3d § 34:3) and in New York, and in New York, People v. Douglas 680 N.Y.S.2d 145, (1998) N.Y. Slip Op. 98572

A Prosecutor's Summation

Unlike a defense lawyer's summation which often has to employ a series of skilled and nuanced arguments as those suggested above, a strong prosecution summation is based on evidence and structure. The typical format is as follows:

A. A strong, gripping, introduction to the events (e.g. On the winding tree light streets of the west village, here in our city, the defendant went robbing)
B. A recitation of the facts, through argument, given chronologically, rather than witness by witness (n.b. if the government goes witness by witness it is easier to isolate each fact as it relates to each witness and destroy that fact)
C. An application of the facts to the specific law (i.e. Because the robbery displayed what appeared to be a gun, he is guilty of robbery in the first degree)
D. A response to the defense case (e.g. defense counsel argues the witnesses are not credible or the law of self-defense does not apply to this case)
E. A call to arms – bring the victim justice

Making Objections

At times, it is important to break up the flow of a seasoned prosecutor's summation if given good reasons. Thus, if the prosecutor: 1) comments on matters precluded from evidence or never introduced 2) vouches for his own witnesses' credentials or credibility 3) argues that the streets would be safer if you convict 4) makes inappropriate references, or analogies, to prejudicial matters such as calling the defendant a monster, an animal, or conjuring up images of the columbine shooting 5) injects himself into the proceeding by claiming he heard the confession, he saw the blood on the sidewalk.

If an objectionable comment is made you may object, state your reason, and ask for a remedy. Prosecutors' summations are often zealous and may give grounds for an appeal. Also remember, since the prosecutor is likely to have the last bite at the apple it is important for the jury to see that you are still standing your ground.

Anticipating Arguments

Since the prosecutor is likely to give the final summation, it is important to anticipate their arguments and responses to your arguments. The best trial lawyers always think the hardest about their cases and put themselves in the shoes of their adversary. While there are too many scenarios to go into in this lecture, the following example is common and makes the point.

Defense Counsel Argument: Law enforcement lied.

Prosecutor's Summation: "Ladies and gentlemen, everything in life we do, we do for a reason. You are thirsty, you have a drink. You are tired, you lie down. The big things in life, we do those for big reasons. Taking the stand, taking an oath and telling a lie in front of a Supreme Court judge with a court reporter

taking down every word, preserving every word... You wouldn't do that unless there was a really big reason for it. In some cases, sure there are reasons. If this were a civil case with millions of dollars at stake sure that might be a reason. If there was some long standing rivalry or vendetta, maybe that would be a reason. There is no reason here. You have to admit to commit perjury to send someone away for no reason, you would have to be a real evil man, a psychopath. And I submit you met these officers/agents, got to see them, hear them, and I know you can see they are not evil. So I submit you must reject the defense argument that they made it up.

Defense Counsel Amended Argument (after anticipating the response): Listen, we are not saying that these officers met in a tower somewhere laughing and planning to frame an innocent man. The prosecutor will likely tell you that these officers are good, decent men. Well, on the night in question they jumped to conclusions, when they were pushed on their conclusions they, whether intentionally or a trick of the mind, they found their way to the facts they wanted to recall. Did they discuss their testimony with each other? Yes, they said they did. Did they meet and go over it with prosecutor's ahead of time? Of course. And so the final fact pattern you see here today is not a product of evil. It is a product of jumping to conclusions, a product of playing loose with the facts, and the power of sticking by your fellow officer and the power to succumb to suggestion. Well you too have the power. The power to not convict. To not succumb to suggestion. To send him home.

Conclusion

Every case is different - each trial lawyer is a unique individual. Each summation should be the same, careful, well organized argument that is consistent with reasonableness and consistent with the defense interposed at trial and the trial record.

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EXHIBIT 1

Prof. Resp. Crim. Def. Prac. 3d § 34:3

Professional Responsibility in Criminal Defense Practice
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John Wesley Hall, Jr.
Chapter 34. Other Ethical Issues

References

§ 34:3. The ethics of presenting jury nullification

Generally

Sometimes the only "defense" for a client is jury nullification. This arises from different scenarios, including: the prosecutor made no plea offer that the client could accept and the client has nothing to lose and everything to gain from a trial; or the client needs to explain to the jury his or her reasons for acting as he or she did so as to not sound irrational or subhuman.[2]

Jury nullification always has been a controversial subject, and it has a long and checkered history, which need not be repeated here. Jury nullification has been recognized since the beginning of the common law, but it fell into disuse with the advent of legally trained judges.[3] Nevertheless, the courts have always recognized that juries have the power, but not the right,[4] to grant mercy or to nullify simply by refusing to convict, even where the facts are virtually uncontroverted,[5] no questions asked.

Many prosecutors[6] and courts[7] counsel against permitting jury nullification at all. Judges often feel constrained to construe relevance issues to exclude evidence offered for no other purpose than to nullify.[8]

Prosecutors are always on guard against nullification by questioning jurors in voir dire whether they can follow the law, even if they might disagree with it.[9] For example, in drug cases, prosecutors universally want to know whether jurors feel that victimless crimes should not be prosecuted. In jury sentencing states, prosecutors want to know that the jury can consider the full range of punishment and the effect of mandatory minimums. Prosecutors sometimes file motions in limine to cut off jury nullification arguments.[10]

Similarly, defense lawyers are always trying to get evidence before the jury that will help explain the defendant's actions in the hope that the jury will find a way to acquit, even if it is directly contrary to the court's instructions.[11]

Cross-examination of a snitch, for example, can legitimately get the punishment question before the jury in an effort to show what punishment the snitch avoided in exchange for his or her testimony. In jury sentencing states, defense counsel wants to know in voir dire whether the jury can consider sentencing alternatives that might be available.

Not all judges are so inflexible. The legendary Jack Weinstein contends that relevance should be loosely construed to permit development of a jury nullification defense:

> The judge may, and sometimes should, exercise some leniency in defining relevance which might allow a jury to consider nullification sensibly. Jurors will then have the information and freedom necessary to ignore the judge's instructions to follow the law if the jurors think the law as applicable to the case before them is unjust... . Addressing the jury or judge is the best chance a defendant may have to obtain publicity for his or her views. Arguably, the opportunity verges on a First Amendment right. A less stringent relevancy definition than the rigid and logical one in Rules 401, 402, and 403 of the Federal Rules of Evidence is justified in such cases.[12]

Also, the court should not substitute its judgment for that of the defendant as to necessity of the admissibility of the evidence.[13] Some view jury nullification as a necessary check on government abuse or overreaching.[14]

But, even if defense counsel succeeds in getting jury nullification before the jury, there is no right to a jury instruction on the jury having the power to determine the law.[15]

Ethical duty of defense counsel

It is submitted that defense counsel has an ethical duty to pursue jury nullification if it is the only "defense." Some judges apparently disagree[16] while others permit evidence tending to support a nullification defense.[17] If nullification is the only defense, counsel should consult with the accused before embarking on it.[18]

Lawyers generally are told that they cannot mount a frivolous defense, but the Sixth Amendment right to a jury trial and its concomitant duty on defense counsel require that criminal cases be viewed differently. Two Rules of Professional Conduct govern:[19]

Rule 1.2 provides as follows:

> Rule 1.2. Scope of representation.
>
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> ...
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 3.1 of the Rules of Professional Conduct provides as follows:

> Rule 3.1. Meritorious claims and contentions.
>
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

This is all in recognition of the maxim that "[i]t is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."[20]

As stated in § 9:3, defense counsel has an ethical and Sixth Amendment duty to zealously represent the interests of the client. This includes pursuing a jury nullification defense if that is the only defense the client has. The client has a right to insist on a trial and putting the government to its proof, no matter how suicidal it may seem to the criminal defense lawyer.[21] Implicit in this must be that defense counsel can pursue jury nullification as best he or she can under the constraints that the trial judge will impose, even if it is just to show that the client's motivations were not evil,[22] even if only for sentencing purposes.

The D.C. Bar has issued an opinion agreeing with *U.S. v. Sams*[23] that good faith arguments for jury nullification are not unethical: "Good faith arguments with incidental nullification effects do not violate the Rules of Professional Conduct" as long as there is "an[] evidentiary argument for which a reasonable good faith basis exists, provided that the lawyer exercises his ability to do so within the constraints of existing law."[24]

Relationship of ineffective assistance claims

The ineffective assistance cases involving failed jury nullification defenses support the conclusion that defense counsel has a duty to put on such a defense when warranted. In *Strickland v. Washington,*[25] the Supreme Court held that the possibility of jury nullification should have no bearing on the prejudice prong of effective assistance of counsel.[26] (Similarly, jury nullification can complicate a collateral estoppel determination.[27])

This does not mean, however, that defense counsel is ineffective for pursuing jury nullification when there is no other defense. Indeed, cases have held that a failed defense of jury nullification (or, in death cases, a plea for mercy unimpeded by horrible facts[28]) is not ineffective assistance of counsel.[29] Where there is a possible defense, and it is overlooked, merely relying on jury nullification can be ineffective assistance of counsel.[30]

Losing acceptance of responsibility

Pursuing a jury nullification defense could preclude a downward departure for acceptance of responsibility,[31] and it could open the door to other evidence[32] or rebuttal argument.[33]

Use of a shadow defense

Many, if not most, judges will limit defense counsel's efforts to pursue jury nullification. Therefore, the only way to provide the jury with an opportunity to nullify may be to utilize a "shadow defense" "such as entrapment or necessity ... to open up the theory of the case, allowing for governmental misconduct or the ethical (if not practical) necessity of the

defendant's actions."[34] Thus, the trial judge will have to allow the evidence in if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,"[35] and trial judges should not second guess counsel's determination of the need for the evidence.[36]

Footnotes

1 See generally Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine, Ch 10 (1998) (a wonderful and indispensable compendium of the history and use of jury nullification); Clay Conrad, Jury Nullification: The Lawyer's Challenge, 24 The Champion 30 (Jan./Feb. 2000); Clay Conrad, Jury Nullification as a Defense Strategy, 2 Tex. Forum Civ. Lib. & Civ. R. 1 (1995); Alan W. Scheflin & Jon M. Van Dyke, Merciful Juries: The Resilience of Jury Nullification, 48 Wash. & Lee L. Rev. 165 (1991); Alan W. Scheflin, Jury Nullification: The Right to Say No, 45 S. Cal. L. Rev. 168 (1972); David N. Dorfman & Chris K. Iijima, Fictions, Fault, and Forgiveness: Jury Nullification in a New Context, 28 U. Mich. J.L. Ref. 861 (1995); Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149 (1997); Andrew Leipold, Rethinking Jury Nullification, 82 Va. L. Rev. 253 (1996); Jack B. Weinstein, Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice, 30 Am. Crim. L. Rev. 239 (1993); Steven M. Warshawsky, Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy, 85 Geo. L. J. 191 (1996).
Carrie Ullman, D.C. Bar Opinion 320: How a Defense Attorney Can Advocate for Her Client Without Encouraging Jury Nullification, 18 Geo. J. Legal Ethics 1097 (2005).

> Comment: This section only covers an ethical and practical overview of the issues involved in defense counsel's attempt to present jury nullification. For the history and development of jury nullification, most of these books and articles contain an historical discussion. The most comprehensive is Conrad's excellent book.

Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine (2013); Jury Nullification Volume I: Featuring a Reprint of Lysander Spooner's Classic Work; An Essay on the Trial By Jury (1852) Plus Two 20th Century Essays (2001) by Mike Timko.

2 This is common in political trials, such as cases from the early 1970's involving Vietnam War protestors; see, e.g., U.S. v. Dellinger, 472 F.2d 340, 408, 22 A.L.R. Fed. 159 (7th Cir. 1972); or draft resisters; see, e.g., U.S. v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969); or more recent cases involving abortion protestors. See, e.g., Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992), as amended, (July 31, 1992) (attorney contempt from conduct of abortion protest trial).

3 See the authorities cited in note 1.
Before the ready availability of statutes and cases by the bar and even the public, jurors in many states had the power to determine both the law and fact applicable to the case. In 1802, Supreme Court Justice Samuel Chase was impeached for not permitting a jury, while sitting as a Circuit Justice, to determine the law applicable to the case. Chase was not convicted, however, and the movement away from juries deciding questions of law was thus in full swing.

4 U.S. v. Gonzalez, 110 F.3d 936, 947–48, 46 Fed. R. Evid. Serv. 1076 (2d Cir. 1997):

> However, the possibility of nullification does not appear to be element specific: It remains as long as any element is left for the jury to consider. Moreover, jury nullification, while it is available to the defendant, is only a power that the jury has and not a "right" belonging to the defendant, much less a substantial right.

5 See, e.g., Morissette v. U.S., 342 U.S. 246, 276, 72 S. Ct. 240, 96 L. Ed. 288 (1952):

> Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

6 Cf. Steven M. Warshawsky, Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy, 85 Geo. L. J. 191 (1996), cited in note 1. The author does not contend that it is unethical for defense counsel to pursue jury nullification. Rather, he is providing prosecutors with guidance to head off nullification since there is no right to present it as a defense.

7 U.S. v. Sepulveda, 15 F.3d 1161, 1189–90, 38 Fed. R. Evid. Serv. 1297 (1st Cir. 1993); Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994) ("counsel may not press arguments for jury nullification in criminal cases"); U.S. v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997) ("[N]o jury has a right to engage in nullification—and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court."); Com. v. Leno, 415 Mass. 835, 616 N.E.2d 453, 457 (1993).

8 U.S. v. Griggs, 50 F.3d 17 (9th Cir. 1995); U.S. v. Johnson, 62 F.3d 849, 851, 1995 FED App. 0260P (6th Cir. 1995); U.S. v. Malpeso, 115 F.3d 155, 162, 47 Fed. R. Evid. Serv. 572 (2d Cir. 1997).

9 Warshawsky, at 224–27.

10 Warshawsky, at 228–31. Examples are: *Zal v. Steppe*, supra (where the prosecutor moved in limine to prevent defense counsel from using certain inflammatory words and phrases at trial and defense counsel repeatedly violated the trial court's order not to use them); U.S. v. Malpeso, 115 F.3d 155, 162–63, 47 Fed. R. Evid. Serv. 572 (2d Cir. 1997) (proffered evidence was irrelevant or more prejudicial than relevant); People v. Douglas, 178 Misc. 2d 918, 680 N.Y.S.2d 145 (Sup 1998) (prosecution entitled to instruction that the propriety of a search and seizure is not a question for the jury).

11 See the book and articles by Conrad cited in note 1.

12 Weinstein, note 1, 30 Am. Crim. L. Rev. at 251. Further:

> There is a danger, however. A defendant may so open the door to prejudicial material by the prosecution or so turn a simple issue-of-fact trial into a political debate as to warrant the court's employing a strict view of relevancy even where a reasonable nullification argument exists. Judges will have to use their discretion sensibly under the Rules.

Weinstein practices what he preaches: see, e.g., U.S. v. Sanusi, 813 F. Supp. 149, 160, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

13 U.S. v. Sanusi, 813 F. Supp. 149, 160, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

14 Scheflin, 45 S. Cal. L. Rev. at 181, supra.
See U.S. v. Sanusi, 813 F. Supp. 149, 160, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992) (videotape of search was admissible because it permitted nullification argument):

> By inviting CBS to accompany it on its search, the Secret Service may well have provided a basis for a finding of not guilty. The criminal may go free, not because the constable has blundered, but because the Secret Service and CBS have abused criminal process in a way the average citizen may find unacceptable. This practical aspect of trial by jury cannot be ignored.
>
> The court is reluctant in a criminal case to substitute its judgment for a defendant's on the question of whether such evidence is "necessary or critical" to a defense. It is sufficient that a compelling argument of cogency can be made.

15 See, e.g., U.S. v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969); U.S. v. Dellinger, 472 F.2d 340, 408, 22 A.L.R. Fed. 159 (7th Cir. 1972); U.S. v. Sepulveda, 15 F.3d 1161, 1189-90, 38 Fed. R. Evid. Serv. 1297 (1st Cir. 1993); U.S. v. Powell, 955 F.2d 1206, 92-1 U.S. Tax Cas. (CCH) ¶50128, 69 A.F.T.R.2d 92-726 (9th Cir. 1991); People v. Douglas, 178 Misc. 2d 918, 680 N.Y.S.2d 145 (Sup 1998).
Only one or two states recognize that trial judges have the discretion to inform a jury of the power to nullify. See, e.g., State v. Mayo, 125 N.H. 200, 480 A.2d 85, 87 (1984). In all other states, however, judges determine the law in the jury instructions and the jury is bound by the instructions to follow the law.

16 See, e.g., People v. Williams, 25 Cal. 4th 441, 106 Cal. Rptr. 2d 295, 21 P.3d 1209 (2001), a case involving removing a juror during deliberations where the juror expressed the view that he would not follow the court's instructions in a statutory rape case. The trial judge in questioning the juror during deliberations found that the juror's reticence came from the defense closing argument. The trial judge told the juror: "You understand that there was an improper suggestion and that it's a violation of the

Rules of Professional Conduct?" *Williams*, 21 P.3d at 1212. There apparently was no objection from the prosecutor at the time the argument was made.

17 See Weinstein, 30 Am. Crim. L. Rev. at 251.
See also People of Territory of Guam v. Sakura, 1996 WL 104533 (D. Guam 1996) (3-judge court), aff'd, 114 F.3d 1195 (9th Cir. 1997) (efforts at jury nullification are common defense techniques in the trial division of the court); U.S. v. Sanusi, 813 F. Supp. 149, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

18 People v. Montanez, 281 Ill. App. 3d 558, 217 Ill. Dec. 459, 667 N.E.2d 548, 553–54 (1st Dist. 1996):

> We do not mean to say we approve of the strategy defense counsel used in this case. In light of *Cronic*, *Strickland*, and *Hattery*, it is a risky business. Better practice requires defense counsel to test the State's proof against the reasonable doubt standard. In that rare case where jury nullification is the only hope, counsel should obtain the defendant's consent to embark on so perilous a strategy, as did the defense lawyer in *Ganus* [People v. Ganus, 148 Ill. 2d 466, 171 Ill. Dec. 359, 594 N.E.2d 211 (1992)].

19 There are no comparable specific provisions of the Code of Professional Responsibility. RPC Rule 1.2, Model Code Comparison & 3.1, Model Code Comparison (1983).

20 U.S. v. Teague, 953 F.2d 1525, 1532 (11th Cir. 1992). See discussion in §§ 9:21- 9:22.

21 Defense counsel also has a duty to dissuade the client from any defense that is virtual suicide in front of the jury. See cases cited supra.

22 *Zal v. Steppe*, 968 F.2d at 934 (concurring opinion):

> As counsel for those accused of a crime, Zal had an obligation to them to present their defense and to present it not halfheartedly, not mechanically, but zealously. The duty of advocacy, the commands of our profession required no less. Zal, accordingly, had the right to bring out the reason for his clients' actions. Even if the reason for the actions did not constitute a good defense under the applicable law, an explanation allowed the jury to see his clients not as monsters mindlessly invading the rights of other, but as human beings.

Weatherall v. State, 73 Wis. 2d 22, 242 N.W.2d 220, 224 (1976):

> Rejecting entrapment as an appropriate theory of the case for the defense, trial counsel instead opted to conduct the trial and made his plea to the jury under a "Good Samaritan" approach. Given the denial of one sale and the admission by his client of the other two sales, counsel sought to increase the possibility of the jury accepting his client's denial as to the first sale by portraying his client as one who had sought only to help someone in trouble and distress. Establishing such intent to help, rather than to profit, would not be a legal defense under the statute defining the crime charged. However, such attempt to put his client in the most favorable light possible, if successful, might incline the jurors to accept, on the issue of credibility, the testimony of the defendant rather than that of the undercover agent as to the first sale, the only one denied by defendant. Our court has taken judicial notice of the fact that juries do, on occasion, temper justice with leniency. As an experienced criminal lawyer, trial counsel was entitled to give weight to such extra-legal possibility. He is no more to be faulted for such exercise of professional judgment than is the defense counsel who, facing formidable adverse facts, advises his client to plead guilty, perhaps on a lesser charge, rather than to go to trial on a plea of not guilty. Later on, post-conviction counsel may not agree with the advice given and followed, but that is always later on.

23 U.S. v. Sams, 104 F.3d 1407 (D.C. Cir. 1996), supra (ineffective assistance claim).

24 D.C. Op. 320 (May 2003).

25 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See generally Ch 10 on ineffective assistance of counsel.

26 *Strickland*, 466 U.S. at 694–95:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

See also Jones v. Jones, 163 F.3d 285, 306 (5th Cir. 1998) (possibility of jury nullification does not make counsel ineffective, looking to this passage from *Strickland*).

27 U.S. v. Gil, 142 F.3d 1398 (11th Cir. 1998); U.S. v. Brown, 983 F.2d 201 (11th Cir. 1993).

28 See, e.g., Collins v. Lockhart, 545 F. Supp. 83, 86–87 (E.D. Ark. 1982), decision rev'd, 707 F.2d 341 (8th Cir. 1983) (defendant was his own worst enemy as a possible witness, and just putting him on the stand would have been worse than hoping for leniency); People v. Nieves, 192 Ill. 2d 487, 249 Ill. Dec. 760, 737 N.E.2d 150 (2000).
And see Anderson v. Calderon, 232 F.3d 1053, 1089–90 (9th Cir. 2000):

> With the amount of solid evidence facing Anderson, Ames's chosen diminished capacity and jury nullification argument is not demonstrably worse than an argument centered on diminished capacity and complete acquittal. But cf. *Capps v. Sullivan*, 921 F.2d 260, 262, 31 Fed. R. Evid. Serv. 1113 (10th Cir. 1990) ("[W]hen a defendant takes the stand in his own behalf and admits all of the elements of the crime, exactly in accord with the court's instructions to the jury, it is surely inadequate legal representation to hope that the jury will ignore the court's instructions and acquit from sympathy, rather than to raise an entrapment defense that has some support in the evidence.") (emphasis added); *Francis*, 720 F.2d at 1194 ("Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury.") (emphasis added). Ames simply found it "advantageous to his client's interests to concede ... guilt of one of several charges," *see Swanson*, 943 F.2d at 1075-76, and attempted to do so under one of two similarly risky strategies.

29 See, e.g., U.S. v. Sams, 104 F.3d 1407 (D.C. Cir. 1996) (dicta); Sams v. U.S., 1999 WL 680008 (D.D.C. 1999) (not per se ineffective assistance); U.S. v. Horsman, 114 F.3d 822, 47 Fed. R. Evid. Serv. 582 (8th Cir. 1997) (harmless error at best in light of overwhelming evidence of guilt; possibility of jury nullification on retrial would not translate into prejudice, quoting *Gonzalez*, supra (not a "right," much less a "substantial right"); People v. Salem, 2001 WL 1029650 (Mich. Ct. App. 2001) (table); People v. Morris, 209 Ill. 2d 137, 282 Ill. Dec. 753, 807 N.E.2d 377 (2004) (overruled on other grounds by, People v. Pitman, 211 Ill. 2d 502, 286 Ill. Dec. 36, 813 N.E.2d 93 (2004)) ("Defense counsel's decision to employ a nonlegal defense is not, by itself, reason to conclude that counsel's assistance in the case at bar falls under the standard of *per se* ineffective assistance ... ."); Weatherall v. State, 73 Wis. 2d 22, 242 N.W.2d 220, 224 (1976), quoted supra; State v. Lammers, 153 Wis. 2d 398, 451 N.W.2d 805 (Ct. App. 1989) (table, unpublished; text in Westlaw) ("Such a defense, commonly known as 'jury nullification,' is a recognized criminal defense strategy... . That the strategy proved unsuccessful does not transform the decision to pursue it into deficient performance.").
But see U.S. v. Hernandez-Ocampo, 985 F.2d 575 (9th Cir. 1993) (table, unpublished; text in Westlaw) (if jury nullification were the defense here, it would have not been a reasonable one; but apparently none would anyway).
Cf. U.S. v. Steverson, 230 F.3d 221, 2000 FED App. 0303P (6th Cir. 2000) (court noted defense was nullification in face of overwhelming facts; counsel's alleged failures were not prejudicial).

30 Capps v. Sullivan, 921 F.2d 260, 262, 31 Fed. R. Evid. Serv. 1113 (10th Cir. 1990) ("[W]hen a defendant takes the stand in his own behalf and admits all of the elements of the crime, exactly in accord with the court's instructions to the jury, it is surely inadequate legal representation to hope that the jury will ignore the court's instructions and acquit from sympathy rather than to raise an entrapment defense that has some support in the evidence.").

31 U.S. v. Montgomery, 14 Fed. Appx. 613 (6th Cir. 2001) (table, unpublished; text on Westlaw) (sole strategy was one of nullification where elements of crime were not disputed; not clearly erroneous to deny acceptance of responsibility).

32 Jack B. Weinstein, Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice, 30 Am. Crim. L. Rev. 239 (1993).

33 People v. Wilson, 972 P.2d 701, 705–06 (Colo. Ct. App. 1998), as modified on denial of reh'g, (Oct. 29, 1998) (argument should have been avoided, but it was not reversible error where it came in response to defense).

34 Conrad, The Champion at 33, supra.

35 Fed. R. Evid. 401.

36 U.S. v. Sanusi, 813 F. Supp. 149, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

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EXHIBIT 2

178 Misc.2d 918
Supreme Court, Bronx County, New York.

The PEOPLE of the State of New York, Plaintiff,
v.
O.B. DOUGLAS, Defendant.*
Aug. 25, 1998.

In prosecution for criminal possession of a weapon in the third and fourth degrees, and for criminal possession of handcuffs, the Supreme Court, Bronx County, Massaro, J., held that People were entitled to a **jury** instruction which affirmatively stated that the propriety of a search and seizure was beyond the **jury's** province to decide.

Ordered accordingly.

Attorneys and Law Firms

****145 *918** Legal Aid Society (Dennis Murphy and Michael Raskin, New York City, of counsel), for defendant.

****146** Robert T. Johnson, District Attorney of Bronx County (Lisa Deldin, of counsel), for plaintiff.

Opinion

***919** DOMINIC R. MASSARO, Justice.

[1] The issue presented on this application—the spectre of race-based **jury nullification** having arisen at trial—is whether the People are entitled to a **jury** instruction which affirmatively states that the propriety of search and seizure is beyond the **jury's** province to decide. The Court is duty bound to uphold the law, and the law requires such appropriate instruction.

Factual Settings

O.B. Douglas was arrested and indicted for the crimes of criminal possession of a weapon in the third (Penal Law, Sec. 265.02[4]) and fourth (Penal Law, Sec. 265.01[1]) degrees, and criminal possession of handcuffs (N.Y.Admin.Code, Sec.10–147). Seeking to preclude the introduction of the weapon and handcuffs at trial, Mr. Douglas moved for and was granted a suppression hearing. The hearing testimony indicated that the police, upon observing the vehicle in which Mr. Douglas was a passenger, stopped it for a traffic violation. It was noted that Defendant and the driver were black men, and that the police officers were white. Responding to a request for identification, Mr. Douglas reached into a waist bag he was wearing, exposing a gun; it was seized and Defendant was asked to step out from the vehicle; the handcuffs were recovered upon his being searched.

After scrutinizing the stop for a Vehicle and Traffic Law violation for which a summons was issued (*see, People v. Bernier,* 245 A.D.2d 137, 666 N.Y.S.2d 161 [1st Dept., 1997]; *People v. Watson,* 157 A.D.2d 476, 549 N.Y.S.2d 27 [1st Dept., 1990]), the Court determined that it was not pretextual, as claimed by Defendant, and that the police had not exceeded the scope of proper conduct in halting the vehicle and questioning its occupants (*see People v. Spencer,* 84 N.Y.2d 749, 622 N.Y.S.2d 483, 646 N.E.2d 785 [1995]; *People v. Martinez,* 246 A.D.2d 456, 667 N.Y.S.2d 247 [1st Dept., 1998]; *People v. Washington,* 238 A.D.2d 43, 671 N.Y.S.2d 439 [1st Dept., 1998]; *cf. Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 [1996]). Hence, Mr. Douglas' suppression motion was denied and the gun and handcuffs were admitted into evidence at trial.

During trial, Defendant attempted to focus the **jury's** attention on the circumstances surrounding the viewing of the gun by the police. His strategy was to elicit testimony designed to discredit the testifying officer's recounting of its discovery. Surely this is permissible. The driver of the vehicle then testified for the defense; it was he who brought forth the "race card" vis-a-vis the stop. Thereafter, Mr. Douglas argued for permission to summarize his case by questioning "why they ***920** [the police] stopped the car."[1] The Court would not condone it. Defendant's attempt to discredit the People's witnesses through non-relevant prejudicial inference, the Court ruled, would go beyond the realm of permissibility and contravene the Court's authority to instruct the **jury** on the law. Despite caution, Defendant's summation nonetheless posited that Mr. Douglas was "set up" and "they [the police] stopped the car [because] they just did not like something about the people in the car."[2]

In essence, Mr. Douglas invited the **jury**, comprised largely of African–Americans, directly or indirectly as the case may be, to acquit him solely on the basis that the seizure of the weapon and handcuffs from his person was unlawful and arose out of an impermissible pretextual stop based on racial bias. Invitations such as the instant one have the effect of **nullifying** any finding that the

People have proven beyond a reasonable doubt the elements of a crime(s) submitted to a **jury** for consideration. It is for this reason that the Court, over Mr. Douglas' objection, granted the People's request for a **jury** instruction which affirmatively stated that the Fourth Amendment issue of search and seizure was beyond their province (*see People v.* ****147** *Hamlin,* 71 N.Y.2d 750, 530 N.Y.S.2d 74, 525 N.E.2d 719 [1988]).[3]

Jury Nullification

It is axiomatic in the American justice system that a **jury's** role at trial is limited to finding the facts. **Jury** "[n]ullification occurs when a **jury**—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt" (Weinstein, "Considering **Jury** 'Nullification': When May and Should a **Jury** Reject the Law to do Justice," 30 *Am.Crim.L.Rev.* 239 [1993]; see generally, Courselle, Bench Memorandum, "The First Monday in October" Program, Office of Appellate Defender [1997]). Renewed attention to the doctrine seeks to encourage abdication of the **jury's** primary function to apply the law, that is, the legal definition of a crime to the evidence and to convict if it is satisfied that each element of said crime has been established beyond a reasonable doubt. The Fully ***921** Informed **Jury** Association, for example, has for a decade kept the issue in the public eye. The Association draws supporters from across the political and social spectrums, including:

> [c]onservatives and constitutionalists, liberals and progressives, libertarians, populists, greens, gun owners, peace groups, taxpayer rights groups, home schoolers, alternative medicine practitioners, drug decriminalization groups, criminal trial lawyers, seat belt and helmet law activists, environmentalists, women's groups, anti-nuclear groups, [and] ethnic minorities (Scheflin & Van Dyke, "Merciful **Juries**: The Resilience of **Jury Nullification**," 48 *Wash. & Lee L.Rev.* 165, 176--177 [1991]).

Anti-abortion activists have more recently encouraged **jury nullification** in trials of people engaged in protests at abortion and family-planning clinics (*see United States v. Lynch,* 952 F.Supp. 167 [S.D.N.Y., 1997] [trial judges, like **juries**, have power to engage in **nullification**], *affd.* 104 F.3d 357, *cert. denied* 520 U.S. 1170, 117 S.Ct. 1436, 137 L.Ed.2d 543 [1997]).

Racial Motivations

Much recent debate has centered around issues of racially motivated **jury nullification** (see, e.g., Butler, "Racially Based **Jury Nullification**: Black Power in the Criminal Justice System," 105 *Yale L.J.* 677 [1995]; Leipold, "The Dangers of Race–Based **Jury Nullification**: A Response to Professor Butler," 44 *U.C.L.A.L.Rev.* 109 [1996]; Butler, "The Evil of American Criminal Justice: A Reply," 44 *U.C.L.A.L.Rev.* 143 [1996]; see also, Abramson, "After the O.J. Trial: The Quest to Create Color-blind **Juries**" and Butler, "**Jury Nullification**: Practice for Blacks is Moral and Legal," *Race and Jury at the Crossroads* [Franklin H. Williams Judicial Commission on Minorities, 1996]). Professor Butler provocatively advocates **jury nullification** as a tool of African–American self-determination, an operational strategy to confront what he perceives to be pervasive racial inequities in the criminal justice system. While conceding that "there is no question that **jury nullification** is subversive of the rule of law,"[4] he argues that African–American **jurors** have a moral obligation "to exercise their power in the best interests of the black community" and to acquit in non-violent criminal cases where ***922** the defendant, though factually guilty, is black.[5] This, he maintains, will diminish the racially disparate impact of the criminal law, help bring about beneficial legal reform and improve the African–American communities that are now crippled by excessive imprisonment of their numbers.[6] This position ****148** has come under attack, not only because it encourages **jurors** to disregard the law, but also because it is premised on a rejection of the criminal justice system.[7]

The rhetoric notwithstanding, it may correctly be stated that **nullification** advocates follow in the footsteps of a hallowed tradition, one which reaches back to the earliest days of our Colonial experience. **Juries** at one time explicitly possessed the power to judge the law as well as the facts, and thus to enter a **nullification** verdict.

Hallowed Tradition

The right of trial by **jury** was designed "to guard against a spirit of oppression and tyrannny [*sic*] on the part of the rulers" and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties" (2 Story, *Commentaries on the Constitution of the United States,* 541, 540 [4th ed., 1873]; see also, 4 Blackstone, *Commentaries on the Laws of England* 342 [1769]; *United States v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 [1995]; *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491

[1968]). From the very beginning, however, judges exercised considerable power over the prosecution process as a whole and over **juries** in particular. Even following a verdict, a judge could force a **jury** to reconsider, and if its members proved obstinate, fine, imprison or prosecute them on the theory they had violated their oaths (see generally, Lawson, *Lawless Juries?, Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* [Cockburn & Green, eds., 1988]).

Responding to the Crown's increased use of criminal prosecutions as a means of silencing opponents during the political upheavals that rocked England during the 17th Century, ***923** religious and political dissenters began asserting the **jury's** right to judge the legality of the law. This culminated with the ruling in *Bushel's Case* (125 Eng.Rep. 1006 [P.C., 1670]), which effectively insulated the **jury's** decisionmaking from court interference "wherein they resolve both law and fact complicatedly, and not the fact by itself" (at 1013). The opinion, arising from the foreman's *habeas corpus* petition, held that the **jury** could not be punished for acquitting the Quaker William Penn of seditious preaching (of religion), even if the trial judge believed such a verdict contrary to the evidence.

> Although criminal **juries** in England following *Bushel's Case* possessed the raw power to ignore the law as given by the judge, they never acquired the legal right to do so. In America, by contrast, the right of the **jury** independently to decide questions of law was widely recognized until well into the nineteenth century. Not only did **juries** have the right to judge the law, "counsel had the right to argue the law—its interpretation and its validity—to the **jury**" (Note, "Opposing **Jury Nullification**: Law, Policy, and Prosecutorial Strategy" [85 *Geo.L.J.* 191, 198 [1996]]).

English in origin, there evolved in America an undoubted **jury** prerogative-in-fact derived from the power to bring in a general verdict of "not guilty" in a criminal case, non-reviewable and irreversible by the court (*see Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 [1980]; *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 [1957]). As Professor Wigmore observed: "The **jury**, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case" (Wigmore, "A Program for the Trial of **Jury** Trial," 12 *Am.Jud.Soc.* 166, 170 [1929]).

"The pages of history shine on instances of the **jury's** exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge" (*United States v. Dougherty,* 473 F.2d 1113, 1130 [Ct. of App., Dist. of Col. Cir., 1972]). What student of the American saga knows not of John Peter Zenger. In 1735, Zenger published the *Weekly Journal,* a New York newspaper, which was highly critical of the royal governor, who promptly shut it down. Arrested on charges of seditious libel, Zenger admitted publishing ****149** the criticism, but stated that what he published was the truth, then not recognized as a legal defense. Despite the judge's instruction, the **jury** refused to enforce a law that made it a crime to criticize the government, thus laying cornerstones of freedom of speech and of a free press.

Nor is there any lack of notable expression(s) from the Framers, Federalists and Anti–Federalists alike, or early prominent ***924** members of the judiciary, in support of the necessity for the practice of **jury nullification** as a protection against the exercise of arbitrary and abusive power—that **jurors** had "a duty to find a verdict according to their own conscience, though in opposition to the direction of the court; that their power signified a right" (*United States v. Dougherty, supra* at 1132).[8] This served as the ultimate protection against tyranny and injustice and was an integral feature of the birth of our nation.[9] As the 19th century dawned, **juries** continued to display the fierce independence exhibited under colonial rule. The wave of confidence generated by the recent victory over England saw Americans of all stations defend the lawmaking function of the **jury** "with an extraordinarily insistent vitality ..." (Howe, "**Juries** as Judges of Criminal Law," 52 *Har.L.Rev.* 582, 582 [1939]; see generally, Scheflin & Van Dyke, "**Jury Nullification**: The Contours of a Controversy," 43 *Law & Contemp. Probs.* 51 [Autumn 1980]).

The clash of contending forces staking out the direction of the government of the newly established Republic was resolved in political terms early on by reforming, but sustaining without radical change, the status of the courts as central to the democratic process for improving the law. Soon, the youthful passion for independence and the casting off the yoke of tyranny stood in sharp contrast to the practical reality that stability was a necessary ingredient for national growth. As time passed, the idea that **juries** were competent to interpret the laws began to recede, reflecting the sentiments of an established nation rather than the spirit of a revolutionary one. This inaugurated a progressive constitutional revolution that has since changed the entire landscape of American law and life, elevating the moral fundamentality of the democratic ***925** order that the value of equality is not mutually exclusive from that of liberty. And while, as a practical matter, **juries** have, and continue to exercise the power to engage in **nullification**, its exercise implicates a

fundamental conflict between the rule of law and the **jury's** historic role as a restraint on the arbitrary power to oppress. Indeed, the democratic purposes initially served by such **juries** have since come to be better served by other democratic institutions.[10]

The Law

The seminal case of *Marbury v. Madison,* 5 U.S. [1 Cranch] 137, 2 L.Ed. 60 [1803] established the rule that "[i]t is emphatically the province and duty of the judicial department ****150** to say what the law is" (at 177). In *United States v. Battiste,* 24 F.Cas. 1042 [2 Sum. 240, No. 14, 545] (Cir.Ct., D.Mass., 1835), Justice Story [at 1043] set forth that "it is the duty of the court to instruct the **jury** as to the law; and it is the duty of the **jury** to follow the law, as it is laid down by the court". This is the modern rule of the **jury** as the trier of fact.

By the end of the 19th century, the **jury** had changed from an intimate institution into a more impersonal arbiter of impartial justice in a more complicated conception of community. And judicial thinking had clearly shifted and conclusively determined it to be "the duty of **juries** in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence" (*Sparf v. United States,* 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 [1895]).

The question in *Sparf* was whether a court transcended its authority when saying "a **jury** is expected to be governed by law, *and the law it should receive from the court.*" (*Sparf, supra,* at 63, 15 S.Ct. 273.) Justice John Marshall Harlan held that a **jury** has

> the physical power to disregard the law, as laid down to them by the court. But I deny that ... they have the moral right to decide the law according to their own notions or pleasure ... [the] **jury** should respond as to the facts, and the court as to the law.... This is the right of every citizen, and it is his only protection (at 74, 15 S.Ct. 273, 39 L.Ed. 343, quoting ***926** *United States v. Battiste, supra*).

The court criticized **jury nullification** as contrary to the rule of law. *Sparf,* then, settled the issue against a **jury's** right to decide questions of law. The alternative approach, the Court (at 103) intoned, would replace a "government of laws" with a "government of men." Since *Sparf,* it has been a commonplace understanding that criminal **juries** have the power, but not the right, to **nullify** the law before them.[11]

For more than a century, the United States Supreme Court has followed this precedent that the right to decide the law belongs to the court, not to the **jury** (see, e.g., *United States v. Gaudin, supra; Berra v. United States,* 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013 [1956]; *Hepner v. United States,* 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720 [1909]). **Jury nullification** is "an 'assumption of power which [the **jury** has] no right to exercise' " (*United States v. Powell,* 469 U.S. 57, 66, 105 S.Ct. 471, 83 L.Ed.2d 461 [1984]; quoting *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 [1932]).

> A **jury** has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power (*United States v. Washington,* 705 F.2d 489, 494 [D.C.Cir., 1983]).

Civic Fragmentation

The idea of deciding cases on the basis of racial politics as opposed to reasonable doubt is not new; however, its modern day proponents advance the logic that if the system routinely fails, here, African–American defendants, then African Americans must abandon the system.[12] This goes beyond the lofty premise of **juror** lenity in refusing to enforce unjust laws or laws that have been unjustly enforced. Race-based **jury nullification** ***927** was a repellant practice when white supremacists on Southern **juries** refused to convict those ****151** accused of violence against African Americans;[13] it is no better practiced by black **jurors**, even if motivated by legitimate anger. There is an unfortunate yet increasing perception that African-American **jurors** vote to acquit defendants for racial reasons. It has a particular resonance in this venue.[14] Racial allegiance, white or black, has no place in a court of law; in the **jury** room, judgment and discretion are inseparable.

American jurisprudence demands equal application of the law; it is the bedrock upon which our system of justice is

premised. The value of **jury nullification**, this "great corrective of law in its actual administration" (Pound, "Law in Books and Law in Action," 44 *Am.L.Rev.* 12, 18 [1910]), pales in comparison when the liberty interest vindicated by the verdict is counter to a commonsense understanding that the pending criminal charge is based neither on principle nor rooted in arbitrary or excessive government; rather, that a defendant is before the bar of justice because of a blameworthy violation of a valid law designed to protect society.

"We categorically reject the idea that, in a society committed to the rule of law, **jury nullification** is desirable or that courts may permit it to occur when it is within their authority to prevent" (*United States v. Thomas,* 116 F.3d 606, 614 [2d Cir., 1997]).

New York Jurisprudence

[2] "While there is nothing to prevent a petit **jury** from acquitting although finding that the prosecution has proven its case, ***928** this so-called 'mercy-dispensing power' ... is not a legally sanctioned function of the **jury** and should not be encouraged by the court" (*People v. Weinberg,* 83 N.Y.2d 262, 268 [1994], quoting *People v. Goetz,* 73 N.Y.2d 751, 752, 536 N.Y.S.2d 45, 532 N.E.2d 1273 [1988], cert. denied 489 U.S. 1053, 109 S.Ct. 1315, 103 L.Ed.2d 584 [1989]; see, also, *People v. Sullivan,* 68 N.Y.2d 495, 510 N.Y.S.2d 518, 503 N.E.2d 74 [1986]; *People v. Mussenden,* 308 N.Y. 558, 127 N.E.2d 551 [1955]; cf. *People v. Tucker,* 55 N.Y.2d 1, 447 N.Y.S.2d 132, 431 N.E.2d 617 [1981]; *People v. Berkowitz,* 50 N.Y.2d 333, 428 N.Y.S.2d 927, 406 N.E.2d 783 [1980]). Furthermore, *Goetz,* at 752, 536 N.Y.S.2d 45, 532 N.E.2d 1273, admonishes that, if the **jury** finds that the state has proved its case beyond a reasonable doubt, it "must" convict.

[3] New York trial courts have a mandated duty to prevent improper and impermissive **nullification** conduct. It has long been recognized in our jurisprudence that "it is [the **jury's**] duty to be governed by the instructions of the court as to all legal questions ... [t]hey have the power to do otherwise, but the exercise of such power cannot be regarded as rightful...." (*Duffy v. People,* 26 N.Y. 588, 593 [1863]; see also, *Safford v. People,* 1 Parker's Cr.Cas. 474 [1854]; *People v. Finnegan,* 1 Parker's Cr.Cas. 147 [1848]).

Furthermore, our *New York Pattern Criminal* ***Jury Instructions,*** in no uncertain terms, informs **jurors** that it is their duty to follow the law as explained by the court (see generally, C.J.I. [N.Y.] 2d ed. [1995–96]; C.P.L. 300.10).[15] If it is established during ****152** *voir dire* that a prospective **juror** is unwilling to do so, that **juror** may be excused for cause (see C.P.L. 270.20).

Conclusion

[4] **Jury nullification**, by definition, is a violation of a **juror's** oath to apply the law as instructed by the Court. Notwithstanding, the power of a **jury** to return a not guilty verdict contrary to the apparent weight of the evidence has been an accepted, indeed cherished, feature of our **jury** system since earliest times. The common law courts recognized that **juries** in criminal cases sometimes exercise discretionary judgment in order to return a general verdict of non-guilt; clearly, in the era following ***929** the Revolution **juries** were routinely instructed that they were not bound by the judge's instruction on the law, but were free to develop their own interpretation of its applicability. **Jury nullification** thus enjoyed an auspicious history well into the last century.[16] This noble doctrine made a great deal of sense at a time when American law was in its infancy and American jurisprudence not yet fully developed.[17]

There is no moral justification in present day America to separate liberty and equality; and "liberty regulated by law is the underlying principle of our institutions" (*Sparf v. United States,* 156 U.S., *supra,* at 103, 15 S.Ct. 273); "[p]ublic and private safety alike would be in peril, if the principle be established that **juries** in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves" (see *Sparf v. United States, supra* at 101, 15 S.Ct. 273). Nor is there a moral responsibility for **jurors** of any race to use **nullification** to reintroduce into the community those whose crimes are destructive of its social fabric, and who otherwise are deserving of conviction under any analysis other than that of proof of guilt beyond a reasonable doubt. **Juries** cannot be "the conscience of the community" (*United States v. Spock,* 416 F.2d 165, 182 [1st Cir., 1969]) by violating their oath to apply the law to the evidence. Historically, the concept of **nullification** was justified solely as a byproduct of the careful defense of other values deemed more fundamental precisely because they proved beneficial to the commonweal. **Nullification** should not, and cannot without greater cost, be transformed into a more robust affirmative grant of power.

Conceptually, **jury nullification** is logically incompatible with applying the law, and to do so diminishes legality by

fostering the perception that individuals can determine the boundaries of lawful conduct. This can only serve to undermine public confidence in the normative effect of rule of law. "Toleration of such conduct would not be democratic ... but inevitably anarchic" (see *United States v. Dougherty, supra* at 1134).

[5] [6] *930 "In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial **jury**" (U.S. Const., Amend. VI [1789]; see also, N.Y. Const., Art. I, Sec. 2). By extension, this right includes the right to a **jury** that is willing to apply the law as instructed by the court (see *Adams v. Texas,* 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 [1980]). In this instance, by charging that, while the credibility of each and every witness is for the **jury** to determine, the lawfulness of police conduct in stopping the automobile in which Defendant was a passenger is not a question of fact for consideration, this Court sought to discourage the **jury** from engaging in a non-legally sanctioned function in reaching its verdict(s). "Due process means a **jury** capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the ****153** effect of such occurrences when they happen" (*Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 [1982]).

The **jury** system is an effort to secure participatory democracy; democratic theory, however, does not countenance extra-legal lawmaking. Political legitimacy suggests that the juryroom is an improper setting to pass judgment on the wisdom of policy choices democratically determined by duly elected representatives. This has no parallel to treating with arbitrary oppression by regal fiat. While in an extraordinary case calling upon high conscience, if at all, the ends of justice may cause **jurors** to consider their own sense of what is just and proper, resulting in a legally indefensible verdict, this is wholly distinct from the court's duty to uphold the law. The very essence of the judicial function is to declare the law's applicability—even if a **juror** does not agree with it.

[7] In a society as multicultural as our own, **jurors** sit not as representatives of discrete groups, but as citizens representing the public interest. It is for this reason that trial courts must insist that **jurors** will consider and decide the facts impartially, especially to forestall favor, that is, to prevent a **juror's** conduct that violates his or her sworn duty to conscientiously apply the law as instructed by the court. Neither democracy nor the **jury** is served by brokering justice based on race.[18]

"Nothing would be more pernicious to the **jury** system than for society to presume that persons of different backgrounds go ***931** to the **jury** room to voice prejudice" (*J.E.B. v. Alabama,* 511 U.S. 127, 154, 114 S.Ct. 1419, 128 L.Ed.2d 89 [1994] [Kennedy, J., concurring]).

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Footnotes

* The herein Defendant was acquitted of all counts; the name is a pseudonym.

1 Tr., July 6, 1998.

2 *Ibid.*

3 "I instruct you that whether the approach and stop of defendant was lawful is not for you to decide. That subject involves a question of law that is not within the province of the **jury** to determine. Your duty as **jurors** is to determine whether the People have proven all of the elements of the crime charged beyond a reasonable doubt" (*People v. Euklin Wright,* 168 Misc.2d 787, 788, 645 N.Y.S.2d 275 [1996]).

4 Butler, "Racially Based **Jury Nullification**: Black Power in the Criminal Justice System," *op. cit.,* at 706; "My goal is the subversion of American criminal justice ..." (*Id.* at 680).

5 *Id.* at 715. "[I]t is the moral responsibility of black **jurors** to emancipate some guilty black outlaws" [*Id.* at 679].

6 Between 1965 and 1992, the arrest rate for African Americans was between four and seven times greater than the arrest rate for whites (see Bureau of Justice Statistics, U.S. Dep't. of Justice, *Sourcebook of Criminal Justice Statistics*

1994, at 378 [1995]).

7 "Black people can 'opt out' of American criminal law" (Butler, Racially Based **Jury Nullification**, *op. cit.,* at 714).

8 John Jay, the first Chief Justice of the United States, stated that the **jury** has the right to judge both "the law as well as the fact in controversy" (*Georgia v. Brailsford,* 3 U.S. 1 [3 Dall.], 3, 1 L.Ed. 483 [1794]).

9 Perhaps the most important reason why early American **juries** were accorded the right to decide questions of law was the central role they had played in opposing the tyrannical rule of the English government in the years leading up to the Revolution. Colonial **juries** regularly refused to enforce the various Navigation Acts, which restricted maritime commerce, or to convict Americans accused of avoiding the imposition of levies. The English responded to these flagrant acts of **jury nullification**, in part, by extending the jurisdiction of the vice-admiralty courts, which functioned without **juries**, and by declaring that colonists charged with treason would be tried in England. These actions caused outrage and constituted one of the major grievances that led to the Revolution. Among the many "injuries and usurpations" enumerated in the Declaration of Independence, King George III was charged with "depriving us in many cases, of the benefits of Trial by **Jury**."

10 "[I]n the colonial era, American **juries** were the governmental bodies most representative of their communities. With independence, state legislatures and other agencies probably represented the whole society better. More democratic lawmaking left little legitimate role for the **jury's** law-intuiting (and law-defying) functions. The democratic purposes initially served by colonial **juries** came to be better served by other institutions" (Alschuler & Deiss, "A Brief History of the Criminal **Jury** in the United States," 61 *U.Chi.L.R.* 867, 917 [1994]).

11 The state constitutions of both Indiana and Maryland yet provide that **jurors** are judges of both the law and facts. **Juries** in those states continue to be instructed on the prerogative to **nullify** the law in criminal cases.

12 To the contrary: seventy-six percent (76%) of African Americans surveyed favored imposing more severe prison sentences as a way to deal with the crime problem (*Sourcebook, op. cit.,* at 172 [Gallup Poll]). Sixty-eight percent (68%) of blacks surveyed said that they would approve of building more prisons so that longer sentences could be given (*Sourcebook, op. cit.,* at 178 [ABC News Poll]). Two-thirds also approved of a "three strikes and you're out" provision which would impose a mandatory life sentence for a third-time violent felon (*Sourcebook, op. cit.,* at 176 [ABC News Poll]). By a two-to-one margin (62% to 31%), black citizens favored treating juveniles who commit crimes the same as adults (*Sourcebook, op. cit.,* at 178 [Gallup Poll]).

13 "[A]lthough the early history of our country includes the occasional *Zenger* trial or acquittals in fugitive slaves cases, more recent history presents numerous and notorious examples of **jurors nullifying**—cases that reveal the destructive potential of a practice ... rightly termed a "sabotage of justice".... Consider, for example, the two hung **juries** in the 1964 trials of Byron De La Beckwith in Mississippi for the murder of NAACP field secretary Medgar Evers, or the 1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old Emmett Till ... shameful examples of how **nullification** has been used to sanction murder and lynching" (*United States v. Thomas,* 116 F.3d 606, 616 [2d Cir., 1997]).

14 "The race factor seems particularly evident in such urban environments as [Bronx County], where **juries** are more than 80% black and Hispanic. There, black defendants are acquitted in felony cases 47.6% of the time—nearly three times the national acquittal rate of 17% for all races. Hispanics are acquitted 37.6% of the time. This is so even though the majority of crime victims in the Bronx are black or Hispanic ..." (Holden, Cohen and de Lisser, "Color Blinded? Race Seems to Play An Increasing Role In Many **Jury** Verdicts," *Wall St. J.,* Oct. 4, 1995, at A1).

15 But see, 1995 N.Y. Senate Bill 4157 (218th Session): "An act to amend the criminal procedure law, in relation to a court's charge to a **jury** [that] [u]pon request of a defendant, the court must also state that the **jury** has the final authority to decide whether or not to apply the law to the facts before it, that it is appropriate to bring into its deliberations the feelings of the community and its own feelings based on conscience, and that nothing would bar the **jury** from acquitting the defendant if it feels that the law, as applied to the facts, would produce an inequitable or unjust result." Referred to Senate Committee on Codes and expired therein.

16 The nineteenth century acquittals by northern **juries** in prosecutions under the Fugitive Slave Act of 1850 is, perhaps, our country's more honorable example of "benevolent **nullification**."

17 Historians suggest three reasons for this unique situation: first, the almost total absence of an established legal profession; second, the pervasive influence of natural rights philosophy; and third, the shared experience of living

under—and then rebelling against—a tyrannical form of government (see generally, Alschuler & Deiss, "A Brief History of the Criminal Jury," *op. cit.*).

18 "Race-based decisionmaking ... is wrong because verdicts will inevitably be based on stereotypes that are harmful to all members of the group; wrong because those who are not part of the favored group are treated more harshly for reasons unrelated to their blameworthiness; wrong because it helps polarize a society that is already struggling with racial division; and most tragically, wrong because it raises the flag of surrender in the fight for equality" (Leipold, "The Dangers of Race–Based Jury Nullification," *op. cit.*, at 139).

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THE STRATEGIC DEFENSE OF HIGH PROFILE CLIENTS

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THE STRATEGIC DEFENSE OF HIGH PROFILE CLIENTS

Introduction

This discussion assumes that the "notoriety" of either the client or the nature of the case will or already has resulted in substantial media interest.

The Type of Client

- High profile cases can arise either through notoriety or because a celebrity is involved. The type of client is important.
    - A non-celebrity thrust into the public eye will be more willing to take advice and is easier to control.
    - Celebrities and high profile clients are generally more difficult to control at the outset.
- One must address both cases forcefully, but the various types of cases will be handled differently.

Dealing With an Entourage

- Celebrities often are surrounded by people, such as agents and public relations managers. These people generally mean well, but do not always understand how to handle a criminal case.

- The situation is far different from what they are accustomed to handling.

- It is important to make sure that no one on the celebrity's staff speaks to the media about the case, or makes any statement that the celebrity will later regret.

Dealing with the Press Initially

- The press is not always immediately involved, if the case has not yet been made public. However, in some cases the press will be involved from the beginning.

- Regardless of when the media becomes involved, it is essential to limit the information that is initially released.
  - At the beginning, the attorney may not know much anyway.
  - As an attorney, what is said can be deemed an adoptive admission by the client.
  - It is important not to alienate the people, like the prosecutor or the police, that will be involved in the case by saying something inappropriate or premature.

The Media's Involvement

- Some of the most successful cases are the ones that are resolved without the media ever finding out about them.
  - However, this is the exception to the rule; generally speaking, by the time an attorney becomes involved in a case, the media is involved as well.
- In the digital age, news spreads very quickly.

Interacting with the Media

- Very often the initial statement will be a longer version of “no comment”.
    - One should not try and respond to every question, especially at the beginning of a case.
- Attorneys should be wary of the media, and the attention, which can be seductive.

Different Concerns

- People who are not celebrities and are thrust into the media’s attention are often frightened, and easier to manage.
- Celebrities are often worried about endorsements and their public image, and are consequentially much more concerned about managing the media.
    - It is much more difficult to keep them from speaking to the media.

The Media’s Impact on the Case

- The media attention can also have an affect on the case.
- For example, in the Plaxico Burress case, Mayor Bloomberg and District Attorney Robert Morgenthau became directly involved in the media coverage. This changed the entire tone of the case.
    - It may be very tempting to respond to a charge made by the mayor, but one may have to negotiate with these people later.
    - It may be more important to deflect the media.

The Plaxico Burress Case

- The Plaxico Burress case was unique in that the facts were never in dispute. The questions revolved around what would happen, not what had happened.
- This case also involved a mandatory minimum sentence.
    - The outspokenness of public officials made it more difficult to negotiate a soft plea.
- It is very rare for media exposure to help clients.

A Fair Trial

- Negative press does not necessarily preclude a fair trail, as evidenced in the Puff Daddy case, which resulted in an acquittal despite weeks of negative press.
- The common perception is that celebrities get “celebrity justice”.
    - However, the opposite is generally true, as celebrities will be prosecuted in cases that would otherwise not be pursued.
    - Marginal cases can become big cases because of the people involved.

Damage Control

- Credibility in the criminal justice system and the ability to make a quick assessment are factors that contribute to an attorney’s ability to keep a case out of the media.
- It is equally important to try and quash a criminal case early, even after the media has broken the story.

    - It may be possible to demonstrate to the public that in reality there is no case.
- Credibility is very important in these situations.

False Statements

- It is very difficult to stop a media storm, and celebrities, as public figures, have few recourses.
- It is impossible to respond to every false accusation and statement.
- The most important thing is winning the case, not getting good press.

Interviews

- It requires discipline to disregard the press, but it is necessary. It is very easy to say something that will ruin a case.
    - Sometimes it may be necessary to make some comment, even if it is not substantive.
- Interviews with a client are rare, unless there is a particular purpose for the interview.
    - On occasion, there may be a human interest story that can be addressed, and that the client may want to address in order to protect his or her interests.

Substantive Statements

- It is often necessary to make a statement early on, after the case has been exposed, even if little substantial information is given.
- It is very rare to issue a substantive statement.
    - This could violate the Rules of Professional Conduct, and anger the judge, in addition to potentially ruining the case.
    - This is essentially the opening act; it is important to save some ammunition for the actual trial.

Openness with the Media

- There may be cases where it can be beneficial to be a little more open with the press.
- For example, in the Plaxico Burress case, where the facts were not in dispute, it was important to generate some understanding for the client and his side of the story.
    - Perhaps as a result, this case was resolved with a two year plea, even though the mandatory minimum sentence was three and a half years.
- In the Puff Daddy case, a modified gag order was issued and there was no discussion with the media until the case was over.

Taking Control of the Situation

- When dealing with a celebrity client, it may take a while to establish a relationship.
    - However, it is important to establish oneself as the authority in the situation.
    - It is important to be forceful in these cases. It may be better to pass on a case than to give up control.
    - Experience and confidence are very important in taking control of the situation.
- It may take some finesse in dealing with the staff, but it is important that the staff and client understand that not everything can be decided by committee.

Dealing with Sponsors

- One must balance the criminal case with the client's other concerns.
    - Even if the case is won, the client may still lose a great deal if he or she loses sponsors and endorsements.

- Sponsors and advertisers do have legitimate concerns; they have a significant amount of money invested in a person, and they may need to be reassured.
    - Except in the most extreme situations, these cases do often blow over.

Dealing with Sponsors (2)

- While it is not the attorney's job to save sponsorships or endorsement deals, the attorney will be involved in the process.
    - It is important to make sure that no one on the celebrity's staff makes a statement that could be potentially harmful.
- Many people respect the fact that the attorney is performing necessary tasks.

The Inner Circle

- It is very important not to be seduced by becoming part of a celebrity's "inner circle".
    - This can be very difficult at times.
- It is important to assert oneself. This can be challenging, as many of the people surrounding a celebrity will be yes people and the client will not be used to being told "no".
    - However, most celebrities are capable of understanding that the attorney is there to protect them and their interests.

Different Stages

- Even in the investigative stage, it may be beneficial to make a statement that addresses some issues for a case that is already huge.
    - However, it is still not recommended to speak substantively to the media.
    - One also has a legal and ethical obligation to the client not to compromise his or her case.

- A statement may be made following charges, but it won't be substantive. During trial, it is not permitted to make substantive statements.
    - Even after winning a case, statements will still be carefully constructed.

Jury Selection

- It can be a challenge to find jurors that are not biased.
    - State and federal rules regarding jury selection also vary significantly. In state court, one can participate in the *voir dire*. In federal court, this is generally not permitted.
    - However, one can submit questionnaires in some cases.
- Some people do want to be involved in the case simply because of the celebrity. This is not always a good thing.
    - The question is not whether or not the jurors have heard of the client and the case, but whether or not they can be unbiased given what they have already heard and read.
    - It is important to attempt to weed out people who are star struck.

Jury Selection (2)

- It is not necessarily important to find people who will believe the celebrity, as celebrities often do not testify.
- Jurors do not have to like the client, but it is important to make sure that no one hates the client. This is harder in organized crime cases, or cases involving a corrupt politician.

- Jury selection is now a shorter process.
    - Many people are honest in admitting that they cannot be unbiased; some people will use this as an excuse to evade jury duty.

Venue

- It is very difficult to get a change of venue due to bad publicity, as the publicity is not restricted to one geographical area.
- New York City as a venue has its benefits, as it has a diverse population.
- Jury selection is essentially an educated guessing game.

The Celebrity's Emotional State

- In most cases involving high profile celebrities, it is possible to form a bond for the duration of the case.
- One must contend with the emotional ups and downs that arise when the defendant has a great deal to lose.
    - Nobody wants to go to prison, but celebrities in particular have a lot to lose.
    - Celebrities also struggle to deal with the loss of control.
    - It is very difficult to deal with clients' emotional states.

Becoming Star Struck

- Celebrities are impressive in their own right; they are essentially the best in their respective professions.

- However, while it is acceptable to be impressed, one cannot become star struck or allow this to compromise one's judgment.
- While it can be interesting to meet a high profile celebrity, the circumstances under which the meeting occurs are less then desirable; one must contend with the criminal trial.

The Puff Daddy Case

- The risk of Puff Daddy testifying was very low, as there was little chance that he could be caught in a lie.
- Puff Daddy was also a good candidate for testifying as he was articulate, intelligent, and had an incredible story. Moreover, the case did not involve any complicated testimony.
- This was a rather unique situation. Generally, celebrities will not testify.
    - Though this might be considered a performance, it is a very high stakes performance.

The Puff Daddy Case (2)

- Jennifer Lopez was also involved in the Puff Daddy case.
- Eventually, she did not end up testifying, as her testimony did not substantially add to the case.
- Though this may have disappointed the media, it was the right decision for the case.

Cameras

- The idea of cameras in the courtroom does have some merit. However, cameras can alter the way people act.
- There are situations where the public should see exactly what is happening, such as in a corruption or terrorist trial.
- However, a case involving a celebrity is not important enough to warrant cameras.

Post-Verdict Interviews

- Post-verdict interviews of jurors often create problems. In some cases, one is not permitted to talk to the jurors even after the case is over.
- Sometimes it is interesting to hear why jurors came to their conclusions. This can also be educational.
    - Nonetheless, post-verdict interviews often cause more problems than they solve.

Social Media

- Particularly with the advent of social media, it is impossible to control what is being said about a client.
- A bigger issue is the possibility of jurors looking up facts online that have not been admitted into court while serving on a jury.
- Judges are beginning to question and instruct jurors about using the internet and social media.

- No matter what, the focus should be on the trial and nothing else.

Forming a Relationship with the Media

- While the press is generally not kind to a defendant in a criminal case, friendly relationships can develop between the attorney and members of the press without breaking any ethical rules.
- Some reporters have excellent sources, and may be willing to leak information the attorney may not know.
- While one often cannot talk about the case itself, there may be other helpful information, such as what time the trial will actually start, that may be helpful to a member of the media.

Conclusion

Each case is fact specific. Bottom line, keep your eye on the objective. Objective is to do a good job and try to win. The objective is not to make yourself a celebrity.

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New York Law Journal

New York Employers Face New Sexual Harassment Legislation

In the wake of the #MeToo movement, employers operating in New York will be subject to sweeping new laws aimed at curtailing sexual harassment in the workplace.

By **David E. Schwartz and Risa M. Salins** | May 31, 2018

David E. Schwartz and Risa M. Salins

In the wake of the #MeToo movement, employers operating in New York will be subject to sweeping new laws aimed at curtailing sexual harassment in the workplace. On April 12, Gov. Andrew Cuomo signed into law the New York State Budget Bill for Fiscal Year 2019 (the Executive Budget), which he termed "the nation's most aggressive anti-sexual harassment agenda." In addition, on May 10, Mayor Bill de Blasio signed into law the Stop Sexual Harassment in New York City

Act, described by the city council as critical to creating safe workplaces in New York City. This month's column reviews the new requirements of these New York state and city laws.

Nondisclosure Agreements

Settlement agreements related to sexual harassment claims typically have included nondisclosure clauses restricting disclosure of the terms of the agreement. Pursuant to the Executive Budget, as of July 11, New York state employers may not include confidentiality provisions in settlement agreements for sexual harassment complaints, unless keeping the matter confidential is "at the complainant's preference." If the complainant requests confidentiality, the nondisclosure language must first be provided to all parties. The new law requires a consideration and revocation period, like those required by the Age Discrimination in Employment Act, under which the complainant has 21 days to consider whether or not to accept the confidentiality language, and then has seven days to revoke his or her acceptance before the agreement becomes effective. If the complainant chooses to revoke his or her acceptance, the entire agreement is revoked.

Section 5-336 was added to the New York General Obligations Law and Section 5003-b was added to the New York Civil Practice Law and Rules (CPLR) to reflect these new prohibitions and requirements. Section 5003-b applies to settlements of sexual harassment lawsuits filed in New York courts. By comparison, Section 5-336 appears to apply to settlements of all claims of sexual harassment.

With respect to nondisclosure clauses, employers also should be cognizant that a provision buried in the Tax Cuts and Jobs Act (signed into law on Dec. 22, 2017) added a new Section 162(q) to the Internal Revenue Code, which prohibits employers from deducting costs related to sexual harassment settlements that are subject to nondisclosure agreements.

Mandatory Arbitration

The Executive Budget also adds Section 7515 to the CPLR to prohibit mandatory arbitration clauses from applying to claims or allegations of sexual harassment. This prohibition is effective for contracts entered into on or after July 11, 90 days after enactment of the law. It also purports to declare, as of the effective date, null and void clauses in existing contracts that mandate arbitration of sexual harassment claims. However, the new law does not affect the enforceability of mandatory arbitration clauses to arbitrate other claims. In addition, the law applies only to pre-dispute arbitration agreements. So, parties may continue to agree to arbitrate claims after a dispute arises.

Importantly, for union employers, the terms of a collective bargaining agreement may continue to require arbitration of sexual harassment claims. The new law explicitly states that where there is a conflict with a collective bargaining agreement, the collective bargaining agreement shall be controlling.

Employers will, no doubt, argue that this new prohibition is pre-empted by the Federal Arbitration Act, which establishes Congress' preference for arbitration as a means of dispute resolution and preempts any state rule discriminating on its face against arbitration.

Policies and Training

Both the New York state and New York City laws now mandate that employers have written sexual harassment prevention policies and provide sexual harassment prevention training to all employees on an annual basis. In particular, the Executive Budget amends the New York Labor Law to require all employers to adopt and implement a written sexual harassment policy that meets or exceeds minimum standards to be set by the New York Department of Labor (NYDOL) in consultation with the New York Division of Human Rights (NYDHR). The NYDOL and the NYDHR will create and publish a model sexual harassment prevention guidance document and

sexual harassment prevention policy that will be available on both agencies' websites. Effective Oct. 9. Employers must adopt the model policy or establish a policy that meets or exceeds the model standards.

Employers may use their own sexual harassment policy as long as it includes, among other things, a statement prohibiting sexual harassment; examples of what constitutes unlawful sexual harassment; information about federal and state statutory remedies for victims of sexual harassment; a standard complaint form; a procedure for investigation of complaints; all available administrative and judicial forums in which to raise sexual harassment claims; remedies available to victims of sexual harassment; and a provision stating that retaliation against individuals who complain of sexual harassment or who testify or assist anyone making such a complaint is unlawful.

Effective Oct. 9, the Executive Budget also requires that employers provide sexual harassment prevention training on an annual basis. Once again, the NYDOL and NYDHR will develop a model sexual harassment prevention training program that employers may use to comply with the law. However, employers may use their own training as long the training is interactive and it includes, among other things, an explanation of the legal definitions of sexual harassment and examples, and information on all possible forums for filing complaints and the remedies available.

Notably, effective as of Jan. 1, 2019, all bidders for contracts with New York state, or any state department or agency, must certify that they have implemented a written policy addressing sexual harassment prevention in the workplace and that they have provided annual training for all employees that meet the requirements described above. This requirement is codified in the New York State Finance Law.

There are key additional requirements under the New York City law with respect to policies and training. First, effective April 1, 2019, New York City employers with 15 or more employees must conduct training for all new employees and interns within 90 days of commencement of employment. New York City employers also will be required to obtain signed employee acknowledgments that they received training and maintain

records of the signed acknowledgements for three years. Furthermore, as of Sept. 7, New York City employers will be required to display a new anti-sexual harassment poster created by the New York City Commission on Human Rights in employee breakrooms or other common areas.

Non-Employees

Historically, contractors, vendors and consultants have not been covered by New York State law prohibiting sexual harassment. Effective April 12, the Executive Budget added a new Section 296-d to the New York State Human Rights Law, which makes it unlawful for an employer to permit sexual harassment of such non-employees in the employer's workplace. An employer may be liable if it knew or should have known that a non-employee, such as a contractor, vendor or consultant, was subjected to sexual harassment in its workplace and failed to take immediate and appropriate corrective action.

City Employers

New York City employers should be aware of several significant provisions of the new New York City law which took effect immediately upon Mayor de Blasio's signature. First, the new New York City law clarifies that sexual harassment is a form of discrimination under the New York City Human Rights Law (NYCHRL). Second, employees now have three years (as opposed to one year) to file a claim of gender-based harassment under the NYCHRL. Finally, the NYCHRL's prohibition on gender-based harassment now applies to all New York City employers. Previously, only employers with four or more employees were subject to this provision.

Conclusion

New York employers are advised, at a minimum, to take the following steps to comply with the new state and city sexual harassment laws:

- Review, when they become available, New York state's model sexual harassment prevention policies and training programs.

- Review and revise, as necessary, policies regarding sexual harassment in the workplace, and include references to nonharassment of contractors, vendors and other non-employees.
- Prepare to provide sexual harassment training for employees and managers on an annual basis.
- Train human resources professionals and in-house counsel about nondisclosure provisions in settlement agreements relating to sexual harassment claims.
- Review arbitration agreements and programs to determine if changes are required with respect to arbitration of sexual harassment claims.
- For New York City employers, reconcile differences in the requirements under state and city laws so that training programs incorporate all rules and parameters set forth under both state and city laws.

—Grace Jun, an associate at the firm, assisted in the preparation of this article.

David E. Schwartz is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom. Risa M. Salins is a counsel at the firm.

How common is sexual misconduct in Hollywood?

A USA TODAY SURVEY OF 843 WOMEN IN THE ENTERTAINMENT INDUSTRY FOUND 94% SAY THEY'VE EXPERIENCED HARASSMENT OR ASSAULT.

Maria Puente and (/staff/1006/maria-puente)

Cara Kelly (/staff/10047446/cara-kelly), USA TODAY

Published 3:36 p.m. ET Feb. 20, 2018 | ***Updated 10:09 a.m. ET Feb. 23, 2018***

The first number you see is 94% — and your eyes pop with incredulity.

But it's true: Almost *every one* of hundreds of women questioned in an exclusive survey by USA TODAY say they have experienced some form of sexual harassment or assault during their careers in Hollywood.

For months now we've all been hearing the horrifying stories of abuse from marquee names like Rose McGowan (https://www.usatoday.com/story/life/people/2017/10/29/harvey-weinstein-scandal-rose-mcgowan-talks-refusing-1-million-hush-money/811206001/) and Gwyneth Paltrow (https://www.usatoday.com/story/life/movies/2017/10/10/angelina-jolie-gwyneth-paltrow-say-weinstein-harassed-them-too/750451001/) and Ashley Judd (https://www.usatoday.com/story/life/people/2017/12/15/peter-jackson-harvey-weinstein-told-me-not-cast-ashley-judd-mira-sorvino-lotr/955282001/) and Salma Hayek (https://www.usatoday.com/story/life/people/2017/12/13/salma-hayek-harvey-weinstein-my-monster-too/948605001/), about what powerful men in Hollywood, like movie mogul Harvey Weinstein (https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/), allegedly did to them and other women over decades.

Unwanted sexual comments and groping. Propositioning women. Exposing themselves. Coercing women into having sex or doing something sexual. And, especially pertinent to showbiz, forcing women to disrobe and appear naked at an audition without prior warning.

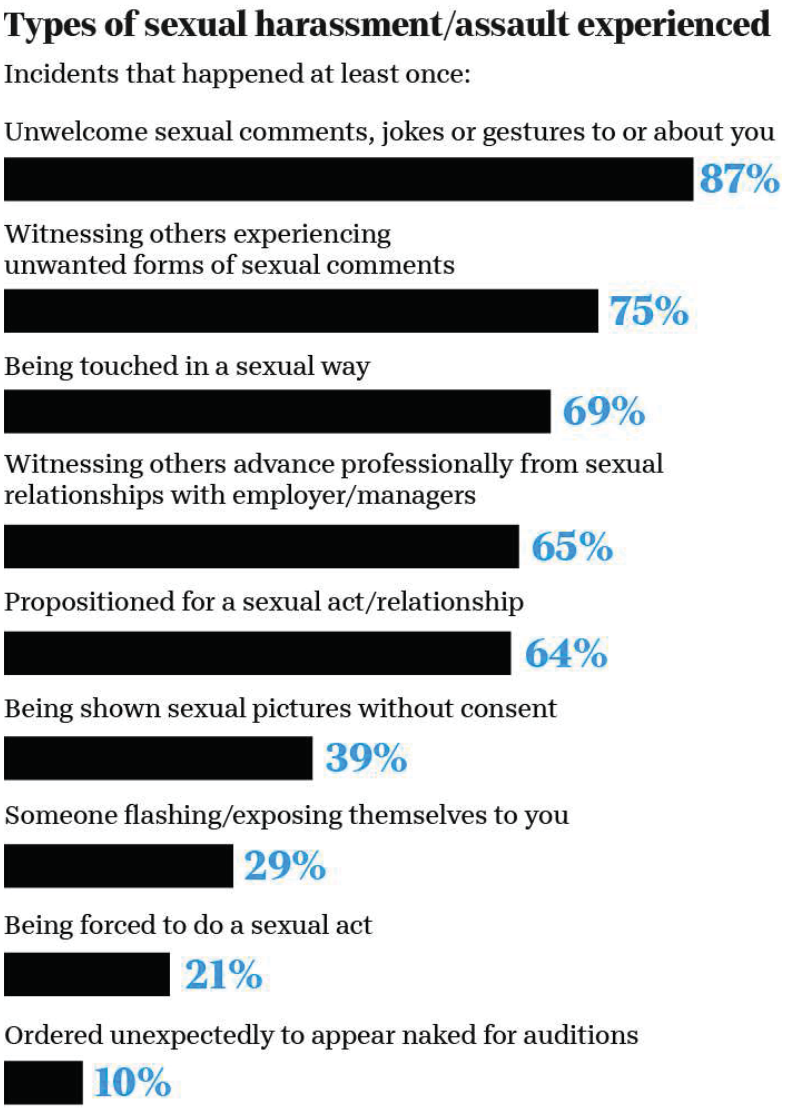
It's been deeply disturbing reading, but so far the powerful stories of accusers outnumber plain, hard facts about the extent of the problem in Tinseltown. Until now.

Working in partnership with The Creative Coalition (http://thecreativecoalition.org/home/about/), Women in Film and Television (https://www.wifti.net/) and the National Sexual Violence Resource Center, USA TODAY

surveyed 843 women who work in the entertainment industry in a variety of roles (producers, actors, writers, directors, editors and others) and asked them about their experiences with sexual misconduct.

The results are sobering: Nearly all of the women who responded to the survey (94%) say they have experienced some form of harassment or assault, often by an older individual in a position of power over the accuser.

Worse, more than one-fifth of respondents (21%) say they have been forced to do something sexual at least once.



Only one in four women reported these experiences to anyone because of fear of personal or professional backlash or retaliation. This reporting rate holds true for all forms of misconduct addressed in the survey, including being forced to do something sexual.

Of those who did report their experiences, most say reporting did not help them; only 28% say their workplace situation improved after reporting.

One surprising finding: Even though America has been arguing about workplace sexual harassment ever since the Anita Hill-Clarence Thomas Supreme Court hearings in 1991, more than one-third of women surveyed weren't even sure that what happened to them was sexual harassment.

Still, even though the survey shows that older and more experienced women have been subjected to more incidents of sexual misconduct, younger women with less than five years of experience in the industry are more likely to blow a whistle on misconduct.

And that suggests there's a chance the status quo — misconduct allowed to flourish because few complain and no one in authority does anything about it — might change in the future as younger women increasingly enter the entertainment workforce and begin asserting influence.

> The National Sexual Violence Resource Center (https://www.nsvrc.org/), which maintains a large library of related surveys on the subject of workplace sexual harassment, says USA TODAY's survey is a first for its focus on Hollywood and for its comprehensiveness.

As with most surveys, there are limitations that could affect interpretations. It was conducted online between Dec. 4, 2017, and Jan. 14 after emails were sent to members of The Creative Coalition and Women in Film and Television inviting them to participate. As a self-selected sample of respondents, it is not scientifically representative of the entire industry, let alone the broader national population of women working in all industries.

Thus, says Anita Raj, director of the Center for Gender Equity and Health at the University of California, San Diego's medical school (http://gph.ucsd.edu/people/core/Pages/raj.aspx), the survey should be treated with some caution. But she believes that the results overall are "credible and important" and that people should pay attention.

"The percentages (in USA TODAY's survey) are higher than what we typically see for workplace abuses, but we know there is variation by the type of workplace," Raj says. "But it makes sense to me that we would see higher numbers (in the entertainment industry)," where the "casting couch" has prevailed for decades and is considered "normal."

Further reading:: USA TODAY's sexual harassment in Hollywood survey methodology explained (https://www.usatoday.com/story/life/people/2018/02/20/usa-today-sunshine-project-methodology-explained/310757002/)

Women may not always know the line between the demands of showbiz and what constitutes sexual harassment, she says. In fact, Raj says, kissing someone without their consent is actually a crime (http://statelaws.findlaw.com/california-law/california-sexual-assault-laws.html) in California, which, she notes, once happened on live TV in front of millions: when Adrien Brody, who won the best-actor Oscar in 2003, grabbed presenter Halle Berry and dip-kissed her at the podium before his acceptance speech. She was not happy, she acknowledged years (https://www.thewrap.com/halle-berry-adrien-brody-kiss-wwhl/)later, but everyone else just laughed.

"Yes, I'd like to see more solidity in the scientific aspects of how the data was collected. But 94% does not seem shocking. It says this is ubiquitous in Hollywood," Raj says. "There is a lack of clarity on what constitutes professional interactions in this (Hollywood) context. So it wouldn't surprise me if in fact it *were* 94%."

About this project

In October 2017, women courageously began speaking out about sexual misconduct by men in Hollywood. To continue this movement in 2018 and beyond, USA TODAY is taking an in-depth look at the issue of sexual harassment and assault in the entertainment industry. Our exclusive survey in partnership with The Creative Coalition, Women in Film and Television and the National Sexual Violence Resource Center found that 94% of hundreds of women questioned say they have experienced some form of sexual harassment or assault during their careers in Hollywood.

Further reading

Our survey methodology, explained: We wanted to quantify the pervasiveness of sexual harassment in Hollywood, in the hope of promoting change. Here's how we did it.

She wanted a Hollywood career. Her agent wanted sex. Four women share their #MeToo stories.

'Death by a thousand cuts': How minor incidents of harassment create toxic environments for women.

Coming soon

We'll examine how to fix a broken system. Mounting allegations have forced the top unions, trade groups and studios to re-examine their policies surrounding sexual harassment and assault. We assess what

What kind of misconduct is happening?

Most often, it's someone making unwelcome sexual comments, jokes or gestures: 87% of respondents say this has happened to them at least once. Also, 69% say they've been groped (slapped, pinched or brushed in a sexual way) at least once, and 64% say they have been propositioned for sex or a relationship at least once.

"It happens so frequently that it's just the functioning normal," says a camera operator in her early 40s. "For me, this includes everything from misogynistic or sexual comments made over a headset while working, to blatant grabbing to comments about my body. I've spent the last 20 years accepting it as the price of doing business in a 'man's job.' "

Far fewer respondents say they've been shown sexual pictures without consent (39%) or have been on the receiving end of someone

Many men wore Time's Up pins to the Golden Globe Awards and other red carpet events to show their support for the protests against sexual misconduct.

(Photo: Dan MacMedan, USA TODAY)

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exposing themselves (29%).

What can happen in a Hollywood audition?

A small but still significant number (10%) of the women in the survey say they have been forced to appear naked — unexpectedly — during auditions or in the course of their professional work at least once.

> Jennifer Lawrence has described how, when she was just starting out, a female producer insisted she do a nude lineup with other nude women (https://www.usatoday.com/story/life/people/2017/10/17/jennifer-lawrence-hollywood-elle-women-in-film/770986001/) during an audition to shame her into losing weight.

And Melissa Gilbert has said she once ran out of an audition in tears because a director intentionally tried to humiliate and degrade her by making her do a "dirty" sex scene (https://www.usatoday.com/story/life/people/2017/11/21/melissa-gilbert-says-oliver-stone-humiliated-her-in-audition-for-the-doors/884074001/).

"There are also little ways women get manipulated into showing more of their bodies on camera," says a female actor in her early 40s. "Like, I had a friend who was on an HBO show and the producers called her the *night before* she's supposed to start shooting and tell her that if she didn't do full frontal nudity (which they didn't state that they expected at her audition), they would demote the role from a recurring to a one-time guest star."

Where does misconduct happen?

More than one-third (35%) of respondents say they have been asked to hold work activities or meetings in inappropriate environments such as hotel rooms or bedrooms. Recall that many of Weinstein's accusers asserted that sexual misconduct took place after he lured them to hotel rooms on the pretext of a business meeting.

"My boss took me to dinner to apologize for being incredibly insulting," says a producer in her early 60s. "After dinner he told me to come back to the studio but instead took me to his apartment (that was behind

the studio). He then asked me to give him (oral sex). I refused. To which he said, 'Why do you think I took you to dinner?' "

Almost every one of hundreds of women questioned in an exclusive survey by USA TODAY say they have experienced some form of sexual harassment or assault during their careers in Hollywood.

(Photo: Kirby Lee, USA TODAY Network)

How many women are expected to trade sex for advancement?

One-fifth (20%) of respondents say they have been put in a quid pro quo position: provide sexual acts with the implicit or explicit promise of promotions or other forms of career advancement. Also, 65% of respondents say they witnessed others advance professionally as a result of sexual relationships with employers or managers.

“After a job interview over lunch, my potential new boss walked me to my car and put his arm around my waist and pulled me very close to him," says a writer in her late 40s. "I pushed him away and said I'm not interested in this (job). I came home and cried. I really thought I was being interviewed for a partnership role with equity."

Many of Hollywood's women, including Mariah Carey, America Ferrera, Natalie Portman, Emma Stone and Billie Jean King, wore black to the 75th Golden Globe Awards as a show of solidarity with the Time's Up movement.

(Photo: Dan MacMedan, USA TODAY)

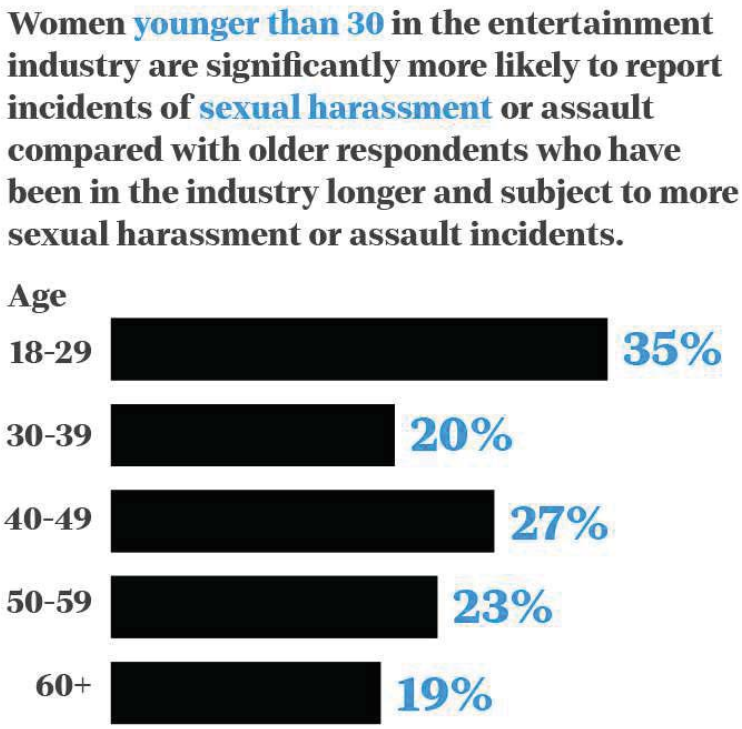
Are women more likely to encounter harassment with age and experience?

More women older than 40 say they were asked to hold meetings in hotel rooms (41% of age 40 to 49) than women younger than 30 (31%).

Similarly, those with more than 20 years experience were more likely to say they were put in a sex-for-advancement position (28%) than women with less than five years in the industry (11%).

How do age and experience influence whether misconduct is reported?

Women younger than 30 were more likely to report (35%) than those older than 60 (19%). Women with less than five years experience were more likely to report (32%) than those with more than 20 years (24%).



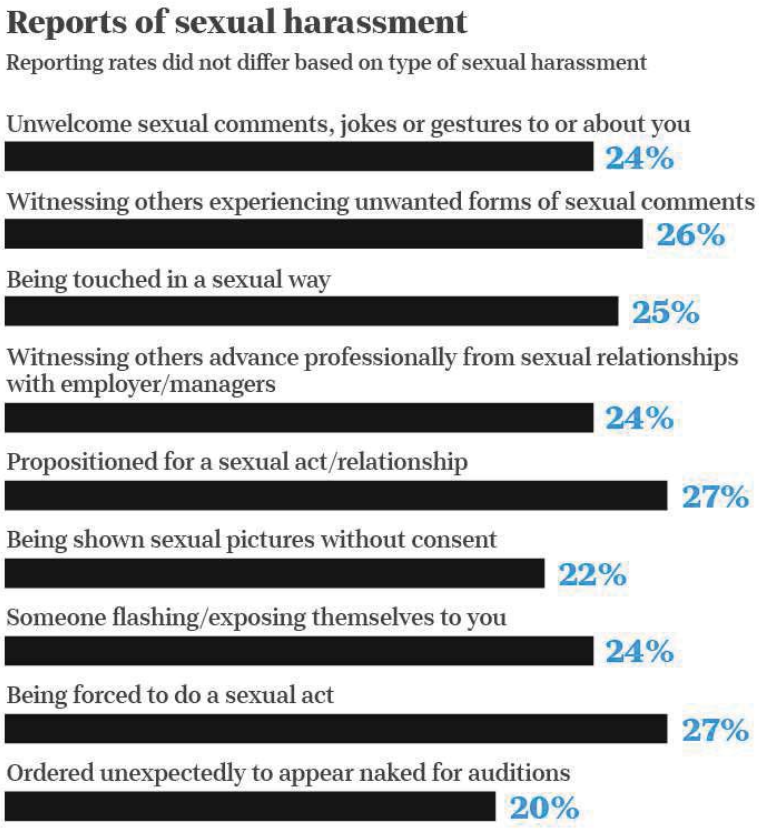
Why don't women report misconduct?

Most sexual misconduct goes unreported largely out of fear. But 40% of respondents say they did not trust the system. More than one-third — 34% — weren't even sure what happened to them amounted to sexual harassment, and 32% say they had no evidence so it was their word against the accused. And 20% say they felt shame.

"On countless occasions, I have been in a position at events with clients, where either the client or a member of the client's team has made sexually explicit comments, sexual advances and/or touched my body without consent," says a publicist in her early 40s. "These assailants seem confident enough to know they can become predators without repercussion."

Often, she says, there are no human resources departments working with producers or directors to take a complaint. As a contract worker, her only "professional exit" option in these situations is to wait out the end of her contract without renewal.

"Being in a line of work that obtains clients through word-of-mouth makes me reluctant to speak (about) these sexual harassment/assault experiences for fear of losing clients or collaborations with other firms/companies," she says.



What happened after misconduct was reported?

Of those few who reported misconduct, the result was most often a warning or reprimand (32%) or removal of the harasser (23%). A fraction (8%) of respondents say they were fired after reporting and 4% say there was a settlement in their case. And zero cases were prosecuted.

Also, a quarter of the respondents (24%) say they left their companies specifically because of sexual misconduct incidents.

"There was one specific instance where I reported a horrible incident of harassment to superiors and the male boss of the man who harassed me told me that 'he wouldn't do such a thing' and stopped replying to my emails," says a director in her early 30s. "Women superiors, though more sympathetic, implied nothing more could be done. I simply couldn't keep working in an environment that would be both physically and mentally unsafe for me."

Who are the assailants?

They're male, older and for the most part more powerful than their accusers. About one-third (29%) were directors, agents, producers or someone else in an authority position as the industry defines it. About one-quarter (24%) were peers or co-workers, and one-fifth (20%) were supervisors or senior managers. Less than 10% were influential individuals in the industry, such as celebrities, and few were in a lower position than the accuser (3%).

THE HARVEY WEINSTEIN EFFECT

Tracking the many men accused of sexual misconduct since the scandal broke

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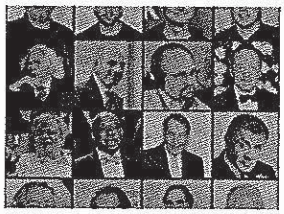
After Weinstein: More than 100 high-powered men accused of sexual misconduct

Editors, USA TODAY Published 4:13 p.m. ET Nov. 22, 2017 | **Updated 9:25 a.m. ET Jan. 30, 2018**



(Photo: AP, Getty Images)

Corrections & Clarifications: Former CNN producer Teddy Davis has been removed from this list. He was accused of inappropriate behavior, according to CNN.

Since the allegations of sexual abuse by Hollywood producer Harvey Weinstein surfaced on Oct. 5, women have been stepping forward to publicly share their stories of sexual misconduct.

Although many of the accusations originally focused on Hollywood, more than 100 high-profile men across industries — including tech, business, politics and media — have since faced claims ranging from sexual harassment to rape (/story/news/nation/2017/11/17/americans-agree-sexual-harassment-problem-they-just-dont-always-agree-what/864621001/).

INTERACTIVE CALENDAR: The near daily onslaught of men accused (/pages/interactives/life/the-harvey-weinstein-effect/)

Below is a list (organized alphabetically) of powerful men who have been accused since the Weinstein scandal broke: (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Ben Affleck

The actor and director was accused of groping (/story/life/movies/2017/10/10/rose-mcgowan-calls-out-ben-affleck-his-harvey-weinstein-statement-you-lie/752025001/) MTV host Hilarie Burton during a 2003 appearance on *Total Request Live*. He issued an apology on Oct. 11, tweeting (https://twitter.com/BenAffleck/status/918166049501208576), "I acted inappropriately toward Ms. Burton and I sincerely apologize." His apology came a day after he condemned Weinstein's behavior.

Tom Ashbrook

The host of National Public Radio program *On Point* was suspended following allegations (/story/life/2017/12/11/veteran-npr-host-tom-ashbrook-suspended-alleged-sexual-misconduct/940903001/) including he engaged in "creepy" sex talks and gave unwanted hugs, neck and back rubs to 11 mostly young women and men who worked on the show. In a statement, Ashbrook said he is sure "once the facts come out that people will see me for who I am — flawed but caring and decent in all my dealings with others."

Gavin Baker

The technology fund manager at Fidelity Investments was accused by multiple employees of harassment, most notably a female equity-research associate who claims she was sexually harassed by Baker and filed a complaint, reports *The Wall Street Journal* (https://www.wsj.com/articles/star-fidelity-manager-gavin-baker-fired-over-sexual-harassment-allegations-1507841061). An attorney for the woman claimed Baker was fired by Fidelity, but Baker — who said in a statement he "strenuously" denies any allegations — claims he left the company "amicably."

Ken Baker

The E! News correspondent has been accused by two women of harassment, including an intern who claims he kissed her without consent in 2011, reports *The Wrap* (https://www.thewrap.com/ken-baker-e-news-sexual-harassment-from-an-unwanted-kiss-to-a-text-about-a-sex-toy/). E! News said Baker will remain off the air while it investigates. "I am very disturbed by these anonymous allegations, which make my heart ache. I take them very seriously," said Baker in a statement to *The Wrap*.

Mario Batali

The renowned chef said he was stepping down from his company and TV show indefinitely (/story/money/2017/12/11/mario-batali-sexual-harassment/939785001/) following accusations of sexual harassment by mutiple women. "I take full responsibility and am deeply sorry for any pain, humiliation or discomfort I have caused to my peers, employees, customers, friends and family," said Batali in a statement.

Randy Baumgardner

A former legislative intern told NPR affiliate KUNC (http://www.kunc.org/post/colorado-senators-baumgardner-and-tate-named-allegations-sexual-harassment) of multiple uncomfortable encounters with Republican Colorado state Sen. Randy Baumgardner during the 2016 legislative session. She has filed a formal complaint. The report also cites six unnamed lobbyists and staffers who say they avoid the senator while at work. Baumgardner denied wrongdoing.

RELATED: At least 40 state lawmakers accused of sexual misconduct in past year, USA TODAY Network investigation finds (/story/news/nation-now/2017/11/20/sexual-harassment-statehouses/882874001/)

Eddie Berganza

Four women accused the DC Comics editor of sexual harassment in a piece published on *Buzzfeed* (https://www.buzzfeed.com/jtes/dc-comics-editor-eddie-berganza-sexual-harassment?utm_term=.ayyE6LdGq#.kl0PMgLqK). Days later, Warner Bros. and DC Comics fired him, reports *Entertainment Weekly* (http://ew.com/books/2017/11/13/dc-comics-fires-editor-eddie-berganza-over-sexual-harassment-accusations/).

John Besh

Chef John Besh attends the Supper to benefit the Global Fund to fight AIDS in New York. Besh is stepping down from the restaurant group that bears his name after a newspaper reported that 25 current or former employees of the business said they were victims of sexual harassment. *(Photo: Brad Barket/Invision/AP)*

Twenty-five women have said they were sexually harassed (by John Besh or other male employees) while working at one of the celebrity chef's (http://www.nola.com/business/index.ssf/2017/10/john_besh_restaurants_fostered.html#incart_special-report) restaurants. Besh stepped down from Besh Restaurant Group (http://www.nola.com/business/index.ssf/2017/10/john_besh_restaurants_fostered.html#incart_special-report) on Oct. 23.

"I have been seeking to rebuild my marriage and come to terms with my reckless actions," he wrote in a statement (http://www.nola.com/business/index.ssf/2017/10/statements_by_john_besh_and_hi.html). "I also regret any harm this may have caused to my second family at the restaurant group, and sincerely apologize to anyone past and present who has worked for me who found my behavior as unacceptable as I do."

Stephen Bittel

Florida Democratic Party Chairman Stephen Bittel has been accused of sexually inappropriate comments and behavior toward a number of women. Bittel resigned.

Stephen Blackwell

Billboard magazine executive Stephen Blackwell was accused of sexual harassment by one woman. He has resigned from the magazine.

David Blaine

In a piece published by *The Daily Beast (https://www.thedailybeast.com/exclusive-former-model-accuses-david-blaine-of-rape)*, model Natasha Prince claims the magician raped her in 2004 shortly after her 21st birthday. Prince reported the incident to London police, and investigators contacted Blaine's lawyer, Marty Singer, to return to the United Kingdom for an interview, said the report. In a statement to *The Daily Beast* and ABC News (https://twitter.com/DanLinden/status/921119602872082432), Blaine's attorney denied the allegations (/story/life/people/2017/10/20/david-blaine-denies-allegation-he-raped-model-2004-natasha-prince/783294001/).

Sepp Blatter

Former FIFA president Sepp Blatter gives an interview to news agencies on April 21. *(Photo: Michael Buholzer, AFP/Getty Images)*

Hope Solo, the former goalkeeper for the U.S. women's national soccer team, accused the former FIFA president (/story/sports/soccer/2017/11/11/hope-solo-says-blatter-grabbed-her-he-calls-it-ridiculous/107577500/) of grabbing her rear during a soccer ceremony. Blatter told the AP the accusation is "ridiculous."

Raul Bocanegra

The California assemblyman announced Nov. 20 he will not seek re-election following accusations of harassment from six women, reports the *Los Angeles Times* (http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-assemblyman-raul-bocanegra-announces-he-1511198136-htmlstory.html). Bocanegra cited "persistent rumors and speculation" in his decision not to serve another term.

George H.W. Bush

Former Republican president George H.W. Bush has been accused by seven women (/story/news/politics/2017/11/16/report-seventh-woman-accuses-george-h-w-bush-groping-her-during-re-election-campaign/871793001/) of grabbing their butts. One of the women says she was 16 at the time (/story/news/politics/2017/11/13/george-h-w-bush-apologizes-after-woman-accuses-him-groping-her-when-she-16/858476001/). After the initial report Oct. 25, a Bush spokesman issued a statement of apology, saying "on occasion, he has patted women's rears (/story/news/politics/onpolitics/2017/10/25/president-george-h-w-bush-apologizes-actress-who-alleged-improper-touching/797846001/)" and it was never meant to cause offense.

Louis C.K. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

The actor and comedian was accused of sexual misconduct by five woman in an exposé published by *The New York Times* (https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html?rref=collection%2Fsectioncollection%2Farts&action=click&contentCollection=arts&region=rank&module=package&version=highlights&contentPlacement= on Nov. 9. Among the claims, comedian Dana Min Goodman alleged C.K. exposed himself and started masturbating in front of her and fellow comedian Julia Wolov in his hotel room during a comedy festival in 2002. C.K. admitted to committing the acts described in the *Times* piece. "These stories are true," he wrote in a statement released by his publicist, Lewis Kay, on Nov. 10. C.K. has since lost a host of jobs, including his gig with the upcoming *Secret Life of Pets* sequel.

Nick Carter

Melissa Schuman, formerly of the pop group Dream, accused Backstreet Boys' Nick Carter on Nov. 2 of raping her (/story/life/people/2017/11/22/nick-carter-denies-melissa-schuman-rape-allegations/888800001/) when she was 18. Carter denies the allegations.

Giuseppe Castellano

Penguin Random House art director Giuseppe Castellano was accused by one woman of sexual harassment. Penguin Random House is investigating. Castellano has not commented.

John Conyers

Facing a rising chorus of voices demanding he step down because of sexual harassment claims, Rep. John Conyers Jr., D-Mich., retired on Dec. 5 (/story/news/politics/2017/12/05/john-conyers-announcement/922417001/) from the seat he has held for more than five decades, a swift and crushing fall from grace for a civil rights icon and the longest-serving active member of Congress. Conyers has been accused of sexual harassment toward staffers in his office and has settled at least one claim. He has denied the allegations, even the one he settled. Conyers said, "They're not accurate, they're not true and they're something I can't explain where they came from."

David Copperfield

The illusionist was accused by Brittney Lewis (/story/life/people/2018/01/24/david-copperfield-calls-metoo-movement-crucial-but-warns-new-allegations/1064051001/) of drugging and sexually assaulting her when she was 17. Lewis told The Wrap the incident happened after she competed in a modeling contest where Copperfield, then 32, was a judge. Before the story published, Copperfield released a statement saying he supports the Me Too movement but cautioned against rushing to judgment about false allegations.

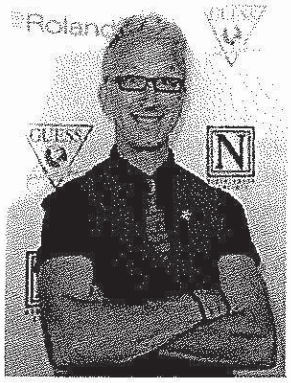
Tony Cornish

Minnesota Republican state Rep. Tony Cornish announced on Nov. 21 that he would resign after being accused of inappropriate behavior by female lobbyist Sarah Walker and Rep. Erin Maye Quade. Cornish said in a statement he had reached an agreement in principle with Walker, who told Minnesota Public Radio News (https://www.minnpost.com/politics-policy/2017/11/amid-sexual-harassment-allegations-sen-dan-schoen-and-rep-tony-cornish-resig) that Cornish had propositioned her for sex dozens of times and once forced her into a wall in an attempt to kiss her. Cornish said the agreement calls for him to apologize and resign. Quade produced texts in which Cornish makes inappropriate comments about her appearance.

Eric Davis

The former NFL player was suspended by ESPN (/story/sports/nfl/2017/12/12/donovan-mcnabb-eric-davis-suspended-espn-investigates-sexual-harassment-allegations-nfl-network/943898001/) after he was named in a sexual misconduct lawsuit over claims while he was employed by NFL Network. Davis has yet to comment on the claims.

Andy Dick



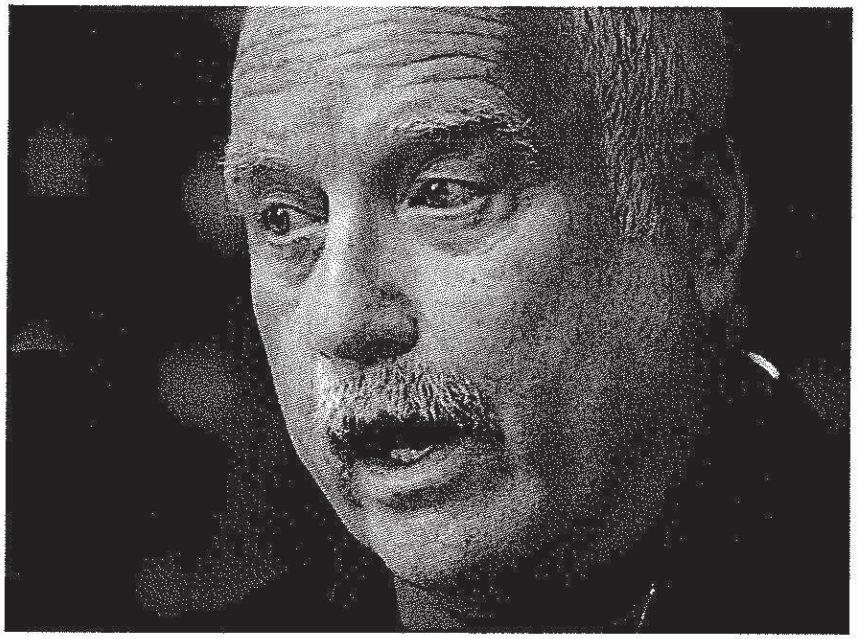
Actor and comedian Andy Dick has been fired from his role in the film 'Raising Buchanan' after he was accused of "groping people's genitals, unwanted kissing/licking and sexual propositions of at least four members of the production on the set," according to 'The Hollywood Reporter.' Dick denied groping claims, but admitted to licking and propositioning people. *(Photo: Kevork Djansezian, Getty Images)*

The actor and comedian (*Road Trip*), was accused of "groping people's genitals, unwanted kissing/licking and sexual propositions of at least four members of the production," on the set of the independent feature film *Raising Buchanan*, according to a report from *The Hollywood Reporter* (http://www.hollywoodreporter.com/rambling-reporter/andy-dick-fired-movie-sexual-harassment-claims-1053162). In an interview with the news outlet Oct. 30, Dick denied the groping claims, but admitted to licking and propositioning people. He has since been fired from his role in *Buchanan*, and was let go from a separate film (http://www.vulture.com/2017/11/andy-dick-fired-from-another-film-for-groping-and-harassment.html) for similar behavior.

Michael Douglas

Author and journalist Susan Braudy claims the actor harassed her (/story/life/people/2018/01/19/michael-douglas-accused-sexual-misconduct-writer-susan-braudy-appalled/1047226001/) while she worked at his production company, Stonebridge Productions. Braudy told *The Hollywood Reporter* (https://www.hollywoodreporter.com/features/michael-douglas-alleged-harassment-media-metoo-moment-1075609) Douglas made sexually charged comments and masturbated in front of her during a private script meeting. Last month, Douglas gave a preemptive interview (/story/life/people/2018/01/10/michael-douglas-denies-sexually-harassing-blackballing-former-employee-complete-lie/1019810001/) denying ever harassing any employees after *THR* contacted him about the story.

Richard Dreyfuss



A writer who worked for actor and political activist Richard Dreyfuss said he sexually harassed her for years and exposed himself to her in a studio lot trailer when she worked for him in the '80s. Jessica Teich told the 'New York Magazine' that the actor made continual, overt and lewd comments and invitations after they met at a theater where she worked and Dreyfuss appeared. Dreyfuss denied the actor ever exposed himself to Teich but acknowledged to other encounters he now realizes were inappropriate. *(Photo: Manuel Balce Ceneta, AP)*

Actor Richard Dreyfuss (/story/life/people/2017/11/10/days-after-his-sons-sexual-assault-reveal-richard-dreyfuss-denies-harassing-l-a-writer/854122001/) (*Jaws*, *Mr. Holland's Opus*) was accused on Nov. 10 of sexual harassment by writer Jessica Teich, who said Dreyfuss showed her his penis. Dreyfuss denies exposing himself, but admitted that "at the height of my fame in the late 1970s I became an asshole — the kind of performative masculine man my father had modeled for me to be. I lived by the motto, 'If you don't flirt, you die.' And flirt I did ... But I am not an assaulter."

Charles Dutoit

The artistic director and principal conductor of London's Royal Philharmonic Orchestra has been accused by four people (/story/life/people/2017/12/21/famed-conductor-charles-dutoit-accused-sexual-misconduct/972882001/) of sexual misconduct. Dutoit has yet to respond to the claims.

Heath Evans

The former pro football player was suspended as an analyst (/story/sports/nfl/2017/12/12/nfl-network-suspends-analysts-over-sexual-misconduct-suit/108532946/) by the NFL Network after a former wardrobe stylist accused him of misconduct in a lawsuit. He has yet to respond to the claim.

Michael Fallon

British Defense Secretary Michael Fallon was accused of inappropriate advances on two women. The Conservative resigned. Sexual harassment and assault allegations have also emerged against a number of other U.K. political figures.

Blake Farenthold

The Texas state representative plans to withdraw from the Republican primary (/story/news/local/texas/state-bureau/2017/12/14/report-farenthold-withdraw-race/951287001/) on March 6 after details emerged he settled a sexual harassment lawsuit filed by a former aide with $84,000 in taxpayers' money.

Marshall Faulk

The former pro football player was suspended as an analyst (/story/sports/nfl/2017/12/12/nfl-network-suspends-analysts-over-sexual-misconduct-suit/108532946/) by the NFL Network after a former wardrobe stylist accused him of misconduct in a lawsuit. He has yet to respond to the claim.

Adam Fields

Film producer Adam Fields has been accused of offering a promotion to a woman at his former employer, Relativity Media, in exchange for sex. He has denied the allegations.

Hamilton Fish

The president and publisher of *The New Republic* magazine resigned on Nov. 3 following a report from *The New York Times* (https://www.nytimes.com/2017/11/03/business/media/hamilton-fish-new-republic-resignation.html) of an investigation into allegations of inappropriate conduct by female employees. In an email to New Republic owner Win McCormack, Fish expressed "deep dismay" at the claims. "Women have longstanding and profound concerns with respect to their treatment in the workplace," he wrote. "Many men have a lot to learn in this regard. I know I do, and I hope for and encourage that new direction."

Harold Ford Jr.

The former Tennessee congressman Harold Ford Jr. was fired by Morgan Stanley (/story/money/nation-now/2017/12/07/report-former-rep-harold-ford-jr-fired-alleged-misconduct/931897001/) after accusations of misconduct. Ford denied the allegations and said he would bring legal action against the woman and his former employer.

Al Franken

The Democratic U.S. Senator from Minnesota and *Saturday Night Live* alum was accused by TV host and broadcaster Leeann Tweeden (/story/news/politics/2017/11/16/sen-al-franken-accused-kissing-and-groping-sportscaster-leeann-tweeden-without-her-consent/870097001/) of kissing and groping her without her consent while on a USO tour in the Middle East in 2006. A second woman has stepped forward claiming Franken inappropriately touched her. While Congressional leaders seek a review of the claims, Franken apologized for the Tweeden incident (/story/news/politics/onpolitics/2017/11/16/read-al-frankens-apology-broadcaster-leeann-tweeden/87091300 1/). "I respect women," he said. "I don't respect men who don't. And the fact that my own actions have given people a good reason to doubt that makes me feel ashamed." Franken resigned on Dec. 7 (/story/news/politics/onpolitics/2017/12/07/sen-al-franken-takes-dig-trump-moore-resignation-speech/930997001/) after more than a half dozen women stepped forward with misconduct allegations.

Trent Franks

The Arizona representative said he would resign immediately (/story/news/politics/2017/12/08/rep-trent-franks-says-he-resign-immediately-citing-wifes-illnessa-day-after-announcing-he-would-step/935858001/), citing his wife's illness. Franks originally planned to step down in January after an aide claimed he repeatedly asked her to serve as a surrogate.

Alex Gilady

International Olympic Committee member Alex Gilady has been accused by two women of rape and by two others of inappropriate conduct (/story/sports/olympics/2017/11/09/olympic-ethics-panel-to-study-allegations-against-gilady/107494366/). Gilady denied the rape accusations, said he didn't recall one of the other allegations, but acknowledged a claim he'd propositioned a woman during a job interview 25 years ago was "mainly correct." He stepped down as president of an Israeli broadcasting company he founded. The IOC has said it is looking into the allegations.

Gary Goddard

The producer and writer (*Masters of the Universe*), was accused by *ER* actor Anthony Edwards of molesting him in an essay (https://medium.com/@anthonyedwards/yes-mom-there-is-something-wrong-f2bcf56434b9) published Nov. 10 on Medium. Edwards says he first met Goddard when he was 12, and served as a leader for Edwards' group of friends. "Everyone has the need to bond, and I was no exception," Edwards wrote. "My vulnerability was exploited. I was molested by Goddard, my best friend was raped by him — and this went on for years. The group of us, the gang, stayed quiet." Goddard's press representative Sam Singer put out a statement on Nov. 10 "unequivocally" denying Edward's charges. Since then, eight more former child actors have stepped forward (/story/life/people/2017/12/20/8-former-child-actors-accuse-producer-gary-goddard-sexual-misconduct/969095001/) to accuse Goddard of sexual harassment.

David Gomberg

Oregon state Rep. David Gomberg told The Oregonian/OregonLive (http://www.oregonlive.com/politics/index.ssf/2017/10/oregon_lawmaker_accused_of_ina.html) that two women's complaints against him involved "inappropriate humor or inappropriate touching," invasion of "personal space" and hugging. The Democratic representative has publicly apologized (https://www.thenewsguard.com/news/report-rep-gomberg-accused-of-inappropriate-behavior-responds/article_554063ee-bbfa-11e7-924b-1707c7ce98b7.html).

Brian Gosch

The former House Majority Leader in South Dakota was accused by former state lawmaker (/story/news/politics/2017/10/13/former-state-lawmaker-lobbyist-tell-sexual-harassment-rape-pierre/762566001/) and lobbyist Angie Buhl O'Donnell of asking for a hug and making comments about her breasts. Gosch said the comments were made in jest and not meant to make her feel uncomfortable.

Tyler Grasham

The Hollywood agent was fired from the Agency of the Performing Arts after a former actor accused him of sexual assault more than a decade ago while he was in his teens, reports *The Wrap* (https://www.thewrap.com/blaise-godbe-lipman-tyler-grasham-apa-hollywood-agent-fed-me-alcohol-sexually-assaulted-me/). Filmmaker Blaise Godbe Lipman claims Grasham gave him alcohol while underage and sexually assaulted. Actor Tyler Cornell also filed a police report against Grasham, alleging "a sodomy crime," according to *Variety* (http://variety.com/2017/biz/news/tyler-grasham-lapd-investigation-apa-agent-sexual-assault-sodomy-1202601993/). At least five men (http://losangeles.cbslocal.com/2017/10/31/agent-sexual-assault-tyler-grasham/) have accused him of sexual misconduct.

Jon Grissom

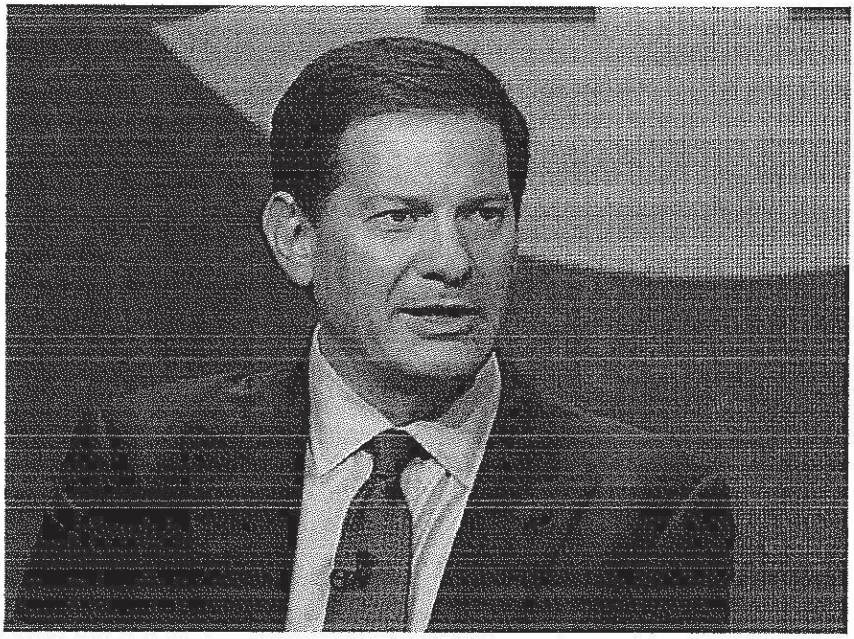
Former child star Corey Feldman identified former actor Jon Grissom (/story/life/people/2017/11/02/corey-feldman-identifies-man-he-says-molested-him/828210001/) as one of the men who molested him when he was a young teen in Hollywood. Feldman identified Grissom to *Dr. Oz* on Nov. 2, but not on air. Feldman called on victims to speak out and abusers to turn themselves in: "If you do not, we're coming for you."

David Guillod

The manager, producer and co-CEO of Primary Wave Entertainment (*Atomic Blonde*), was accused by actress Jessica Barth of drugging and sexually assaulting her in 2012 when he was working as her manager, she confirmed to *The Wrap* (https://www.thewrap.com/david-guillod-jessica-barth-ted-atomic-blonde-producer-drugged-assaulted-exclusive/) on Nov. 2. Barth said she reported the incident to the LAPD after it happened. She then said that Guillod threatened her with a lawsuit to keep her from pressing charges. Following the allegations, Guillod's attorney said charges were fully

investigated at the time, but he has taken a leave of absence from the company, reports *Deadline* (http://deadline.com/2017/11/david-guillod-leave-of-absence-primary-wave-sexual-assault-accusation-jessica-barth-1202201162/) and *The Hollywood Reporter* (http://www.hollywoodreporter.com/news/primary-wave-ceo-david-guillod-takes-leave-absence-sexual-assault-claims-1054750).

Mark Halperin



NBC News ended its contract with political commentator Mark Halperin after he was accused of sexual harassment. *(Photo: Richard Shotwell, AP)*

The MSNBC political analyst was accused by five women of sexual harassment (http://money.cnn.com/2017/10/25/media/mark-halperin-sexual-harassment-allegations/index.html), including forcible kissing. One woman claims Halperin grabbed her breasts. NBC News terminated his contract (/story/money/nation-now/2017/10/30/nbc-terminates-mark-halperins-contract-over-sexual-harassment-allegations-reports-say/812885001/), and he lost both a book deal and HBO project (https://preview.usatoday.com/story/money/nation-now/2017/10/26/5-accuse-nbc-analyst-mark-halperin-sexual-harassment/801982001/). In a statement to CNN, Halperin said he would take a step back to deal with the situation. "I now understand from these accounts that my behavior was inappropriate and caused others pain," he said. "For that, I am deeply sorry and I apologize."

Andy Henry

Casting employee Andy Henry admitted to urging women to take off their clothes during coaching sessions in 2008 while working on the "CSI" series. He was fired by his current employer.

Cliff Hite

The former Ohio senator resigned over claims (/story/news/politics/2017/10/28/yformer-ohio-senator-cliff-hite-repeatedly-sought-sex-legislative-employee-despite-refusals-memo-say/809267001/) he repeatedly asked a female legislative employee for sex. According to a memo obtained from the woman's employer, she refused his advances eight or nine times. "I sometimes asked her for hugs and talked with her in a way that was not appropriate for a married man, father and grandfather like myself," said Hite in a statement.

Dustin Hoffman

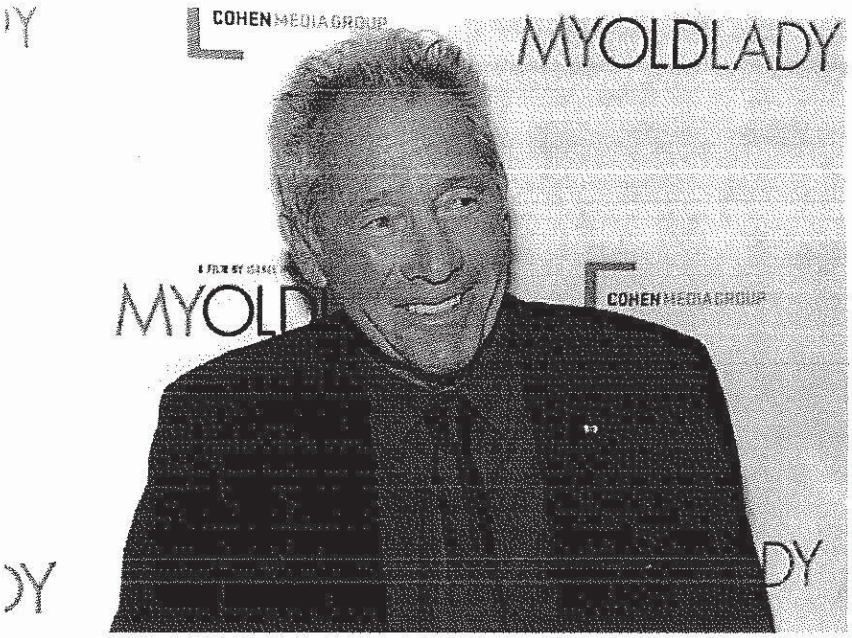
Anna Graham Hunter alleges that Oscar-winning actor Dustin Hoffman groped her and talked about sex in front of her while she was a 17-year-old intern on the set of his 1985 TV-movie adaptation of 'Death of a Salesman.' Hoffman apologized in a statement to the 'Associated Press,' saying, "I have the utmost respect for women and feel terrible that anything I might have done could have put her in an uncomfortable situation... It is not reflective of who I am." The following day, a second accuser, Wendy Riss Gatsiounis told 'Variety' the actor made verbal advances and tried to convince her to go to a hotel. *(Photo: Jordan Strauss, Invision/AP)*

The Oscar-winning actor known for *Rain Man* and *The Graduate*, was accused of sexual harassment by Anna Graham Hunter in an article published by *The Hollywood Reporter* (http://www.hollywoodreporter.com/features/dustin-hoffman-sexually-harassed-me-i-was-17-guest-column-1053466) on Nov. 1. Hunter alleges talked about sex in front of her while she was a 17-year-old intern on the set of his 1985 TV-movie adaptation of *Death of a Salesman*. Hoffman apologized in a statement to the Associated Press (/story/life/people/2017/11/01/dustin-hoffman-apologizes-alleged-1985-sexual-harassment-incident/821209001/), saying, "I have the utmost respect for women and feel terrible that anything I might have done could have put her in an uncomfortable situation... It is not reflective of who I am." The following day, a second accuser (/story/life/people/2017/11/02/dustin-hoffman-second-woman-accuses-oscar-winner-sexual-harassment/825099001/), Wendy Riss Gatsiounis, told *Variety* he made verbal advances and tried to convince her to go to a nearby hotel when she was a playwright in her 20s.

Jeff Hoover

Kentucky House Speaker Jeff Hoover stepped down as speaker after news surfaced that the Republican had settled a sexual harassment claim from a GOP caucus staffer. Hoover denied the harassment allegation but said he sent consensual yet inappropriate text messages. He remains in the Legislature.

Israel Horovitz



Nine women have accused playwright Israel Horovitz of sexual misconduct and his son, Beastie Boys' Adam Horovitz, says he believes the accusers. *(Photo: Andy Kropa, Andy Kropa /Invision/AP)*

Nine women who have accused award-winning playwright Israel Horowitz of sexual misconduct have the support of his son, Adam Horovitz of the Beastie Boys (/story/life/people/2017/11/30/beastie-boys-adam-horovitz-father-sexual-abuse-allegations/912229001/). The women detailed their allegations against Horovitz in a story Nov. 30 in The New York Times. Some were in the teens and others were in their 20s when they say the incidents occurred. The alleged abuse by Horovitz includes forced kissing, sexual touching and rape.

Dylan Howard

Dylan Howard, the top editor for the *National Enquirer* (/story/money/business/2017/12/05/ap-exclusive-top-gossip-editor-accused-sexual-misconduct/924783001/), *Us Weekly* and other major gossip publications openly described his sexual partners in the newsroom, discussed female employees' sex lives and forced women to watch or listen to pornographic material, former employees told The Associated Press.

Jesse Jackson

The civil rights activist was accused by The Root writer Danielle Young (https://www.theroot.com/don-t-let-the-smile-fool-you-i-m-cringing-on-the-insid-1819987586) of inappropriate touching following a keynote speech he gave. She said colleagues witnessed him grab her thigh. In a statement given to The Root, a representative for Jackson said he does not recall the incident but "profoundly and sincerely regrets any pain Ms. Young may have experienced."

Fullscreen

The Rev. Jesse Jackson through the years

Danny Jordaan

Former South African soccer association president Danny Jordaan (/story/news/world/2017/11/14/weinstein-effect-goes-global-powerful-men-confronted/862353001/) has been accused by former member of parliament Jennifer Ferguson of raping her in 1993. Jordaan denies the accus on.

Ethan Kath

The songwriter and producer of Canadian music group Crystal Castles was accused of rape on Oct. 24 by former bandmate Alice Glass in a lengthy letter posted on her website, *Vulture* (http://www.vulture.com/2017/10/alice-glass-accuses-crystal-castless-ethan-kath-of-rape.html) and *The Huffington Post* (https://www.huffingtonpost.com/entry/alice-glass-crystal-castles-abuse_us_59f090f0e4b0e064db7e0d20) report. She claims the abuse lasted for almost 10 years, starting when she was 15 years old, and that this was the reason she left the band, which she co-founded with Kath, in 2014. In a statement to Pitchfork (https://pitchfork.com/news/alice-glass-accuses-crystal-castles-co-founder-ethan-kath-of-rape-and-assault/) via his attorney, Kath — whose real name is Claudio Palmieri — denied the allegations. "I am outraged and hurt by the recent statements made by Alice about me and our prior relationship," the statement reads. "Fortunately, there are many witnesses who can and will confirm that I was never abusive to Alice."

Garrison Keillor

Ethan Kath (Claudio Palmieri), 34, a songwriter and producer of Canadian music group Crystal Castles. *(Photo: C Flanigan, FilmMagic)*

The veteran radio host confirmed he was fired by Minnesota Public Radio (/story/life/people/2017/11/29/garrison-keillor-fired-alleged-improper-behavior-minnesota-public-radio/905491001/) for accusations of improper behavior. In a follow-up statement, Keillor told The Associated Press he was dismissed over "a story that I think is more interesting and more complicated than the version MPR heard." MPR said it is ending its business relationship with Keillor, which includes rebroadcasts of *The Best of A Prairie Home Companion*.

Ruben Kihuen

Rep. Ruben Kihuen, D-Nev., speaks with reporters on Capitol Hill in Washington on Nov. 14, 2016. *(Photo: Cliff Owen, AP)*

U.S. Rep. Ruben Kihuen, D-Nev., is alleged to have touched the thighs of a campaign aide as well as asked her out on dates and commented on her appearance, according to a Dec. 1 report by Buzzfeed News (https://www.buzzfeed.com/katenocera/she-says-she-quit-her-campaign-job-after-he-harassed-her?utm_term=.fxOxmVkZw#.gr89bK2EY). Democratic Congressional Campaign Committee chairman Rep. Ben Ray Lujan called on Kihuen to resign. Kihuen's office released a statement, including: "I sincerely apologize for anything that I may have said or done that made her feel uncomfortable."

Robert Knepper

Actor Robert Knepper, star of *Prison Break* and *iZombie*, has been accused by one woman of sexual assault. He denies the allegations.

Andrew Kreisberg

The creator of CW superhero series *Arrow*, *The Flash*, *Supergirl* and *Legends of Tomorrow*, was fired by Warner Bros (/story/life/tv/2017/11/29/supergirl-producer-andrew-kreisberg-fired-after-sexual-misconduct-investigation/905716001/)., spokesperson Tammy Golihew confirmed to USA TODAY, after *Variety (http://variety.com/2017/tv/news/warner-bros-sexual-harassment-andrew-kreisberg-1202612522/)*published a story in which 15 women and four men alleged sexual harassment and inappropriate physical contact. He told the trade magazine that he denied any inappropriate touching or massages, saying "I have made comments on women's appearances and clothes in my capacity as an executive producer, but they were not sexualized. Like many people, I have given someone a non-sexual hug or kiss on the cheek."

Jeff Kruse

Two Oregon lawmakers filed formal complaints (http://www.oregonlive.com/politics/index.ssf/2017/11/second_oregon_state_senator_pu.html) against the Republican state Sen. Jeff Kruse for sexual harassment and inappropriate touching. Kruse denied the allegations in an interview with *The Oregonian* (http://www.oregonlive.com/politics/index.ssf/2017/11/second_oregon_state_senator_pu.html).

Knight Landesman

The publisher of Artforum has been accused by multiple women of sexual harassment. According to *The New York Times* (https://www.nytimes.com/2017/10/25/nyregion/knight-landesman-artforum-sexual-harassment-lawsuit.html), nine women filed a lawsuit in New York claiming he sexually harassed them. Landesman has resigned from the magazine.

John Lasseter

The chief creative officer of Pixar and Walt Disney Animation Studios, will take a six-month leave of absence (/story/life/movies/2017/11/21/disney-pixar-head-john-lasseter-takes-leave-absence-after-missteps/886425001/) following what he called "missteps" in a memo obtained by USA TODAY on Nov. 21. The news broke as *The Hollywood Reporter* was compiling a report into alleged sexual misconduct, which published later that day citing sources who remain unnamed "out of fear that their careers in the tight-knit animation community would be damaged." The insiders told the industry publication that his behavior went beyond hugging to "grabbing, kissing, making comments about physical attributes."

Jack Latvala

Florida Republican state Sen. Jack Latvala is being investigated by the Senate over allegations of harassment and groping. Latvala has denied the allegations.

Matt Lauer

NBC News announced it fired the Today show co-host (/story/life/2017/11/29/matt-lauer-fired-nbc-inappropriate-workplace-behavior/904340001/) for "inappropriate workplace behavior." According to a memo from NBC News chairman Andrew Lack, Lauer's dismissal was sparked by "a detailed complaint from a colleague about inappropriate sexual behavior" in the workplace. The memo also said while this is the first formal complaint against Lauer during his NBC tenure, "we were also presented with reason to believe this may not have been an isolated incident."

Steve Lebsock

The Colorado state representative has been accused of harassment (/story/news/local/colorado/2017/11/11/accused-harassment-colorado-rep-lebsock-apologizes-causing-pain/855762001/) including inappropriate comments. Lebsock later apologized (https://www.stevelebsockforcolorado.com/press-release-1/#pressreleases) for "the pain I have caused."

James Levine

New York's Metropolitan Opera suspended its relationship with longtime conductor James Levine (/story/life/people/2017/12/03/metropolitan-opera-suspects-conductor-james-lesexual-abuse-accusations-against-conductor-james-levin/917728001/%20%C2%A0) Dec. 3 pending an investigation into multiple allegations of sexual misconduct against him. Several of the men accusing him say they were underage (/story/life/music/2017/12/05/metropolitan-opera-waited-year-to-act-on-accusation-against-conductor-james-levine/108325956/) when the incidents took place.

Corey Lewandowski

President Trump's former campaign manager was accused of sexual assault after a singer and potential congressional candidate claimed he hit her twice on her buttocks during a Washington gathering in November. According to the Associated Press (/story/news/politics/2017/12/27/singer-says-she-filed-sex-assault-complaint-against-former-trump-aide-corey-lewandowski/983672001/), Lewandowski did not respond to an email seeking comment.

Ivan Lewis

U.K. Labour Party member Ivan Lewis has been suspended over an allegation of sexual misconduct; Lewis disputed the account but apologized if his behavior had been "unwelcome or inappropriate."

Ryan Lizza

The reporter was fired from *The New Yorker* on Dec. 11 (/story/money/business/2017/12/11/new-yorker-fires-reporter-ryan-lizza-over-alleged-sexual-misconduct/942412001/) for an incident of "improper sexual conduct." CNN later suspended him as an on-air contributor. "I am dismayed that *The New Yorker* has decided to characterize a respectful relationship with a woman I dated as somehow inappropriate," said Lizza in a statement.

Peter Martins

Peter Martins (/story/life/people/2017/12/05/new-york-city-ballet-peter-martins-under-investigation-sexual-harassment/108326006/), who has led New York City Ballet since the 1980s, has been removed from teaching his weekly class at the School of American Ballet while the two organizations jointly investigate an accusation of sexual harassment against him, it was announced Dec. 4. On January 1, Martins announced he would retire, reports *The New York Times* (https://www.nytimes.com/2018/01/01/arts/dance/peter-martins-resigns-ballet.html?smid=tw-nytimes&smtyp=cur).

Danny Masterson

Actor Danny Masterson has been ousted from the Netflix series 'The Ranch' amid multiple sexual assault allegations. Revisit Masterson's Hollywood career in photos, from 'That '70s Show' to his more current projects. *(Photo: Annie I. Bang, Annie I. Bang/Invision/AP)*

Netflix yanked the actor from the series *The Ranch*following a series of sexual assault allegations (/story/life/people/2017/12/05/danny-masterson-fired-netflixs-amid-allegations/922500001/). In March, Los Angeles police said they started investigating Masterson after three women reported being sexually assaulted by him in the early 2000s. Masterson denies the allegations. "Law enforcement investigated these claims more than 15 years ago and determined them to be without merit," he said in the statement. "I have never been charged with a crime, let alone convicted of one."

Donovan McNabb

The former NFL quarterback was suspended by ESPN (/story/sports/nfl/2017/12/12/donovan-mcnabb-eric-davis-suspended-espn-investigates-sexual-harassment-allegations-nfl-network/943898001/) after he was named in a sexual misconduct lawsuit over claims while he was employed by NFL Network. McNabb has yet to comment on the claims.

Benny Medina

The manager who currently represents Jennifer Lopez was accused of attempted rape by *Sordid Lives* star Jason Dottley in an interview published by *The Advocate* (https://www.advocate.com/crime/2017/11/10/sordid-lives-actor-alleges-mogul-benny-medina-tried-rape-him) on Nov. 10. After throwing Dottley onto a bed in Medina's Los Angeles mansion in 2008, Medina "stuck his tongue down my mouth," Dottley alleges in the interview. A statement from Medina's lawyers Howard Weitzman and Shawn Holley to USA TODAY said Medina "categorically denies the allegation of attempted rape."

Tony Mendoza

Three women have accused California state Sen. Tony Mendoza of sexual harassment, the *Los Angeles Times* (http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-senate-panel-on-sen-tony-mendoza-from-1511802516-htmlstory.html) and *Sacramento Bee* (http://www.sacbee.com/news/politics-government/capitol-alert/article185133028.html) report. The Democrat was booted from leadership positions pending an investigation. He has denied wrongdoing.

Murray Miller

The screenwriter best known for the hit TV series *Girls* was accused of sexual assault by actress Aurora Perrineau, according to a. Nov. 20 report from *The Wrap* (https://www.thewrap.com/girls-murray-miller-aurora-perrineau-harold-perrineau-lost-oz/). Perrineau, who alleges the incident occurred in 2012 when she was 17, filed a report at the West Hollywood station of the Los Angeles County Sheriff's Department, Sgt. Nelson Rios confirmed to USA TODAY. Miller's attorney, Matthew B. Walerstein, sent USA TODAY a statement (/story/life/tv/2017/11/18/report-actress-aurora-perrineau-accuses-girls-writer-murray-miller-sexual-assault/876665001/) in which his client denied Perrineau's allegations. *Girls* creator and star Lena Dunham and executive producer Jenni Konner issued a statement Friday in support of Miller, which she later apologized for (/story/life/people/2017/11/19/lena-dunham-sorry-timing-statement-backing-girls-writer-accused-sexual-assault/878606001/) after receiving criticism. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

T.J. Miller

The actor denied claims reported in The Daily Beast (/story/life/people/2017/12/19/actor-t-j-miller-denies-accusations-sexual-assault-physical-violence/964492001/) from an anonymous alleged victim who said he punched and sexually assaulted her.

Roy Moore

The Republican candidate for U.S. Senator in Alabama was accused by eight women of a range of inappropriate conduct, ranging from unwanted attention to sexual misconduct and assault. Most of the incidents took place when Moore was assistant district attorney in Gadsden from 1977 to 1982. One woman, Leigh Corfman, said she was 14 when Moore, then 32, took her to his home, undressed her and guided her hand over his crotch. The legal age of consent, then and now, is 16. Moore calls the allegations "completely false," (/story/news/nation-now/2017/11/15/roy-moore-attorney-demands-accusers-yearbook/868848001/) and plans to continue his Senate campaign.

Rick Najera

The writer and producer was fired by CBS from his role as director of the network's annual diversity showcase after claims surfaced he made inappropriate comments to performers, reports *Variety* (http://variety.com/2017/tv/news/cbs-diversity-showcase-1202601412/). In a statement to *Variety*, Najera said he was "shocked" by the allegations. "Anyone who has been slammed by libelous deceptions knows exactly how we feel."

Larry Nassar

Longtime USA Gymnastics doctor Larry Nassar has been accused of sexual abuse by more than 120 women (/story/sports/olympics/2017/11/21/larry-nassar-usa-gymnastics-expected-plead-guilty-sexual-assault/886906001/) since the *Indianapolis Star* (/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/) first reported on assault allegations in September 2016. Since the #metoo movement, three members of the Fierce Five – the U.S. women's gymnastics team that won all-around gold at the 2012 London Olympics – have said he abused them, too: McKayla Maroney (/story/sports/olympics/2017/10/18/olympic-gold-medalist-mckayla-maroney-says-she-victim-sexual-abuse/774970001/), Aly Raisman (/story/sports/olympics/2017/11/12/aly-raisman-60-minutes-interview-larry-nassar/857203001/) and Gabby Douglas (/story/sports/olympics/2017/11/21/gabby-douglas-says-she-was-abused-former-usa-gymnastics-doctor-larry-nassar/886447001/). On Dec. 7, Nassar was sentenced to 60 years (/story/news/local/2017/12/07/larry-nassar-sentenced-60-years-federal-child-pornography-case/908838001/) in federal prison for child pornography.

Nelly

The rapper has been sued by a woman (/story/life/music/2017/12/21/woman-sues-rapper-nelly-claiming-sexual-assault-defamation/972283001/) claiming he sexually assaulted her on his tour bus and later damaged her reputation by refuting her account. Nelly's attorney says the lawsuit is financially motivated and a countersuit is planned.

Michael Oreskes

Mike Oreskes resigned as NPR's senior vice president for news after two women accused him of kissing them while discussing job prospects when he worked for the New York Times in Washington, D.C. *(Photo: Chuck Zoeller, AP)*

The senior vice president for news at National Public Radio resigned on Nov. 1 (http://www.npr.org/sections/thetwo-way/2017/11/01/561363158/nprs-head-of-news-resigns-following-harassment-allegations) after multiple women accused him of inappropriate conduct. Two women claimed (/story/money/media/2017/11/01/npr-news-chief-michael-oreskes-resigns-after-sexual-harassment-accusations/821405001/) Oreskes abruptly kissed them on the lips and stuck his tongue in their mouths while discussing job prospects, according to *The Washington Post*. The incidents took place while he was *The New York Times'* Washington D.C. bureau chief in the 1990s. A third woman filed a complaint at NPR accusing him of harassment in October 2015. "I am deeply sorry to the people I hurt," Oreskes said in a statement. "My behavior was wrong and inexcusable, and I accept full responsibility."

Shervin Pishevar

Less than a week after being hit with claims that he sexually harassed six women, Virgin Hyperloop One co-founder Shervin Pishevar (/story/tech/2017/12/05/hyperloop-cofounder-pishevar-takes-leaves-after-harassment-allegations/923730001/) said Dec. 5 he was taking a leave of absence from his businesses to focus on a lawsuit against a research firm that he believes is behind a smear campaign. A Bloomberg report charged that the venture capitalist and early Uber investor groped Uber employee Austin Geidt at a 2014 Uber party, citing unnamed witnesses.

Jeremy Piven

The actor on the TV series *Entourage*, was accused by actress and reality star Ariane Bellamar of groping her on two occasions. In her tweets (https://twitter.com/ArianeBellamar/status/925104391748837377) published Oct. 30, she alleges one encounter took place in Piven's trailer on the *Entourage* set, when he allegedly grabbed her breasts and bottom, and the other occurred at the Playboy Mansion. Piven denied the allegations in a statement sent to USA TODAY (/story/life/2017/10/31/cbs-investigating-harassment-allegations-against-jeremy-piven/819607001/) by his rep, Jennifer Allen: "I unequivocally deny the appalling allegations being peddled about me." CBS, which airs Piven's new series, *Wisdom of the Crowd*, said in a statement, "We are aware of the media reports and are looking into the matter." (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Roy Price

In August, producer Isa Hackett accused Amazon Studios chief Roy Price of making unwanted sexual remarks. It wasn't until after the Weinstein scandal broke that Price was forced out of his high-profile job. *(Photo: Barry Brecheisen, AP)*

The Amazon Studios programming chief resigned in October after Isa Hackett, a producer of Amazon Studios' series *The Man in the High Castle*, accused him of insistently and repeatedly propositioning her (/story/tech/2017/10/17/amazon-studios-head-roy-price-steps-down-amid-harassment-claims/773801001/) in 2015. Two of Price's lieutenants, Joe Lewis and Conrad Riggs, were also let go shortly after his departure. Price has yet to issue a statement on the allegation.

Brett Ratner

The producer and director (*Rush Hour*, *X-Men: The Last Stand*), was accused of sexually harassing six women, including actresses Olivia Munn and Natasha Henstridge, in a Nov. 1 report from the *Los Angeles Times* (http://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-allegations-20171101-htmlstory.html). In an Facebook post, Melanie Kohler claimed Ratner "was a rapist at least one night in Hollywood about 12 years ago" and that he "preyed on me as a drunk girl (and) forced himself on me." Ratner is suing Kohler for libel, and is no longer working on projects at Warner Bros.

Twiggy Ramirez

The former bassist and guitarist of the band Marilyn Manson was accused of rape Oct. 20 by Jack Off Jill singer Jessicka Addams, who shared in a Facebook post (https://www.facebook.com/MissJessickaAddams/posts/10155413298828005) that White — whose real name is Jeordie White — physically and sexually assaulted her while they were dating. On Oct. 24, Marilyn Manson shared in a Twitter statement that he decided to "part ways with Jeordie White as a member of Marilyn Manson." (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Jerry Richardson

The owner of the NFL's Carolina Panthers faces an NFL investigation into alleged sexual misconduct (/story/sports/nfl/2017/12/17/nfl-taking-over-investigation-of-richardson-allegations/108698472/) following a Sports Illustrated report claiming he made sexually suggestive comments to women. Although he did not address allegations, Richardson said hours after the report surfaced he planned to sell the team.

Terry Richardson

The fashion photographer faces multiple allegations since 2010 (/story/life/2017/10/24/sexually-explicit-fashion-photographer-terry-richardson-banned-british-vogue/795390001/), when some models began going public, describing episodes of graphic abuse, inappropriate touching and sexual harassment during photo shoots. Condé Nast International discontinued working with Richardson Oct. 24 and banned him from future assignments. "He is an artist who has been known for his sexually explicit work so many of his professional interactions with subjects were sexual and explicit in nature but all of the subjects of his work participated consensually," said a representative for Richardson in a statement to BuzzFeed (https://www.buzzfeed.com/markdistefano/conde-nast-terry-richardson?utm_term=.gpXNMwy88#.gj7ZBegzz). (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Rich Rodriguez

The University of Arizona fired the football coach on Jan. 2 (/story/sports/ncaaf/pac12/2018/01/02/arizona-fires-football-coach-rich-rodriguez/998676001/) amidst an investigation into an off-the-field allegation of sexual harassment. The university said in a letter although the claims from a former athletic department employee could not be substantiated, they became aware of information causing concerns over the direction of the football program.

Charlie Rose

The longtime TV journalist was accused by eight women of sexual harassment (/story/life/tv/2017/11/21/cbs-morning-addresses-charlie-rose-scandal-charlie-does-not-get-pass-here/884102001/) in a report from *The Washington Post*. The women claim Rose made unwanted sexual advances toward them, including lewd phone calls and walking around naked in their presence. In a separate report, three CBS employees accused Rose of harassment during his tenure. CBS fired Rose, while PBS revealed it would no longer carry his long-running interview show.

Paul Rosenthal

The Colorado state representative was accused of inappropriately touching (/story/news/local/colorado/2017/11/15/second-colorado-lawmaker-accused-sexual-harassment/869220001/) a political organizer during a fundraiser in 2012. Rosenthal denies the claim.

Gilbert Rozon

Comedy festival organizer Gilbert Rozon has been accused by at least nine women of sexually harassing or sexually assaulting them. Rozon stepped down as president of Montreal's renowned "Just for Laughs" festival and apologized "to all those I have offended during my life."

Geoffrey Rush

The Sydney Theatre Company announced that an actress accused Geoffrey Rush (/story/life/people/2017/12/01/geoffrey-rush-denies-inappropriate-behavior-theater/912469001/), the Oscar-winning actor and a star of the Pirates of the Caribbean franchise, of inappropriate touching. Rush denies it, but announced Dec. 2 that he stepped down as president of the Australian Academy of Cinema and Television Arts amid the "current climate of innuendo and unjustifiable reporting."

Carl Sargeant

British Labour Party legislator Carl Sargeant is believed to have taken his own life after harassment allegations cost him his post as the Welsh government's Cabinet secretary for communities and children. He had asked for an independent inquiry to clear his name.

Chris Savino

An animator and writer best known for creating *The Loud House* was fired from Nickelodeon after multiple women lodged complaints against him, the network confirmed in a statement to *The Hollywood Reporter* (http://www.hollywoodreporter.com/live-feed/nickelodeon-fires-loud-house-creator-sexual-harassment-allegations-1050485). On Oct. 23, Savino posted an apology to his Facebook page, writing he is "deeply sorry" that his words and actions "created an uncomfortable environment," CBS News (https://www.cbsnews.com/news/chris-savino-ex-nickelodeon-producer-sexual-harassment-allegations/) and *The Hollywood Reporter* (http://www.hollywoodreporter.com/live-feed/fired-nickelodeon-showrunner-apologizes-sexual-harassment-allegations-surface-1051107) report. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Dan Schoen

Minnesota state legislator Dan Schoen announced his resignation in November after being accused of sexual misconduct. The Democratic first-term senator was accused of making unwanted advances against several women and sexually assaulting one of them. Schoen, 42, was accused by a Democratic candidate for office of grabbing her buttocks in 2015. Another candidate who is now a fellow Democratic lawmaker said he sent her a string of suggestive texts, and a Senate employee said he texted her a picture of male genitalia.

Mark Schwahn

A screenwriter best known for creating the popular TV series *One Tree Hill*, was accused of "traumatizing" sexual harassment by 18 cast and crew members of the show, including Sophia Bush and Hilarie Burton, in a letter published in *Variety* on Nov. 13 (http://variety.com/2017/tv/news/one-tree-hill-3-1202614198/). The letter was penned in support of former *Tree Hill* writer Audrey Wauchope, who detailed in a series of tweets (https://twitter.com/audreyalison/status/929504940254359552?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.usatoday.com%2Fstory%2Flife%2Fpeople%2F2017%2F11%2F14%2Fone-tree-hill-cast-unite-accuse-creator-mark-schwahn-sexual-harassment%2F861180001%2F) the treatment female crew endured on the show. On Dec. 21, Schwahn was fired by Lionsgate (/story/life/tv/2017/12/21/royals-creator-mark-schwahn-fired-after-sexual-misconduct-probe/975015001/).

Robert Scoble

The tech consultant and blogger was accused of sexual harassment by two women (/story/tech/2017/10/22/robert-scoble-resigns-transformation-group-after-sexual-harassment-allegations/789071001/). A third woman claimed Scoble verbally harassed her. On Oct. 22, Scoble's friend and partner said Scoble had agreed to step down from their business consulting firm Transformation Group. After initially apologizing for doing things "that are really, really hurtful to women," he said he's not guilty of sexual harassment (https://scobleizer.blog/) because he had no power to "make or break" the careers of women who made allegations against him. "Sexual Harassment requires that I have such power," he wrote.

Steven Seagal

The actor and producer (*Under Siege, Above the Law*), was accused of sexual harassment by Portia de Rossi (/story/life/people/2017/11/08/portia-de-rossi-claims-steven-seagal-unzipped-his-leather-pants-during-office-audition/846985001/), who claims he unzipped his pants during a private office audition. *ER* actress Julianna Margulies also revealed an incident she had with Seagal in an interview with *SiriusXM*'s Jenny Hutt (/story/life/2017/11/03/harvey-weinstein-news-criminal-investigations-updates-sexual-assault-harassment/828432001/) on Nov. 4. She claims the producer requested to go over a scene with her in his hotel room when she was 23, and once she arrived, the female assistant who said she would be there with her was gone.

Don Shooter

Eight women have accused Arizona state representative Don Shooter (/story/news/politics/legislature/2017/11/13/another-woman-accuses-arizona-rep-don-shooter-sexual-misconduct/860893001/) of misconduct, including inappropriate touching and comments. The Arizona House of Representatives has launched multiple investigations into the claims. Shooter has declined comment.

Andy Signore

The creator of entertainment site Screen Junkies and the YouTube series Honest Trailers was fired following several accusations from women on social media. One woman claimed (http://variety.com/2017/digital/news/honest-trailers-creator-andy-signore-fired-for-egregious-and-intolerable-sexual-behavior-1202583996/) Signore tried to sexually assault her and threatened to fire her boyfriend if she went public. In a statement posted to Twitter (https://twitter.com/defymedia/status/917199853658169345) on October 8, employer Defy Media called his behavior "egregious" and "intolerable." The *New York Times* (https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html), *Variety* (http://variety.com/2017/digital/news/honest-trailers-creator-andy-signore-fired-for-egregious-and-intolerable-sexual-behavior-1202583996/)and IndieWire (http://www.indiewire.com/2017/10/andy-signore-suspended-screen-junkies-honest-trailers-1201884692/)reported on the fallout.

Gene Simmons

The member of rock group Kiss was named in a lawsuit filed in Los Angeles Superior Court, according to the San Bernardino Sun (http://www.sbsun.com/2017/12/15/kiss-bassist-gene-simmons-facing-lawsuit-alleging-sexual-battery-during-socal-interview/). Simmons is accused of making unwarranted sexual advances at an on-air radio personality during an interview at a restaurant he co-owns with bandmate Paul Stanley. Simmons denies the accusations (/story/life/people/2017/12/17/kiss-frontman-gene-simmons-denies-accusations-sexual-misconduct/959583001/).

Bryan Singer

A lawsuit filed in Washington state claims (/story/life/movies/2017/12/07/new-lawsuit-alleges-director-bryan-singer-raped-17-year-old-boy/933265001/) the director behind the *X-Men* films sexually assaulted a 17-year-old boy. In a statement to Variety, Singer denies the allegations. The lawsuit landed the same week Singer was fire from directing the Queen biopic *Bohemian Rhapsody*.

Ira Silverstein

Illinois state Sen. Ira Silverstein has been accused by activist Denise Rotheimer of "mind games" and commenting on her appearance, according to the *Chicago Sun-Times (https://chicago.suntimes.com/news/leadership-post-stripped-for-senator-named-at-harassment-hearing/)*. She said he did not proposition her or initiate physical contact, the *Chicago Tribune (http://www.chicagotribune.com/news/opinion/zorn/ct-perspec-zorn-silverstein-rotheim-papers-1108-20171107-story.html)* reports.

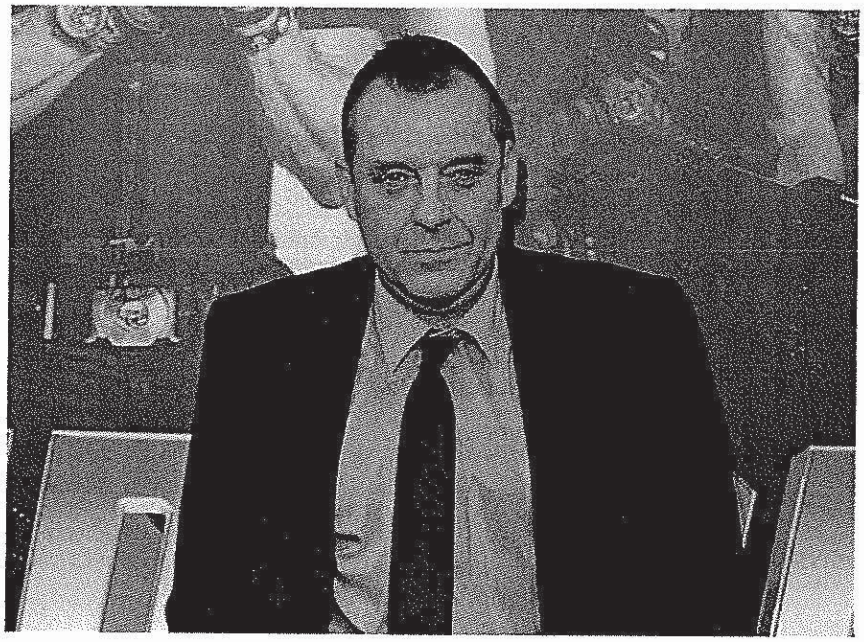
Russell Simmons

The music mogul was accused of assault by model Keri Claussen Khalighi when she was 17, according to a report in *The Los Angeles Times* (http://www.latimes.com/business/hollywood/la-fi-brett-ratner-russell-simmons-20171119-htmlstory.html). Khalighi claims Simmons assaulted her and coerced her to perform oral sex while director Brett Ratner — then a music video producer — was present. In a statement (/story/life/people/2017/11/19/russell-simmons-accusations-terry-crews-brett-ratner/878856001/), Simmons said he "completely and unequivocally" denies the claims.

John Singleton

Director John Singleton was accused by The Root author Danielle Young (https://www.theroot.com/don-t-let-the-smile-fool-you-i-m-cringing-on-the-insid-1819987586) of making sexual advances while interviewing him about his new show *Snowfall*. She says others witnessed it. Singleton has yet to comment on the incident.

Tom Sizemore



An 11-year-old actress on the set of crime thriller Born Killers (shot as Piggy Banks) in 2003, according to a report from The Hollywood Reporter published Nov. 13, alleges that Tom Sizemore touched her genitals during a photo shoot for the film. His agent Stephen Rice, told the industry trade paper, "Our position is 'no comment.'" *(Photo: Jordan Strauss, Invision/AP)*

The actor known for *Saving Private Ryan,* was accused of molesting an 11-year-old actress on the set of crime thriller *Born Killers* (shot as *Piggy Banks*) in 2003, according to a report from (http://www.hollywoodreporter.com/news/tom-sizemore-was-removed-movie-set-allegedly-violating-11-year-old-girl-1057629)*The Hollywood Reporter (http://www.hollywoodreporter.com/news/tom-sizemore-was-removed-movie-set-allegedly-violating-11-year-old-girl-1057629)*published Nov. 13. The child actress allegedly told her mother that Sizemore touched her genitals during a photo shoot for the film. According to *THR*, her parents declined to press charges and months later, Sizemore returned for reshoots in Malibu. His agent, Stephen Rice, told the industry trade paper, "Our position is 'no comment.'"

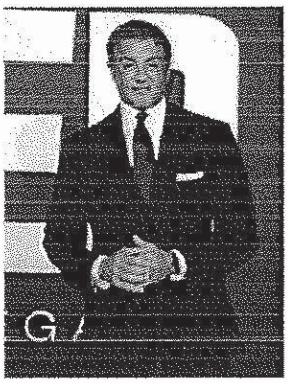
Tavis Smiley

PBS indefinitely suspended the late-night TV show host (/story/life/2017/12/13/tavis-smileys-show-dropped-pbs-amid-troubling-allegations-misconduct/950476001/) following "multiple, credible allegations" of misconduct. According to *Variety* (http://variety.com/2017/tv/news/tavis-smiley-pbs-1202639424/), an investigation found credible allegations Smiley had engaged in sexual relationships with multiple subordinates, and that some believed their jobs depended on a sexual relationship with Smiley. Smiley denies any wrongdoing.

Kevin Spacey

The actor best known for his role on *House of Cards* and *American Beauty*, has been accused of sexual harassment by several people including actor Anthony Rapp (/story/life/people/2017/10/30/who-anthony-rapp-actor-who-accused-kevin-spacey-sexual-harassment/812414001/), who claims he was 14 when Spacey made advances towards him in 1986. Spacey apologized to Rapp via Twitter on Oct. 30, writing, "I owe him the sincerest apology for what would have been deeply inappropriate drunken behavior, and I am sorry for the feelings he describes having carried with him all these years." The actor also came out as gay in the statement. Spacey plans to "seek evaluation and treatment," the actor's representative Staci Wolfe told USA TODAY (/story/life/people/2017/11/01/kevin-spacey-scandal-new-accuser-says-actor-made-advances-him-teen/820324001/). (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Sylvester Stallone



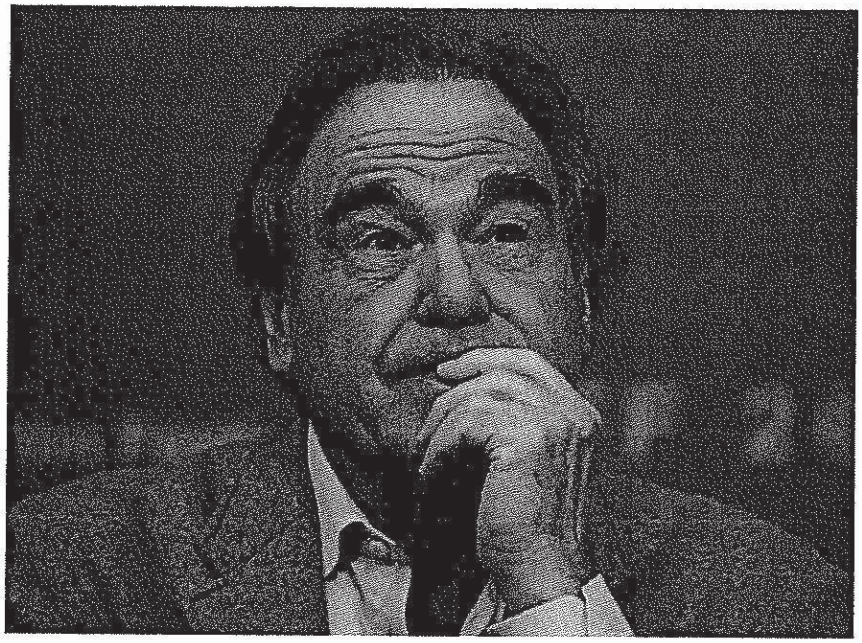
A rep for Sylvester Stallone has called decades-old sexual assault allegations against the star "categorically false." *(Photo: Mike Marsland, WireImage)*

The actor-director whose *Rocky* franchise saw a rebirth with 2015's *Creed*, is facing reports of sexual assault from the late 80s. An old police report detailed by the *Daily Mail (http://www.dailymail.co.uk/news/article-5081605/Sylvester-Stallone-accused-forcing-teen-threesome.html)* and the *Baltimore Post-Examiner* (http://baltimorepostexaminer.com/sylvester-stallone-accused-30-years-ago-allegedly-group-sex-teen-police-say/2016/02/16) website indicates an unnamed teen, then 16, consented to sex with Stallone in Las Vegas in 1986. But she told police she did not consent to group sex after Stallone invited his bodyguard to join them. She said she felt intimidated into having sex with both of them. Under Nevada law, the age of consent is 16. "This is a ridiculous, categorically false story," his rep, Michelle Bega, told USA TODAY. Meanwhile, a second woman has stepped forward (/story/life/people/2017/12/21/sylvester-stallone-categorically-disputes-sexual-assault-claim-second-accuser/974418001/), reportedly filing a police report last month in Santa Monica, Calif.

Lockhart Steele

The editorial director for Vox Media was fired for harassment (http://money.cnn.com/2017/10/20/media/vox-media-fires-editorial-director-lockhart-steele/index.html) following allegations made by a former employee. In a Medium post from Eden Rohatensky, a former web developer at Vox Media, she said a VP caressed her hand and kissed her neck while in the back of an Uber. "Lock admitted engaging in conduct that is inconsistent with our core values and is not tolerated at Vox Media," said CEO Jim Bankoff in a memo to employees, *Variety* reports (http://variety.com/2017/digital/news/vox-media-lockhart-steele-fired-sexual-harassment-1202595146/).

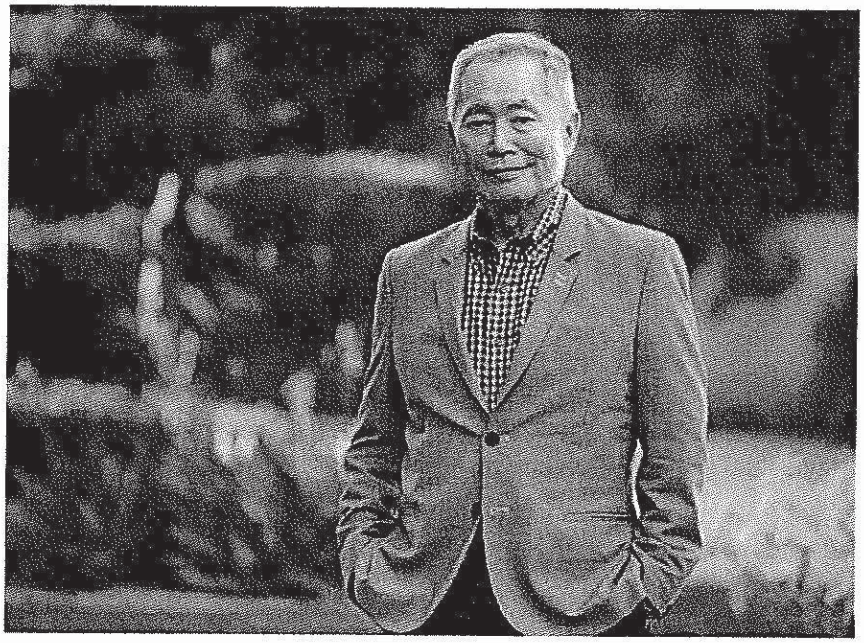
Oliver Stone



Oliver Stone speaks during a press conference of the New Currents Jury at the Busan International Film Festival (BIFF) in Busan, South Korea, on Oct. 13, 2017. *(Photo: JEON HEON-KYUN, EPA-EFE)*

Carrie Stevens, an actress and former Playboy model, alleged the Oscar-winning director grabbed her breast during a party, she tweeted and detailed to *The Hollywood Reporter* (https://www.hollywoodreporter.com/news/oliver-stone-accused-groping-tv-actress-early-1990s-1048468) and *New York Daily News*. Meanwhile, actress Melissa Gilbert said she felt "humiliated" (/story/life/people/2017/11/21/melissa-gilbert-says-oliver-stone-humiliated-her-in-audition-for-the-doors/884074001/) following an audition for the 1991 film *The Doors*, which Stone directed. "The whole scene was just my character on her hands and knees saying, 'Do me, baby.' Really dirty, horrible," Gilbert said. "Then he said, 'I'd like you to stage it for me.'" In a statement, Stone said actors were told the audition process would be intense.

George Takei



'Star Trek' original cast member George Takei denies the claim of former model Scott R. Brunton alleging Takei groped him in the actor's Los Angeles condominium in 1981. *(Photo: USA TODAY)*

The *Star Trek* actor and social activist was accused of sexually assaulting former model Scott R. Brunton, according to an interview published by *The Hollywood Reporter* on Nov. 10 (http://www.hollywoodreporter.com/news/george-takei-accused-sexually-assaulting-model-1981-1056698?utm_source=twitter&utm_source=t.co&utm_medium=referral&utm_source=t.co&utm_medium=referral). Brunton alleges Takei groped him in the actor's

Los Angeles condominium in 1981. Takei denied the allegations (/story/life/people/2017/11/11/george-takei-sexually-assault-accusation/854433001/) in a series of tweets on Nov. 11, writing, "The events he describes back in the 1980s simply did not occur, and I do not know why he has claimed them now."

Jeffrey Tambor

The *Transparent* actor was accused of engaging in inappropriate behavior by his former assistant, a transgender woman named Van Barnes, according to a *Deadline* report (http://deadline.com/2017/11/jeffrey-tambor-sexual-harassment-claims-amazon-1202204220/) on Nov. 8. Tambor, who plays a trans woman on the hit show, rejected the claims, calling Barnes' allegations "baseless." Tambor was also accused of sexual misconduct (/story/life/people/2017/11/16/transparent-trace-lysette-jeffrey-tambor/873288001/) by *Transparent* star Trace Lysette in a Nov. 16 report from *The Hollywood Reporter*. Amazon Studios has initiated an investigation into the allegations, Amazon spokesperson Craig Berman confirmed to USA TODAY. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Jack Tate

A woman told NPR affiliate KUNC (http://www.kunc.org/post/colorado-senators-baumgardner-and-tate-named-allegations-sexual-harassment) the Colorado senator was inappropriate with her repeatedly over a period of two-and-a-half months in 2016, when she was 18. A formal complaint (http://aspenpublicradio.org/post/sen-jack-tate-fourth-colorado-lawmaker-accused-sexual-harrassment) has been filed. Tate denied wrongdoing, reports KUNC.

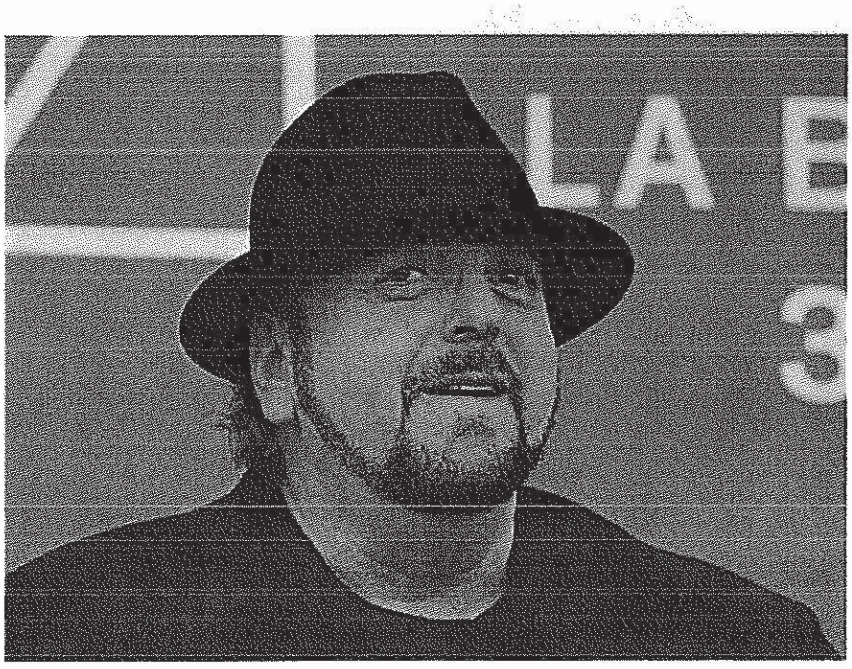
Ike Taylor

The former pro football player was suspended as an analyst (/story/sports/nfl/2017/12/12/nfl-network-suspends-analysts-over-sexual-misconduct-suit/108532946/) by the NFL Network after a former wardrobe stylist accused him of misconduct in a lawsuit. He has yet to respond to the claim.

Glenn Thrush

Several women accused the White House reporter for The New York Times of sexually inappropriate behavior, reports Vox (/story/news/politics/2017/11/20/new-york-times-suspends-star-reporter-glenn-thrush-after-sexual-misconduct-allegations/880955001/). The report's author, Laura McGann, claimed Thrush came on to her at a bar and she had to quickly leave. McGann said she believes he later disparaged her to their newsroom colleagues. The Times said it will suspend Thrush while it investigates the matter. "Over the past several years, I have responded to a succession of personal and health crises by drinking heavily," said Thrush in a statement to Vox. "During that period, I have done things that I am ashamed of, actions that have brought great hurt to my family and friends."

James Toback



Director James Toback attending the photocall of the movie "The Private Life of a Modern Woman" presented out of competition at the 74th Venice Film Festival. *(Photo: Tiziana Fabi, AFP/Getty Images)*

The screenwriter and film director (*The Pick-up Artist*, *Two Girls and a Guy*), was accused of sexually harassing over 300 women, according to reports from the *Los Angeles Times* (http://beta.latimes.com/entertainment/movies/la-et-mn-selma-blair-rachel-mcadams-james-toback-20171026-story.html) on Oct. 27. The *Times* says 31 of the women spoke on the record about their encounters with Toback, which go back decades, and more than 270 have contacted journalist Glenn Whipp (http://beta.latimes.com/entertainment/movies/la-et-mn-toback-follow-up-20171023-story.html) with similar claims.

Adam Venit

The agent faces a lawsuit from Terry Crews (/story/life/people/2017/12/05/terry-crews-sues-hollywood-agent-he-says-groped-him/925510001/) for allegedly groping the actor at an industry event in 2016. Crews said in the lawsuit he shoved Venit after the agent grabbed his penis and testicles. "I have never felt more emasculated, more objectified, I was horrified," Crews said during an interview (/story/life/people/2017/11/15/terry-crews-opens-up-alleged-assault-good-morning-america-interview/865631001/) on *Good Morning America*.

Bruce Weber

Fashion photographer Bruce Weber has been accused (http://www.tmz.com/2017/12/05/fashion-photographer-bruce-weber-sexual-harassment-allegations/) by models Jason Boyce and Mark Ricketson of forcing them to touch their own genitals, they announced in a news conference with attorney Lisa Bloom on Dec. 5.

Kirt Webster

Webster Public Relations CEO Kirt Webster has been accused of sexual assault by one woman. The firm has been renamed and Webster is "taking time away."

Bob Weinstein

The film producer and brother of Harvey Weinstein has been accused of harassing TV producer Amanda Segel. In a statement, Spike TV told the Associated Press (/story/life/movies/2017/10/17/bob-weinstein-accused-sexually-harassing-female-tv-producer/773055001/) that the network is investigating the allegations by Segel, the showrunner on its adaptation of Stephen King's *The Mist*. According to a story published Oct. 17 by *Variety* (http://variety.com/2017/tv/news/bob-weinstein-sexual-harassment-1202592165/), Weinstein invited her to dinner, to his home and to a hotel room during a three-month period in the summer of 2016.

Harvey Weinstein

The film producer (*Shakespeare in Love*, *Emma*), was accused of decades of alleged sexual harassment and assault in bombshell reports from the *New York Times* (https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?_r=0) and *New Yorker* (https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories) in early October. The list of his accusers (/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/773...) now totals 83 women, includes actresses Angelina Jolie, Gwyneth Paltrow and Rose McGowan. In wake of the allegations, Weinstein resigned from the company board of directors on Oct. 17. He has also filed suit against the Weinstein Company in an attempt to gain access to his emails and personnel file for the purpose of defending himself, the *Associated Press* reports.

Fullscreen

Harvey Weinstein's opulent Hollywood career

Matthew Weiner

The creator of hit series *Mad Men* was accused of sexual harassment by *Mad Men* staff writer Kater Gordon in an interview with *The Informatio* (https://www.theinformation.com/articles/former-mad-men-writer-starts-nonprofit-after-alleged-harassment?jwt=eyJhbGciOiJIUzI1NiJ9.eyJzdWIiOiJzaGFyZnphY2tAZ21haWwuY29tIiwiZXhwIjoxNTQxODIxNjg2LCJuIjoiR3Vlc3QiLCJzY29wZSI6WyJzaGFyZSJdfQ.xM_YG Nov. 9. In the interview, she alleges Weiner told her late one night she "owed it to him to let him see her naked." She says she didn't report the comment officially because she was afraid of losing her job. A year after the incident, Gordon was let go from *Mad Men*. Weiner's spokeswoman said in a statement to *The Information*, "Mr. Weiner spent eight to ten hours a day writing dialogue aloud with Miss Gordon, who started on Mad Men as his writers assistant. He does not remember saying this comment nor does it reflect a comment he would say to any colleague."

Jann Wenner

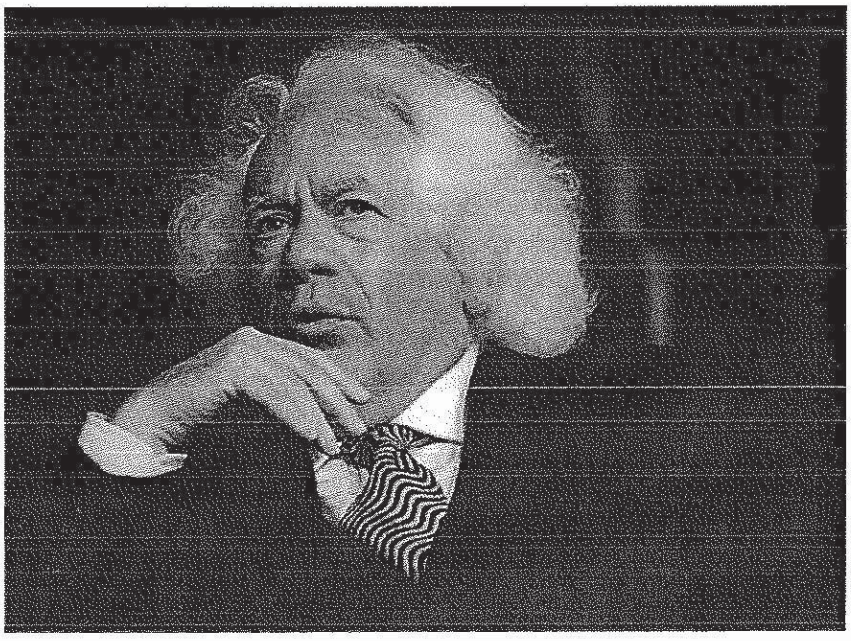
Rolling Stone publisher Jann Wenner was accused by one man of sexual harassment. He says he did not intend to make the accuser uncomfortable.

Ed Westwick

Ed Westwick known for his role on Gossip Girl is accused of sexual misconduct by two women. Actress Kristina Cohen accused Westwick in a Facebook post Nov. 6, of raping her at his house three years ago and filed a Hollywood police on Nov. 7. Westwick denied the allegations, tweeting on Nov. 7, "I do not know this woman. I have never forced myself in any manner, on any woman. I certainly have never committed rape." Rachel Eck accused him of groping her and unwanted advances in a Buzzfeed report on Nov. 14. *(Photo: FREDERIC J. BROWN, AFP/Getty Images)*

The *Gossip Girl* actor was accused of rape by actress Kristina Cohen, who filed a report of sexual assault with the Hollywood police station on Nov. 7, LAPD spokesman Drake Madison confirmed to USA TODAY (/story/life/people/2017/11/07/lapd-investigating-ed-westwick-allegations/842440001/). Cohen accused Westwick in a Facebook post (https://www.facebook.com/kristina.kruz.5/posts/10211729772336179) Nov. 6, which claimed he raped her at his house three years ago. Westwick has denied the allegations, tweeting on Nov. 7 (https://twitter.com/EdWestwick/status/927940546382913536), "I do not know this woman. I have never forced myself in any manner, on any woman. I certainly have never committed rape." Westwick was also accused of unwanted advances and groping by Rachel Eck in a *Buzzfeed* report (https://www.buzzfeed.com/mbvd/a-third-woman-says-gossip-girl-star-ed-westwick-sexually?utm_term=.psJYq2Ge1#.tn9aYKj0w) on Nov. 14. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Leon Wieseltier



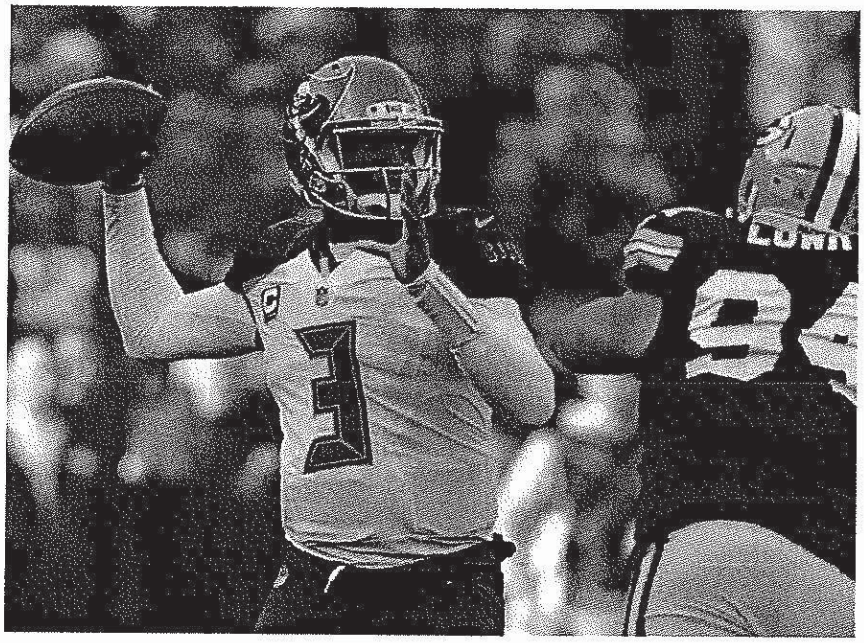
One-time New Republic literary editor Leon Wieseltier apologized to past staffers for behavior that accusers say included inappropriate touching. The Emerson Collective immediately pulled its support for a magazine Wieseltier was set to publish. *(Photo: June 9, 2013 photo by AP)*

The former *New Republic* editor and senior fellow at The Brookings Institution was at the center of several stories about his conduct from former female employees at the publication, reports Politico (https://www.politico.com/story/2017/10/24/leon-wieseltier-new-republic-emerson-collective-workplace-conduct-244120). Emerson Collective cut ties with Wieseltier, reported Politico, while The Brookings Institution suspended Wieseltier without pay, according to the Washington Post (https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/10/25/brookings-institution-suspends-leon-wieseltier-without-pay/?utm_term=.c4ed8c2e1534). "For my offenses against some of my colleagues in the past I offer a shaken apology and ask for their forgiveness," Wieseltier said in a statement.

Brendan Williams

Former Washington state Rep. Brendan Williams has been accused of four women of harassing or assaulting them while he was in office from 2005-2010.

Jameis Winston



(Photo: The Associated Press)

The Tampa Bay Buccaneers quarterback was accused by an Uber driver of groping, reports Buzzfeed (https://www.buzzfeed.com/talalansari/jameis-winston?utm_term=.oh0nQIX9V#.ycMk0XOEY). The National Football League said it is investigating the matter (/story/sports/nfl/2017/11/17/nfl-reviewing-allegation-jameis-winston-groped-uber-driver/107784674/). In a statement from representative Russ Spielman, Winston denies the allegations.

Steve Wynn

The casino mogul resigned as finance chair of the Republican National Committee (/story/news/politics/2018/01/27/steve-wynn-sexual-misconduct-allegations-could-hurt-gop/1071968001/) following allegations of sexual assault. According to *The Wall Street Journal*, Wynn engaged in sexual misconduct with company employees spanning decades. Wynn has vigorously disputed the accusations.

Gregg Zaun

The former Major League Baseball player who was a Toronto Blue Jays analyst for Sportsnet, was fired for "inappropriate behavior and comments" toward female employees, Rogers Media announced (/story/sports/mlb/bluejays/2017/11/30/blue-jays-analyst-gregg-zaun-fired-inappropriate-behavior/911861001/) Nov. 30. Zaun, 46, had played for nine major league teams over 16 seasons.

Matt Zimmerman

NBC News booker Matt Zimmerman was accused of inappropriate conduct by multiple women at the network. He was fired from NBC.

Contributing: Associated Press

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Employment Law Lookout

Insights for Management

Sexual Harassment Legal Settlements: What Employers Need to Know About the New Tax Act

By **Seyfarth Shaw LLP** on February 6, 2018

POSTED IN RETAIL, TAX

By **Paul S. Drizner** and **Michael D. Fleischer**

Seyfarth Synopsis: *The new Tax Act prohibits employers from deducting payments to individuals alleging sexual harassment or sexual abuse if the settlement or payment requires the Claimant to execute a nondisclosure agreement.*

The #MeToo movement continues to have a significant impact on all employers, forcing human resource professionals to review their protocols for preventing, reporting and investigating sexual harassment claims. Now, Congress has passed the **Tax Cuts and Jobs**

Act (the "Tax Act"), which may make sexual harassment settlements more expensive for employers who seek to keep these settlements private.

Under current tax law, an employer may deduct the ordinary and necessary expenses it incurs in carrying on its trade or business. This deduction generally includes legal settlements or payments to a plaintiff (including plaintiff's attorney fees) and any legal fees the employer has incurred for its defense.

There has been an outcry by high profile victims' advocates who have characterized confidentiality payments in settlements as "hush money" arguing that they mask inappropriate corporate conduct. In response, Congress included a provision in the Tax Act which is aimed directly at deterring employers from using nondisclosure agreements in sexual harassment settlements. Pursuant to new Internal Revenue Code Section 162(q), the government will no longer permit employers to deduct "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement" or "attorney's fees related to such a settlement or payment."

Implications and Challenges

New Section 162(q) has important implications for employers but there remain a number of questions regarding its application. We expect the IRS to issue guidance in the future which will clarify some of the current ambiguities, but employers must devise a plan now for new legal settlements since Section 162(q) applies to payments made after December 22, 2017.

First, the price for confidentially just increased. When an employer settling a sexual harassment claim includes a nondisclosure provision in the agreement, it will be unable to deduct any payments related to the matter, including the settlement payment and attorney's fees. This may backfire on the Plaintiff's Bar, because there are certainly instances where the plaintiff desires confidentiality for a variety of reasons, including that publication of the agreement may make it more difficult for the plaintiff to find another job. In cases where the plaintiff desires confidentiality more than the employer, the employer may use this leverage to lower its settlement offer, essentially charging the plaintiff for the additional cost of confidentiality.

Second, the broad language of the statute makes it uncertain whether the IRS will consider payments made pursuant to a confidential agreement that does not settle sexual harassment

claims but which contains a broad waiver of claims, including for sexual harassment, as "related to sexual harassment" and, thus, preclude the deduction. Unfortunately, we do not know the answer yet. Until this issue is clarified, employers may want to consider adding a provision to their settlement agreements by which the parties acknowledge that even though the claimant is waiving a broad range of potential claims, there was no claim of sexual harassment or sexual abuse and none of the settlement payments are related to such claims.

It is also unclear exactly which deductions the IRS is precluding in connection with the confidential settlement of a sexual harassment claim. The statute is clearly intended to apply to the settlement payment itself, as well as attorney's fees. But what about other payments? If an employer hires an investigator or expert to assist with its case, are those costs deductible? What if the employer provides outplacement services for the plaintiff or pays the plaintiff's COBRA premiums, are those costs deductible? Finally, if an employer has Employer Professional Liability Insurance and the insurance carrier makes the settlement and/or attorney's fees payment, will the insurance company be denied a deduction for those payments? These are questions that will hopefully be answered with future official guidance. Plaintiffs often bring sexual harassment claims along with other discrimination claims like age and race. We will need the IRS to clarify whether a portion of the settlement may be allocated to sex harassment, so that the employer may deduct remaining payments.

Third, the statute explicitly provides that attorney's fees related to the confidential settlement of a sexual harassment or sexual abuse matter are not deductible. This provision creates separate implications for both plaintiffs and employers.

We read the new statute to prohibit any deduction for an employer's own attorney's fees incurred for defense, or the payments made to the plaintiff's attorneys. The provision would also seem to prohibit a plaintiff from deducting any attorney's fees the plaintiff pays to his or her attorneys. A plaintiff has income if the employer pays his or her attorney's fees. In the past, a plaintiff was generally allowed to deduct the amount of the plaintiff's attorney's fees that the employer paid, resulting in no net income to the plaintiff for the attorney's fees. The broad language of new Section 162(q) appears to change that general rule and prohibit a plaintiff from deducting the attorney's fees the employer paid. As such, the plaintiff may now owe tax on income that the plaintiff never received and this will significantly reduce his or her net recovery.

Although it is unlikely that Congress intended to place a tax burden on plaintiffs who raise sexual harassment claims, there is no clear guidance on these issues. As a result, until the IRS issues further clarification, plaintiffs may look to employers to cover their additional tax liability, which will add to the cost of settlement and make negotiations more difficult.

The result of all of this is that employers will have to carefully evaluate the cost/benefit of confidentiality. It will remain important to continue to monitor developments concerning the new tax law and incorporate the issues discussed above into the legal and financial analysis when settling cases involving sexual harassment or sexual abuse.

Seyfarth Shaw will provide further alerts as new developments occur.

For more information on this topic, please contact the authors, your Seyfarth Attorney, or any member of Seyfarth Shaw's **Retail**, **Tax**, or **Labor & Employment** Teams.

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MORALS CLAUSES: PAST, PRESENT AND FUTURE

CAROLINE EPSTEIN*

This note argues that morals clauses remain important in talent contracts, despite the liberalization of the modern moral climate. Morals clauses, express and implied, are employed to terminate a contract when talent misbehaves. These clauses have a storied history, but are still relevant despite the considerable changes in social norms since they were first implemented. These clauses are applicable to various sectors of the entertainment industry, including motion picture, television, athletics, and advertising. Their popularity has also led to the implementation of reverse morals clauses, which protect the employee from improprieties of the employer. The outgrowth of Internet and social media has only made such clauses more important, by providing more opportunities for talent misbehavior and public embarrassment. This note finds that morals clauses remain relevant, effectual, nuanced, and flexible, well suited to adapt to a changing legal and cultural landscape.

* J.D. Candidate, New York University School of Law, 2016; B.A. English & Government, magna cum laude, Georgetown University, 2013. The author would like to thank the 2015-16 Editorial Board of the Journal of Intellectual Property & Entertainment Law, as well as Professor Day Krolik, for their invaluable assistance in the editing process.

INTRODUCTION

Imagine you are the chief executive of a major news network. You have just signed a multi-million dollar contract with your top news anchor, Fred Fabricate. Just as you are congratulating yourself on your shrewd negotiations, you notice a troubling headline trending on Facebook, Twitter, and your Daily Beast Cheat Sheet: "Fred Fabricate's Web of Lies!" According to the articles, your golden boy has falsified details of past news reports. You call your lawyers in distress, and thankfully they have a solution. Fabricate has a morals clause in his contract with the network, and his conduct is grounds for termination of the agreement. You sigh in relief, thankful that this disaster can be resolved with minimal financial liability.

This example is adapted from the recent fallout surrounding Brian Williams and NBC News. Unfortunately for NBC, the separation was not as seamless as the hypothetical above. Williams has been a presence on the Network since 1993, and

was a rare bright spot in the struggling network news industry.[1] Since the revelations of Williams' exaggerations of his experiences in Iraq, NBC has scrambled to perform damage control for their popular Nightly News program.[2] Initially, Williams issued a public apology and stepped away from the show for several days.[3] Then, rumors began to swirl that Williams' embellishments went beyond this singular occurrence. A six-month suspension without pay quickly followed.[4] Ultimately, Williams was jettisoned to MSNBC, NBC's ratings-challenged cable analogue.[5] Concerns remain whether Williams can "win back the trust of both his colleagues and his viewers . . . [and] abide by the normal checks and balances that exist" for those in the news industry.[6] The incident "set off a debate about the level of trustworthiness required from someone who explained the world to nearly 10 million people a night"; however, NBC's primary concern was "protecting the integrity of its news operation, once called the crown jewel of the company."[7] NBC made clear that the incident provided a right to terminate Williams pursuant to the morals clause in his personal services contract.

The Fabricate hypothetical and its real-life counterpart are merely illustrations of how a morals clause might be activated in a talent contract. A morals clause is:

> A contractual provision that gives one contracting party (usually a company) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought) in the event that such other party engages in reprehensible behavior or conduct that may negatively impact his or her public image and, by association, the public image of the contracting company.[8]

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[1] *See* Emily Steel, *Brian Williams Scandal Prompts Frantic Efforts at NBC to Curb Rising Damage*, N.Y. TIMES (Feb. 11, 2015), http://www.nytimes.com/2015/02/12/business/media/frantic-efforts-at-nbc-to-curb-rising-damage-caused-by-brian-williams.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Emily Steel, *Brian Williams Return is Part of Revamp at MSNBC*, N.Y. TIMES (Sept. 21, 2015), http://www.nytimes.com/2015/09/22/business/media/williams-return-is-part-of-revamp-at-msnbc.html.

[6] *Id.* (internal quotation marks omitted).

[7] Steel, *supra* note 1.

[8] Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009).

The television, motion picture, athletic, and advertising industries all include morals clauses in talent agreements.[9]

The value of a morals clause lies in the protection it provides to the contracting company.[10] Companies employ talent to achieve "meaning transference"; they aim to use a "'celebrity's established familiarity and credibility' to make a product [or] project 'similarly familiar and credible' to consumers."[11] Unfortunately, meaning transference cannot be limited to only positive associations with talent; incidental transfers of negative meanings may also occur when talent misbehaves in a professional or personal context.[12] Businesses spend considerable sums of money to cultivate the ideal image, and negative associations can wreak havoc upon their efforts.[13] Because a morals clause allows the contracting company to swiftly sever its relationship with troublesome talent,[14] it is an excellent form of corporate protection.[15]

This note will argue that morals clauses remain essential and influential in entertainment contracts of all kinds, despite the considerable changes in social norms since they were first implemented, and the obstacles such changes represent. Part I will begin with a discussion of the history of morals clauses. Part II will examine the two categories of morals clauses: express and implied. Part III will address the use of morals clauses in various sectors of the entertainment industry: motion picture, television, athletics, and advertising. Part IV will discuss the outgrowth of reverse morals clauses, which protect the employee from improprieties of the employer. Part V will address drafting concerns, and Part VI will explore the implications of social media and the current moral climate.

I
HISTORY OF MORALS CLAUSES

Despite the increasing prevalence of cases involving morals clauses in the public consciousness, the clauses themselves are not new and history provides

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[9] Noah B. Kressler, *Using The Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 239 (2005).

[10] *See* Sarah D. Katz, "*Reputations….A Lifetime to Build, Seconds to Destroy": Maximizing Mutually Protective Value of Morals Clauses in Talent Agreements,* 20 CARDOZO J. INT'L & COMP. L. 185, 187 (2011).

[11] *Id.* at 190.

[12] *Id.* at 191.

[13] *See* Margaret DiBianca, *Bad Boys, Bad Boys: Whatcha Gonna Do When They Work for You?,* 13 No. 2 DEL. EMP. L. LETTER 1 (2008).

[14] Katz, *supra* note 10, at 192.

[15] *See* Pinguelo & Cedrone, *supra* note 8, at 366–67.

important context in understanding them. Morals clauses were successful and unabashed contract mechanisms used not only to sever contracts due to moral misconduct, but also to censor political activity.

The seminal case that triggered the use of morals clauses in talent contracts, was the moral impropriety of Fatty Arbuckle.[16] In 1921, Comedian Roscoe "Fatty" Arbuckle had just signed a three-year, three-million-dollar contract with Paramount Pictures when a female guest at his party was found severely injured in his hotel suite.[17] After the guest died from her injuries,[18] Arbuckle was arrested on rape and murder charges, turning public opinion against the previously beloved performer.[19] Although he was ultimately acquitted at trial, the court of public opinion had already made its damning judgment.[20] Universal Studios was not involved with the Arbuckle case, but the fallout from the incident inspired Universal to begin including morals clauses in all of their talent contracts.[21]

During the late 1940s and 1950s, movie studios more frequently used the clauses to challenge political expression than immoral conduct.[22] For example, morals clauses were used as grounds for dismissal of controversial talent known as the Hollywood Ten.[23] These ten influential actors and screenwriters were jailed and blacklisted by big movie studios for publicly denouncing the activities of the House Committee on Un-American Activities (HUAC) during its investigation of Communist influence in Hollywood at the height of the McCarthy Era.[24] "Fearing

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[16] *See* Pinguelo & Cedrone, *supra* note 8, at 354.

[17] *Id.*

[18] The guest, Virginia Rappe, died of a ruptured bladder. It was speculated that the 266 pound Arbuckle had crushed her bladder while sexually assaulting her. Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN MAG. (Nov. 8, 2011), http://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/.

[19] Pinguelo & Cedrone, *supra* note 8, at 354.

[20] *See* King, *supra* note 18.

[21] "As a direct result of the Arbuckle case in San Francisco, Stanchfield & Levy, attorneys for the Universal Film Manufacturing Company, have drawn up a protective clause . . . to [be] inserted in all existing and future actors', actresses', and directors' contracts with the company." Pinguelo & Cedrone, *supra* note 8, at 354; *see also Morality Clause for Films*, N.Y. TIMES, Sept. 22, 1921, at 8, *available at* http://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.html?pageNumber=8.

[22] Pinguelo & Cedrone, *supra* note 8, at 355.

[23] *Id.*

[24] "During the investigative hearings, members of HUAC grilled the witnesses about their past and present associations with the Communist Party . . . [M]ost individuals either sought leniency by cooperating with investigators or cited their Fifth Amendment right against self-incrimination. . . [T]he Hollywood Ten[] not only refused to cooperate with the investigation but denounced the HUAC anti-communist hearings as an outrageous violation of their civil rights, as

widespread boycotts amid a shrinking market share of consumer leisure spending, studios used the morals clause, a customary clause in talent agreements for twenty-five years, to terminate and disassociate themselves from the scandalized Hollywood Ten."[25] The controversial activity and its perceived impact on the studio's image were cited as grounds for their dismissal. [26]

The three most notorious of the Hollywood Ten cases were litigated before the Ninth Circuit Court of Appeals between 1947 and 1957 and are referred to as the "Hollywood Ten Trilogy."[27] In *Loew's, Inc. v. Cole*,[28] MGM[29] dismissed a member of the Hollywood Ten, Lester Cole, more than a month after he testified before HUAC.[30] Cole sued MGM based on the suspicious delay between his testimony and firing, but the Ninth Circuit ruled that the damage dealt to the studio's image was sufficient grounds for his dismissal.[31] The parties eventually settled the case.[32] The other two cases in the trilogy, *Twentieth Century-Fox Film Corp. v. Lardner*[33] and *Scott v. RKO Radio Pictures, Inc.*,[34] relied on similar reasoning, finding in favor of the studios at the expense of Fox writer, Lardner, and RKO producer and director, Scott. In both cases, the courts relied on *Cole*'s rationale that "the natural result of the artist's refusal to answer the committee's

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the First Amendment to the U.S. Constitution gave them the right to belong to any political organization they chose." *Hollywood Ten*, A+E NETWORKS (2009), http://www.history.com/topics/cold-war/hollywood-ten.

[25] Kressler, *supra* note 9, at 238.

[26] For example, RKO's letters of dismissal to Adrian Scott and Edward Dmytryk, two members of the Hollywood Ten, stated: "By your conduct . . . and by your actions, attitude, public statements and general conduct . . . you have brought yourself into disrepute with large sections of the public, have offended the community, have prejudiced this corporation as your employer and the motion picture industry in general, have lessened your capacity fully to comply with your employment agreement and have otherwise violated your employment agreement with us." THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:107 (3d ed. 2014).

[27] Pinguelo & Cedrone, *supra* note 8, at 358.

[28] Loew's, Inc. v. Cole, 185 F.2d 641, 645 (9th Cir. 1950).

[29] MGM was the trade name for Loew's at the time. Pinguelo & Cedorone, *supra* note 8, at 358.

[30] SELZ ET AL., *supra* note 26, at § 9:107.

[31] Pinguelo & Cedrone, *supra* note 8, at 359. The court opined, "[a] film company might well continue indefinitely the employment of an actor whose private personal immorality is known to his employer, and yet be fully justified in discharging him when he so conducts himself as to make the same misconduct notorious." *Cole*, 185 F.2d at 658.

[32] Pinguelo & Cedrone, *supra* note 8, at 359.

[33] Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954).

[34] Scott v. RKO Radio Pictures, Inc., 240 F.2d 87 (9th Cir. 1957).

questions was that the public would believe he was a Communist."[35] Because much of the population was opposed to communism, this was considered a violation of the express morals clause, and constituted grounds for termination.[36]

In recent decades, morals clauses have become even more common in talent contracts, but the changing moral landscape has posed challenges to their efficacy and legality. Nonetheless, the growth of social media, the greater publicity given to once private information, and the speed with which private information is disseminated have augmented the need for morals clauses.[37]

II
TYPES OF MORALS CLAUSES

There are two basic types of morals clauses, express and implied. Each represents different considerations on the part of the talent and the contracting company and each poses unique interpretative challenges.

A. Express Morals Clauses

Express morals clauses are drafted as part of the employment agreement. A typical express morals clause reads as follows:

> The spokesperson agrees to conduct herself with due regard to public conventions and morals, and agrees that she will not do or commit any act or thing that will tend to degrade her in society or bring her into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the [contracting company] in general. [Contracting company] shall have the right to terminate this Agreement if spokesperson breaches the foregoing.[38]

Clauses can range widely based on the talent and contracting company involved, as well as the context of the agreement.[39] The standard punishment for violation of a clause under New York and California Law, where the clauses are frequently invoked, is termination of the agreement.[40]

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[35] Kressler, *supra* note 9, at 245.

[36] *Id.*

[37] *See* discussion *infra* Part VI.

[38] Sarah Osborn Hill, *How to Protect Your Brand When Your Spokesperson Is Behaving Badly: Morals Clauses in Spokesperson Agreements*, 57 FED. LAW 14, 14 (2010).

[39] *See* Kressler, *supra* note 9, at 251–54.

[40] *Id.* at 244.

New York and California case law define the scope of behavior prohibited by morals clauses, which goes beyond a mere requirement to obey the law, and includes a duty "to refrain from behavior that tends to 'shock, insult, and offend the community and public morals and decency,' bring the artist into 'public disrepute, contempt, scorn and ridicule,' or hurt or prejudice the interests of, lower the public prestige of, or reflect unfavorably upon, the artist's employer or the industry in general."[41] *Loew's, Inc. v. Cole, Twentieth Century-Fox Film Corp. v. Lardner, Scott v. RKO Radio Pictures, Inc.*,[42] and *Nader v. ABC Television Inc*.[43] are the primary cases exploring morals clauses in talent contracts under contract law principles[44] and help illustrate how an express morals clause operates.[45]

Compliance with express morals clauses is difficult because their requirements can be unpredictable, a problem that is further exasperated by the tremendous consequence of violating the clause. When talent knows an express morals clause is included in their contract, it is in their interests to moderate their actions to minimize the possibility of breach. However, moderation is not always easy. For instance, the members of the Hollywood Ten probably would have risked termination based on the slightest opposition to HUAC, because of the political tenor of the times.[46] In *Nader*, violation of the "disrepute" trigger would be impossible to predict ex-ante because the reviewing court only found it enforceable after external review, based upon an inherently unpredictable reasonableness standard.[47] Therefore, this lack of predictability can present distinct challenges to talents' compliance with an express morals clause.

Because of the cost and unpredictability of morals clauses, they can be a point of contention between artists and employers in contract negotiations. Given

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[41] *Id.* at 244– 45.

[42] *See* discussion *supra* Part I.

[43] Nader v. ABC Television Inc., 150 F. App'x. 54; *see* discussion *infra* Section III(i).

[44] Pinguelo & Cedrone, *supra* note 8, at 358. Although some other cases have involved morals clauses in contracts, they were not resolved on these grounds. *Id.* at 358 n. 57; s*ee, e.g.*, Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth., 971 F. Supp. 875, 887 (D.N.J. 1977) (deciding the case primarily on First Amendment grounds); Vaughn v. Am. Basketball Assoc., 419 F. Supp. 1274, 1278-79 (S.D.N.Y. 1976) (deciding the case based on jurisdictional issues), and Revels v. Miss N.C. Pageant Org., 627 S.E.2d 280, 284 (N.C. Ct. App. 2006) (ordering the case to be resolved in arbitration).

[45] Lardner, Scott, and Cole each had contracts containing a similar morals clause. Kressler, *supra* note 9, at 245.

[46] *See* Pinguelo & Cedrone, *supra* note 8, at 361-62.

[47] Katz, *supra* note 10, at 214. Sometimes it is unclear to talent whether they are violating a morals clause. For example, Nader had previously maintained his job despite arrests, making him believe this case would not be handled differently. *See id.*

that the current moral climate is more socially liberal than eras past,[48] many employers no longer require them and will delete them if necessary in a negotiation.[49] However, if a morals clause is necessary, there are several ways for companies to reduce the impact of a morals clause.[50] Lawyers can draft morals clauses to require plaintiffs to show evidence of a negative reaction before the court will find a violation. [51]

In addition to contractual limitations on morals clauses, state law can also impact their enforceability. New York and California provide the broadest protections for employees and do not allow employers to make decisions based on an employee's lifestyle.[52] In contrast, Delaware does not have any laws of this nature, meaning that unless the basis of termination is a protected characteristic such as race, religion, gender or age, the employer can be the judge of conduct warranting termination.[53] In all states, clauses that improperly infringe on a performer's rights, such as First Amendment rights guaranteed by the United States Constitution, are not permitted.[54]

Although express morals clauses remove some of the ambiguity associated with permissible employee behavior, lack of predictability as to when they might be triggered undoubtedly persists. As social norms continue to shift and evolve, this issue will only become more acute.

B. Implied Morals Clauses

Morals clauses can also be implied from principles of common law, which impose a duty upon talent to refrain from activities that are detrimental to the employer or that might devalue the talent's performance.[55] Whether a morals clause should be implied is a question of fact, and requires an evaluation of the

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[48] *See* discussion *infra* Section VI(A).

[49] SELZ ET AL., *supra* note 26, at § 9:107.

[50] *Id.*

[51] For example, "the words 'tend to' and 'may' [can] [be] removed, so that a demonstrably negative reaction is required before the clause can be triggered," and "most companies will agree to remove the right to terminate employment so that the only remedy is the right to remove a credit." *Id.*

[52] DiBianca, *supra* note 13.

[53] *Id.*

[54] *See, e.g.*, Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth., 971 F. Supp. 875, 887 (D.N.J. 1977) (holding New Jersey Sports and Exhibition Authority's requirement that performers agree to a morals clause problematic from a constitutional First Amendment standpoint); *see also* Pinguelo & Cedrone, *supra* note 8, at 377.

[55] Kressler, *supra* note 9, at 246.

circumstances of the employment and conduct at issue.[56] Under both New York and California law this obligation of good conduct is considered an implied morals clause and is recognized as grounds to terminate an employment agreement.[57] Importantly, an implied moral obligation does not arise solely in the absence of an express provision; rather, these common law duties exist alongside any provisions in an employment agreement.[58]

There are hurdles to establishing this implied duty. Principally, an implied morals clause requires a common law employment relationship, which is more difficult to establish in the current film industry than it was in the past for several reasons. One reason for this is the shift from the "star system," which engendered exclusive contracts between talent and studios, to the "free agency system," where actors work with many studios and function more like independent contractors than common law employees.[59] Another reason is that the tax-motivated system of creating "loan out" corporations challenges the employment relationship. "Loan outs" contract directly with studios to provide the personal services of the actor. This arrangement potentially destroys privity between the studio and actor by making the actor the common law employee of the loan-out rather than the studio.[60] Nonetheless, for the purposes of employment law, actors are traditionally considered common law employees, rather than independent contractors in New York and California courts.[61] Furthermore, both jurisdictions disregard the "loan out" when determining if there is an employment relationship.[62]

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[56] *Id.*

[57] *Id.* at 246-47; *see, e.g.*, Drayton v. Reid, 5 Daly's Rep. 442, 444 (N.Y. Ct. Com. Pl. 1874) (holding that an actress's public scandal resulting from immoral conduct was just cause for termination of her employment contract); Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 89 (9th Cir. 1957) (finding that an employee's conduct before a congressional committee breached "an implied covenant . . . not to do anything which would prejudice or injure his employer").

[58] Kressler, *supra* note 9, at 250; *see also* Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 850 (9th Cir. 1954) (finding that, despite the application of expressio unius, the parties intended to bolster potential remedies, not waive given common law rights, and Fox retained the right to discharge its employee for an unspecified cause).

[59] Kressler, *supra* note 9, at 247-48.

[60] *Id.* at 248; *see generally* Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879 (1995) (discussing the tax considerations of loan-out corporations).

[61] *See* Kressler, *supra* note 9, at 249-50. This is a multi-factor analysis, the most significant factor being the degree of control the employer maintains over the alleged employee. *See, e.g.*, Makarova v. United States, 201 F.3d 110, 114 (2d Cir. 2000) (finding that a performer was an employee because her producer maintained artistic control over her performance); Johnson v. Berkofsky-Barret Prods., Inc., 260 Cal. Rptr. 1067, 1073 (Cal. Ct. App. 1989) (finding an actor

III
APPLICATION OF MORALS CLAUSES IN ENTERTAINMENT INDUSTRIES

Morals clauses are common in many sectors of the entertainment industry. This section will explore the application of morals clauses to the television, motion picture, sports, and advertising industries.

A. Morals Clauses in the Television Industry

Historically, branding has dominated the television industry. Television programming was once entirely dominated by advertisers, who bought time from a network and then created programming.[63] Because the sponsor held a franchise on his time period, network consent was considered pro-forma and"[m]any programs were ad agency creations, designed to fulfill specific sponsor objectives."[64] In the mid-1950s, numerous factors converged to bring an end to sponsor-franchised programming, and control shifted to the networks. Advertisers nonetheless provide the primary support for the medium, and when their support falters, the programming will often change to accommodate them and maintain their backing.[65]

Because of the historical importance of advertising in the television industry, morals clauses are essential to protect advertising relationships, the brand of productions, and company image.[66] "[N]etworks have adopted a conservative bias [toward programming], with no risks and no controversy that would exclude, alienate, or miss parts of the audience."[67] The talent, program, and sponsors are still closely related, and morals clauses are used to quickly sever the connection with talent that poses a threat to public image.[68]

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to be an employee because the production company "directed and supervised the manner in which he performed . . . ").

[62] Kressler, *supra* note 9, at 249; *see, e.g.*, Welch v. Metro-Goldwyn-Mayer Film Co., 254 Cal. Rptr. 645, 655 (Ct. App. 1988) (finding a talent agreement that contained specific obligations between an actor and studio as forming an employment relationship), *rev'd on other grounds*, 769 P.2d 932 (Cal. 1989); *Berkofsky-Barret Prods., Inc.*, 260 Cal. Rptr. at 1072 (holding that the court "need not focus on . . . [that] link in the employment chain").

[63] Kressler, *supra* note 9, at 241.

[64] WILLIAM LEISS ET AL., SOCIAL COMMUNICATION IN ADVERTISING 108-09, (2d ed. 1997) (quoting ERIK BARNOUW, THE SPONSOR: NOTES ON A MODERN POTENTATE 33 (1978)).

[65] Kressler, *supra* note 9, at 241-42.

[66] Pinguelo & Cedrone, *supra* note 8, at 368.

[67] Katz, *supra* note 10, at 222.

[68] Kressler, *supra* note 9, at 243.

Morals clauses have remained important in the television industry. The effect of these clauses has been shown in high profile terminations of television actors, newscasters, and reality television stars.

1. Television Actors

The Southern District of New York addressed the issue of morals clauses in television actors' contracts in *Nader v. ABC Television*.[69] Michael Nader portrayed Dimitri Marick on "All my Children" from 1991 to 1999. When ABC asked Nader to return to the show in 2000, his agreement contained the network's standard "morals" clause, allowing ABC "to immediately terminate the contract if Nader engaged in conduct that 'might bring [him] into public disrepute, contempt, scandal or ridicule, or which might tend to reflect unfavorably on ABC.'"[70] During the contract Nader was arrested and charged with criminal sale of cocaine and resisting arrest. ABC immediately suspended Nader and he entered rehab.[71] When ABC informed Nader that they were terminating his employment contract for his violation of the morals clause, Nader filed a lawsuit challenging this decision.[72] The court found the morals clause valid, and held that Nader had breached it due to the media coverage of his arrest.[73]

Several other high profile disputes involving television stars' contractual morals clauses have dominated the news in recent years. Most prominent is that of Charlie Sheen, who WBTV fired from its television show "Two and a Half Men" after he exhibited erratic behavior and publicly ridiculed the show's executive producer Chuck Lorre.[74] He challenged his termination in a $100 million lawsuit.[75] This conduct is a classic example of what might fall within a traditional morals clause violation; however, Sheen's contract did not have a traditionally worded

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[69] Nader v. ABC Television, 150 F. App'x 54 (2d Cir. 2005).

[70] *Morals Clause, Not Drug Addiction, Reason for Soap Star's Termination*, 19 No. 4 ANDREWS EMP. LITIG. REP. 12 (2004).

[71] *Id.*

[72] James G. Murphy, *Soap Star Slips Up on Morals Clause in Contract*, 11 No. 10 N.Y. EMP. L. LETTER 7 (2004).

[73] Kressler, *supra* note 9, at 245-46; *see also* Murphy, *supra* note 72 ("The court held, among other things, that the provisions of the morals clause weren't so vague, overly broad, and ambiguous as to render it void.").

[74] Sheen's antics included drug abuse, hospitalization, domestic abuse, rehab, and a series of bizarre interviews and tweets. Emily Yahr, *Let's All Remember the Infamous Charlie Sheen 'Two and a Half Men' Meltdown,* WASHINGTON POST STYLE BLOG (Feb. 19, 2015), https://www.washingtonpost.com/news/style-blog/wp/2015/02/19/lets-all-remember-the-infamous-charlie-sheen-two-and-a-half-men-meltdown/

[75] *Id.*

morals clause.[76] The "moral turpitude clause" in his contract essentially required a felony conviction before termination could be triggered, making the process more complicated.[77] As a result, WBTV relied upon the "force majeure" clause in the contract instead, citing Sheen's incapacitated state as grounds for his termination.[78] The parties eventually settled the case.[79] Another example of a high profile dispute occurred when Mel Gibson made anti-Semitic remarks during an arrest for drunk driving, and ABC subsequently cancelled his contract for their miniseries on the Holocaust.[80] A recent and ongoing example is the mounting allegations of sexual misconduct Bill Cosby is facing, and the considerable media attention it has received, which led NBC and Netflix to shelve planned collaborations with him.[81] Although the Cosby situation does not appear to be a case involving a morals clause, it raises interesting implications for the value and image of Cosby's legacy as America's favorite dad, Heathcliff Huxtable.[82]

Overall, morality clauses in television actors' contracts illustrate the contracting company's concerns with public opinion and most importantly, the talent's ability to work. Because television is dependent on a regimented production schedule and good ratings, factors that might derail filming or sour

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[76] Eriq Gardner, *Charlie Sheen's Contract: Was There Actually a Morals Clause?*, HOLLYWOOD REPORTER (Mar. 8, 2011, 9:13 AM), http://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309.

[77] *Id.*

[78] *Id.*

[79] Nellie Andreeva, *Charlie Sheen, Warner Bros TV & Chuck Lorre Announce Settlement*, DEADLINE HOLLYWOOD (Sept. 26, 2011, 3:12 PM), http://deadline.com/2011/09/charlie-sheen-warner-bros-tv-chuck-lorre-announce-settlement-176345/ (official statement of Warner Bros. studio) ("Warner Bros. Television, Chuck Lorre and Charlie Sheen have resolved their dispute to the parties' mutual satisfaction. The pending lawsuit and arbitration will be dismissed as to all parties. The parties have agreed to maintain confidentiality over the terms of the settlement.").

[80] Pinguelo & Cedrone, *supra* note 8, at 349.

[81] Dorothy Pomerantz, *Netflix and NBC Back Away from Bill Cosby*, FORBES (Nov. 19, 2014, 2:35 PM), http://www.forbes.com/sites/dorothypomerantz/2014/11/19/netflix-and-nbc-back-away-from-bill-cosby/.

[82] *See* Nellie Andreeva, *Bill Cosby Controversy is NBC Conundrum: Will America Accept Him Playing a Family Man Again?*, DEADLINE HOLLYWOOD (Nov. 17, 2014, 8:30 AM), http://deadline.com/2014/11/bill-cosby-controversy-nbc-series-plan-1201285605/. Given that cast members of The Cosby Show were made to sign morality clauses, widely speculated to be the basis of Lisa Bonet's abrupt departure, it is possible that the publicity surrounding Cosby's misdeeds has implications for his prior body of work. *See* Kara Kovalchik, *10 Actors' Dramatic Departures from Popular Shows*, MENTAL FLOSS (Sept. 12, 2011, 5:30 AM), http://mentalfloss.com/article/28735/10-actors-dramatic-departures-popular-shows.

public opinion could prove fatal.[83] For example, although Charlie Sheen's remarks were alarming, the public seemed to revel in the entertainment value of his outlandish public persona.[84] The bigger concern seemed to be Sheen's questionable lifestyle habits affecting his performance, and the producer's general desire to eliminate him from the cast.[85] The *Nader* case involved similar concerns, given the incapacitating nature of Nader's cocaine addiction and the bad press it engendered.[86] On the other hand, the cases of Mel Gibson and Bill Cosby represent different concerns because the morally offensive allegations turned public opinion against them. Cosby has suffered widespread shaming in the media, especially given his towering cultural presence beforehand.[87] To this day, it appears Gibson's career has yet to recover.

2. Newscasters

Morals clauses have also been an issue for television newscasters. These clauses are key for news broadcasters, because newscasters must maintain credibility in order for viewers to trust them. Understandably, the public seems to have less tolerance for the controversial antics of those they trust to relay the news.

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[83] This challenge has also paved the way for the success of streaming platforms like Netflix. Todd Spangler, *TV Ratings Have Hurt Creative Side of Television, Says Netflix Content Boss Sarandos,* VARIETY (Dec. 8, 2014, 12:46 PM), http://variety.com/2014/digital/news/tv-ratings-have-hurt-creative-side-of-television-says-netflix-content-boss-sarandos-1201373908/.

[84] Media sources still revel in the entertainment value of Sheen's "meltdown." *See, e.g.*, Yahr, *supra* note 74.

[85] *See id.* Although, it does not appear his antics were unforgivable; as it was widely Sheen would return for the finale of Two and a Half Men. Lynette Rice, *It's Official: Charlie Sheen Will Have a Presence on the Two and a Half Men Finale – But There's a Catch*, PEOPLE (Feb. 6, 2015, 7:30 AM), http://www.people.com/article/charlie-sheen-two-and-a-half-men-finale.

[86] *See* Katz, *supra* note 10, at 213-14. His argument that he had been fired based on a disability, his cocaine addiction, was rejected by the court. ANDREWS EMP. LITIG. REP. 12, *supra* note 70.

[87] Cosby has lost millions of dollars, had several honorary degrees revoked, and has been accused of tarnishing the Cosby show legacy. *See e.g.*, Daniel Bukszpan, *How Bill Cosby's Fortune and Legacy Collapsed*, FORTUNE (Jul. 15, 2015, 10:18 AM), http://fortune.com/2015/07/15/bill-cosby-fortune-collapse/; Sydney Ember & Colin Moynihan, *Honorary Degrees in Unwanted Spotlight*, N.Y. TIMES, Oct. 7, 2015, at C1, *available at* http://www.nytimes.com/2015/10/07/arts/television/to-revoke-or-not-colleges-that-gave-cosby-honors-face-a-tough-question.html?_r=0; Nancy Dillon & Corky Siemaszko, *Actor Who Played Bill Cosby's Son on 'The Cosby Show' Says Rape Allegations Have 'Tarnished' Show's Legacy,* N.Y. DAILY NEWS (Oct. 10, 2015, 12:06 AM), http://www.nydailynews.com/entertainment/gossip/bill-cosby-questioned-alleged-1974-molestation-article-1.2391569.

Bad publicity that might undermine their credibility can wreak havoc on their popularity and the network's viewership.

For example, Alycia Lane, a popular Philadelphia anchorwoman on a CBS subsidiary, attracted considerable negative public attention when she was arrested and charged with assault in New York City.[88] Lane allegedly hit a female police officer and called her a homophobic slur.[89] Although she pled not guilty and contested the charges, the incident activated the morals clause in her contract, and CBS terminated her employment.[90] Lane's alleged reprehensible statements proved to be the downfall of her career as an anchorwoman.

Another incident involved Virginia Galaviz, a reporter covering the "Crime Beat" for a TV station in San Antonio who was similarly terminated based on a morals clause in her contract.[91] Galaviz was involved in three incidents that garnered negative media attention. She had a confrontation with a city councilman whom she was dating, she had an interaction with another woman whom her boyfriend was dating, and an altercation with her fiancée in which both of them were arrested.[92] Although she challenged her termination and argued that the language of her morals clause was ambiguous, the trial and appeals court both held that her conduct was covered and her termination was justified.[93] Understandably, an arrestee with a violent record is no longer considered a credible crime reporter.

Brian Williams, discussed in the introduction, is the most recent example of a morals clause affecting a newscaster. Williams' contract contained the standard NBC News morals clause:

> If artist commits any act or becomes involved in any situation, or occurrence, which brings artist into public disrepute, contempt, scandal or ridicule, or which justifiably shocks, insults or offends a

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[88] DiBianca, *supra* note 13.

[89] *Id.*

[90] *Id.*

[91] *Morals Clause Forecloses Claim of San Antonio TV Reporter*, 21 No. 8 TEX. EMP. L. LETTER 2 (2010).

[92] *Id.*

[93] *Galaviz v. Post-Newsweek Stations*, 380 F. App'x 457, 459-60 (5th Cir. 2010); *see also TV Reporter Fired Due to Morals Clause Violation, Not Sex Bias*, EMP. PRAC. GUIDE, 2013 WL 422203 (2009).

> significant portion of the community, or if publicity is given to any such conduct . . . company shall have the right to terminate.[94]

NBC executive Stephen Burke and Comcast CEO Brian Roberts had the ultimate responsibility of determining whether Williams breached his duties under the clause.[95] The fallout surrounding Williams has led to a major loss of credibility for both himself and NBC. His trustworthiness ranking has tumbled,[96] and the network has turned against their former star.[97] NBC lost nearly 700,000 viewers in the wake of the scandal, and it is still unclear if the scandal has permanently damaged the network's image and ratings.[98] Due to Williams' presence as a major news anchor with his own show, it is curious that his contract would contain the same morals clause as all other NBC News employees. Because of this clause, even if producers preapproved his comments and his lies, any resultant public disrepute would still activate the clause. Given his relative youth and success, it will be interesting to see if his reputation can be rehabilitated. His ultimate fate will be telling for the implications of bad press and the loss of credibility for television newscasters.

3. Reality Television Stars

Finally, morals clauses have become a huge issue within the burgeoning reality TV industry. Americans delight in the misbehavior of these stars and live vicariously through their transgressions. Catering to this public demand, while censoring the more outlandish actions and outbursts of talent, has posed a legitimate challenge to TV networks. Networks have been using morals clauses in an attempt to constrain the more controversial reality stars.

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[94] Emily Smith, *Contract 'Morality Clause' Could Determine Brian Williams' Future,* N.Y. POST: PAGE SIX (Feb. 15, 2015, 10:33 PM), http://pagesix.com/2015/02/15/brian-williams-future-hangs-on-morality-clause-in-contract.

[95] *Id.*

[96] Lloyd Grove, *Peacock Panic: NBC Suspends Brian Williams for Six Months*, DAILY BEAST (Feb. 10, 2015, 5:55 AM), http://www.thedailybeast.com/articles/2015/02/10/fear-and-loathing-at-nbc.html.

[97] It is alleged that NBC seriously considered firing Williams before his 6-month unpaid suspension. Aaron Feis, *NBC Considered Firing Brian Williams Before Suspending Him*, N.Y. POST: PAGE SIX (Feb. 12, 2015, 12:04 PM), http://pagesix.com/2015/02/12/nbc-considered-firing-brian-williams-before-suspending-him/.

[98] "The viewer hemorrhage was magnified by the fact it happened in the winter — traditionally the most competitive season for network newscasts." Michael Starr, *'NBC Nightly News' Loses 700K Viewers After Brian Williams Scandal*, N.Y. POST (Feb. 18, 2015, 12:17 PM), http://nypost.com/2015/02/18/nbc-nightly-news-loses-700k-viewers-after-brian-williams-scandal/.

This phenomenon is aptly illustrated by the recent examples of controversies surrounding reality shows "Duck Dynasty" and "Here Comes Honey Boo Boo." Phil Robertson, the patriarch of Duck Dynasty's starring family was suspended by A&E after making anti-gay remarks in GQ magazine.[99] Although specifics of his agreement were not revealed, it was widely speculated that his suspension was based upon a morals clause in his contract with the network.[100] When A&E ended his suspension amidst fan protestation, they "saw ratings plummet nearly 50 percent from the show's heights."[101] Similarly, after revelations that "Here Comes Honey Boo Boo" star "Mama June" Shannon was dating Mark McDaniel, a convicted sex offender who had recently been released from prison after a decade behind bars, TLC cancelled the show.[102] Shannon lost payment for the early termination of the contract based upon the morality clause in her agreement with the network.[103] Because the other cast members did not violate their morals clauses, they still received the full benefit of their contracts.[104]

These examples demonstrate the ever-present risks facing reality TV producers: "handing worldwide platforms to dubious people in questionable circumstances" and hoping those people will not implode until the show's popularity is already in decline.[105] The consistent popularity of reality shows, built upon the misbehavior of their stars, demonstrates that the American public is far less concerned with the good morals of reality stars. However, morality clauses are

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[99] Tim Kennealley, '*Duck Dynasty' Star Phil Robertson: What Are His Legal Options?*, THEWRAP (Dec. 19, 2013, 6:06 PM), http://www.thewrap.com/phil-robertson-duck-dynasty-free-speech-religious-discrimiination/

[100] *Id.*; *see also* Scott Collins, *'Duck Dynasty': A&E Warned Phil Robertson About Speaking Out Too Much*, L.A. TIMES (Dec. 20, 2013, 4:55 PM), http://www.latimes.com/entertainment/tv/showtracker/la-et-st-duck-dynasty-ae-warned-phil-robertson-about-speaking-out-too-much-20131220-story.html ("Phil and other family members also probably signed contracts containing 'morals clauses' in which they promised to, among other things, avoid anything that would embarrass or bring shame to A&E or the brand.").

[101] Eric Deggans, *TLC's 'Honey Boo Boo' Cancellation Shows Dangers Of Exploitative TV*, NAT'L PUB. RADIO (Oct. 24, 2014, 4:08 PM), http://www.npr.org/2014/10/24/358567472/tlcs-honey-boo-boo-cancellation-shows-dangers-of-exploitative-tv.

[102] *Id.*

[103] Ryan Arciero, *'Honey Boo Boo': Mama June Is Losing Salary, New Child Molestation Interview*, EXAMINER (Nov. 1, 2014, 4:26 PM), http://www.examiner.com/article/honey-boo-boo-mama-june-is-losing-payment-child-molestation-safety-risks.

[104] *Id.*; *see also* Karen Butler, *'Mama' June Shannon Won't Be Fully Paid for Final 'Honey Boo Boo' Season*, UNITED PRESS INT'L (Nov. 1, 2014, 2:50 PM), http://www.upi.com/Entertainment_News/TV/2014/11/01/Mama-June-Shannon-wont-be-fully-paid-for-final-Honey-Boo-Boo-season/6121414845458/.

[105] Deggans, *supra* note 101.

essential to protect the network's interests in the event that a talent's antics polarize public sentiment and destroy ratings.[106]

B. Morals Clauses in the Motion Picture Industry

Movie studios also use morals clauses in contracts with talent. While the motion picture industry also faces the branding and advertising concerns of the television industry, these concerns are mitigated because motion pictures developed more independently from advertising than television did.[107] Although movie executives use product placement and co-marketing to "close the gap on budgets,"[108] advertisements are not as essential as they are to television networks. Motion pictures lack dependence on advertisers, but that does not render morals clauses irrelevant. The industry employs morals clauses to protect the value of a film's brand. Studios and their marketing partners have an economic interest in keeping a movie's brand value high, and morals clauses insure that talent does not compromise this value.[109] As brand value increases, actors or actresses that become a liability to maintaining this value are eliminated.[110] The protective value of a morals clause in the motion picture context is therefore largely dependent on the specific parties and projects at issue.[111] Illustrative examples include the high profile cases *Loew's, Inc. v. Cole*,[112] *Twentieth Century-Fox Film Corp. v. Lardner*,[113] and *Scott v. RKO Radio Pictures, Inc.*,[114] discussed in Part I.

Additionally, the movie industry has several noteworthy prohibitions on express morals clauses. Both the Director's Guild of America and the Writer's Guild of America expressly prohibit morals clauses in any agreements signed by guild members as a response to the removal of screen credit for violators.[115] Although the Screen Actors Guild does not have such a blanket prohibition, many contracts between studios and major talent do not contain a morals clause because

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[106] As illustrated by the cases summarized, morals clauses can help minimize damaging fallout for networks. *See, e.g.*, *id.*

[107] Kressler, *supra* note 9, at 243.

[108] *Id.*

[109] *Id.* at 244.

[110] For example, they made the third American Pie movie without troubled and headline prone actress Tara Reid. *See id.*

[111] Katz, *supra* note 10, at 223.

[112] Loew's, Inc. v. Cole, 185 F.2d 641, 658 (9th Cir. 1950).

[113] Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954).

[114] Scott v. RKO Radio Pictures, Inc., 240 F.2d 87 (9th Cir. 1957).

[115] Credit is the lifeblood of writers and directors, who do not enjoy the same level of notoriety and recognition as on screen talent. SAG and AFTRA do not include such prohibitions. Katz, *supra* note 10, at 198-99.

these famous actors are influential enough to eliminate this contractual language.[116] As a result, a morals clause is often the first thing stricken from a contract.[117] However, studios may attempt other methods to coerce talent into behaving properly, such as threatening liability for monetary damages to a production or distancing a production from the studio.[118]

Movie studios have concerns similar to those of television networks when it comes to morals of the talents. Due to huge production budgets and the importance of ticket sales, incapacitated talent or bad press can derail the success of a movie. Therefore, studios consider morals clauses important to protecting their bottom line.

C. Morals Clauses in Sports Contracts

Morals clauses have also existed throughout the history of professional sports. Given the "tough guy" image cultivated by many professional athletes, morals clauses have different implications in the context of sports. The harbinger of the modern sports' morals clause was that of Babe Ruth, who had a provision in his contract requiring him to abstain from alcohol and to be in bed by 1:00 am during the baseball season.[119] Although his clause differed from modern morals clauses because violation did not result in termination of his contract, it did allow legal action upon breach, laying the foundation for the modern usage of morals clauses in professional sports.[120]

Morals clauses have become routine in national league contracts. "As of 2008, the collective bargaining agreements in the National Football League,[121]

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[116] For example, "[w]hen Tom Cruise entered the 'danger zone[,] with public tirades about psychiatry, Scientology, and postpartum depression,' Paramount Pictures was still obligated by contract to release Mission: Impossible III," and "when Mel Gibson was arrested for drunk driving in 2006, Disney had no right to terminate its distribution agreement for Gibson's movie *Apocalypto*." Katz, *supra* note 10, at 199-200.

[117] *Id.*

[118] Morgan Creek productions threatened to do as much when Lindsay Lohan misbehaved consistently on the set of Georgia Rule. *Id.* at 200 & n.84.

[119] Porcher L. Taylor III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L. J. 65, 75–76 (2010).

[120] *See id.*

[121] Under § 11 of the NFL Player Contract, a football club may terminate the player contract "[i]f at any time, in the sole judgment of Club, . . . [the] Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club." NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 2006-2012, at 252 (2006), *available at* http://www.docslide.us/documents/nfl-collective-bargaining-agreement-2006-2012.html.

National Basketball Association,[122] National Hockey League,[123] and Major League Baseball[124] each contained a standard player agreement that included a morals clause. "[125] Collective bargaining agreements leave little room for negotiation between individual players and teams on the subject of morals clauses because they are negotiated for the league as a whole.[126]

Morals clauses in athletes' league contracts are employed by teams and leagues in an attempt to moderate the athletes' off-duty behavior. For example, the NFL suspended Adam "Pacman" Jones for the entire 2007 season after being arrested five times in less than two years. "Despite being reinstated by the NFL with clearly delineated requirements for avoiding subsequent suspensions, Jones became involved in an alcohol-related fight with a member of his security team during the 2008 season," resulting in another suspension.[127]

Morals clauses are not always effective in this context. In an effort to circumvent these clauses, the leagues have been lenient in their interpretation of immoral conduct. For example, when Jayson Williams was indicted on manslaughter charges in 2002, his agent argued that the morals clause in his contract did not apply because the clause required intentional moral impropriety, and there was no allegation that his conduct was intentional.[128] Similarly, an NBA

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[122] Under § 16 of the NBA's Uniform Player Contract, a basketball team may terminate a player contract "if the Player shall . . . at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, whether or not such acts would constitute a crime), and good sportsmanship." NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, at A-16 (2011), *available at* http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA(2011)_(newversion_reflectsJeremyLinRuling)May30_2013.pdf.

[123] Under the NHL Standard Player's Contract, § 2(e), each NHL player agrees "to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally." COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYER'S ASSOCIATION, at 245 (2005), *available at* http://www.nhl.com/cba/2005-CBA.pdf.

[124] Under § 7(b) of the Major League Baseball Uniform Player's Contract, a baseball club "may terminate [a player contract] . . . if the Player shall at any time . . . fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship." 2012-2016 BASIC AGREEMENT, at 284 (2011), *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf. *Id.* at 284.

[125] Pinguelo & Cedrone, *supra* note 8, at 364.

[126] *Id.*

[127] *Id.* at 373.

[128] Tom Canavan, *Williams Will Still Be Paid from Nets Deal, Agent Says: Morals Clause Does Not Apply to Remaining $24 Million*, RECORD (Newark), Feb. 28, 2002, at A04.

Grievance Arbitrator reinstated player Latrell Spreewell's contract with the Golden State Warriors after finding that choking one's coach does not meet the NBA's "moral turpitude" standard.[129] When videos surfaced of Baltimore Ravens running back Ray Rice knocking unconscious his now-wife Janay in an Atlantic City elevator, he was initially suspended indefinitely, but won his appeal and was reinstated.[130] After public sentiment turned against Rice, the Ravens, and the NFL for how they handled the incident, the NFL strengthened its domestic violence policy.[131] As these examples illustrate, although national sports leagues attempt to control their athletes' behavior through morality clauses, they have not been entirely effective.

D. Morals Clauses in Advertising

Morals clauses are prevalent in advertising contracts between brands and spokespeople. Many companies use celebrity spokespeople to distinguish their brands from other similar products.[132] In choosing celebrity endorsers, advertisers emphasize "trustworthiness, values, image, reputation and publicity risk."[133] Studies illustrate that celebrity endorsements affect consumers favorably and commingle the public perception of the celebrity and the product .[134] However, this so called "meaning transference" can be a double-edged sword. When the celebrity offends the public, this negative perception can transfer from the person to the product.[135] "Advertisers worry that once a celebrity's image is connected with a product, it may become an albatross if it is besmirched by allegations of impropriety."[136] Therefore, companies often include morals clauses within endorsement contracts that allow them to protect themselves from these risks by quickly severing ties and disassociating the connection between offensive talent and products.[137]

A typical morals clause in an endorsement contract is similar to a standard express morals clause, but the talent can negotiate for narrower clauses.[138] Courts

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[129] Katz, *supra* note 10, at 208–09.

[130] Jill Martin & Steve Almasy, *Ray Rice Wins Suspension Appeal*, CNN (Nov. 30, 2014, 12:59 AM), http://www.cnn.com/2014/11/28/us/ray-rice-reinstated/.

[131] Josh Levs, *NFL Toughens Policy Addressing Assault and Domestic Violence*, CNN (Dec. 10, 2014, 10:45 PM), http://www.cnn.com/2014/12/10/us/nfl-conduct/index.html.

[132] Hill, *supra* note 38, at 14.

[133] Kressler, *supra* note 9, at 240–41.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Success will depend on the talent's leverage. Pinguelo & Cedrone, *supra* note 8, at 364.

have held that an express morals clause gives the brand owner a reasonable amount of time to determine the public perception of a clause violation and decide if they want to terminate the endorsement arrangement.[139] Although these clauses provide an exit opportunity for brand owners, endorsement agreements are still risky. Even if the fallout is minimized, there is potential for damage based on existing products featuring the celebrity's likeness, or the previously established association between the celebrity and the brand.[140]

A striking example of the drawbacks of meaning transference is illustrated by the misstep of the "creator of branding," P&G. After choosing spokeswoman Marilyn Briggs, P&G suffered fallout when an adult film she starred in was released the same week as millions of Ivory soap boxes featuring her likeness.[141] Numerous reviews of the film mentioned the association, and "Ivory's association with 'purity,' 'mildness' and 'home-and-hearth values' was fiercely bruised."[142]

Many other similar mishaps have occurred with companies and their spokespeople in recent years.[143] For instance, when pictures surfaced of Kate Moss doing cocaine, retailer H&M and designers Chanel and Burberry dropped her from their advertising campaigns.[144] Less famous spokespeople are not immune from the effects of morals clauses either. Benjamin Curtis, most famous for being the "Dell Dude," was dismissed from his contract with Dell Inc. after being arrested for marijuana possession in 2003.[145]

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[139] Hill, *supra* note 38, at 14–15.

[140] *See id.* at 15.

[141] Kressler, *supra* note 9, at 239.

[142] *Id.*

[143] "Other such deals include . . . Seven-Up with Flip Wilson (later arrested for trafficking cocaine), Mazda with Ben Johnson (later implicated in an Olympic steroid scandal), Gillette with Vanessa Williams (later appearing nude in Penthouse magazine), Beef Industry Council with Cybil Shepherd (later telling a journalist she did not like to eat beef), Pepsi-Cola with Michael Jackson (later canceling his world tour amid charges of child molestation and admitting that he was addicted to painkillers), Pepsi-Cola with Madonna (later releasing her controversial video for "Like a Prayer"), Pepsi-Cola with Britney Spears (later appearing in numerous magazines drinking Diet Coke), O.J. Simpson with Hertz (later arrested for two murders), and National Fluid Milk Processors Board ("Got Milk?") with Mary- Kate and Ashley Olsen (the former later checked into a treatment facility for an eating disorder)." *Id.* at 241 n.43.

[144] *Id.* at 235; *see also* Pinguelo & Cedrone, *supra* note 8, at 347; *Kate Moss: Sorry I Let People Down*, CNN (Sept. 22, 2005, 3:13 PM), http://www.cnn.com/2005/WORLD/europe/09/22/kate.moss/.

[145] Pinguelo & Cedrone, *supra* note 8, at 372; *see also* Anthony Ramirez, *"Desperate Housewives" Actor Arrested on Marijuana Charge,* N.Y. TIMES, May 19, 2005, at B2, *available*

The most prominent morals clause mishaps have been violations of athletes' endorsement contracts. OJ Simpson, who led the way for sports stars to become spokespeople, also illustrated the importance of morals clauses when he was indicted for a double murder while serving as the spokesman for Hertz, among other brands.[146] Since then, these clauses have become more prevalent in sports endorsement contracts. While a 1997 survey found that less than half of all sports endorsement contracts had morals clauses, by 2003 that number had grown to at least seventy-five percent.[147] Commentators suggest that the growing use of morals clauses in endorsement contracts is due to a combination of factors: the significant amounts of money at stake, the increasing youth of athletes and the concerns posed by an athlete's potential volatility.[148]

There are many other examples of athletes falling victim to morals clauses in endorsement contracts. In 1999, former Sacramento King's player Chris Webber successfully challenged the termination of his endorsement agreement with sportswear brand Fila pursuant to the morals clause.[149] Furthermore, after Kobe Bryant was charged with sexual assault in 2003, he lost endorsement deals with McDonald's, Nutella, Spalding, and Coke, altogether totaling $4 million.[150] When

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at http://www.nytimes.com/2005/05/19/nyregion/desperate-housewives-actor-arrested-on-marijuana-charge.html?_r=0.

[146] *See* Bruce Horovitz, *Simpson Ads Opened Door to Endorsements by Athletes Marketing: Sponsors Are Leery of Controversy. Hertz is Expected to at Least Temporarily Suspend Its Use of Ex-Football Star*, L.A. TIMES, June 15, 1994, at 18, *available at* http://articles.latimes.com/1994-06-15/news/mn-4395_1_sports-marketing. Morals clauses in these contracts allowed the brands to sever the relationship, but the damage was already done, specifically in the case of Hertz.

[147] Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 4 (2005).

[148] *See id.*; *see also* Pinguelo & Cedrone, *supra* note 8, at 369 (stating that in the sports industry alone, "as of May 31, 2008, Nike, Inc., owed more than $3.8 billion in endorsement deals" and the "aggregate of sponsorship deals for the 2008 Beijing Olympics was approximately $2.5 billion").

[149] Webber argued that paying an administrative fine did not constitute the conviction necessary to trigger the clause, winning a $2.61 million judgment in arbitration. Pinguelo & Cedrone, *supra* note 8, at 377–78; *see also 'Prematurely Terminated' - Kings' Webber Wins Ruling Against Fila*, CNN/SPORTS ILLUSTRATED (July 8, 1999, 4:07 PM) https://web.archive.org/web/20040503065604/http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webber_fila_ap/.

[150] In "the greatest marketing comeback in the history of sports marketing," less than six years later, Bryant was re-engaged by Nike and Coke's Vitaminwater, put at number 10 on the Forbes Celebrity 100 list, and his jersey outsold all others in the NBA for the second time in the three years. Bryant's success at making the public and endorsing corporations "forget" his crimes is nothing short of astounding. Taylor, Pinguelo & Cedrone, *supra* note 119, at 101–02; *see also*

Atlanta Falcons quarterback Michael Vick was indicted on dogfighting charges in 2007, Nike, Reebok and Donruss dropped him from endorsement deals.[151] After the adultery scandal that surrounded Tiger Woods in 2009, he lost $22 million in endorsement deals with companies including Gatorade, Accenture, and AT&T.[152]Finally, aided by a broadly-worded morals clause, Nike ended its endorsement deal with seven-time Tour de France winner, Lance Armstrong, in 2012 following mounting allegations that he abused performance enhancing drugs over the course of his career.[153]As all of these examples illustrate, morals clause violations in sports endorsement contracts are widespread.

Because advertisers try to appeal to a wide audience and sell products to the public, they are likely to have lower tolerance for controversies and any bad press about a spokesperson. Any desirable attention that talents' misbehavior might offer to a movie studio or television network is undercut by the risks of meaning transference: a spokesperson's controversial persona becoming irrevocably intertwined with the contracting company's image.

Darren Rovell, *Bryant Is NBA's Most Marketable Again*, CNBC (June 15, 2009, 9:34 AM), http://www.cnbc.com/id/31367376.

[151] Pinguelo & Cedrone, *supra* note 8, at 375. Although Vick suffered a "'catastrophic and very public fall' from sports stardom," and had to "climb a steep hill to repair his tarnished image," he has appeared to have fully recovered. *See* Taylor, Pinguelo & Cedrone, *supra* note 120, at 103. In 2011, nearly four years after they cancelled his contract, Nike signed him to a new deal. *See Nike Re-signs Vick*, N.Y. TIMES, July. 2, 2011, at D3, *available at* http://www.nytimes.com/2011/07/02/sports/football/nike-re-signs-vick.html.

[152] Nike, Woods' biggest endorser since he went pro in 1996, stood by the golfer. Will Wei, *Tiger Woods Lost $22 Million in Endorsements in 2010*, BUSINESS INSIDER (July 21, 2010, 1:19 PM). http://www.businessinsider.com/tiger-woods-lost-22-million-in-2010-endorsements-2010-7. Despite the fallout suffered by Woods in the wake of the scandal, he seems to have recovered, signing his biggest deal since with Hero Motorcorp in December 2014. Bob Harig, *Tiger's New Deal Biggest in Years*, ESPN (Dec. 3, 2014, 6:55 PM), http://abcnews.go.com/Sports/tigers-deal-biggest-years/story?id=27349217.

[153] "The termination of Armstrong as an endorser of the Nike brand was likely simplified by the inclusion of a broadly worded 'morals clause' within the cyclist's endorsement contract with Nike. Morals clauses are typically worded in such a way as to allow a brand to immediately terminate an endorsement contract, without any penalty, should the athlete endorser act in a certain manner that would tarnish the reputation of the brand." Darren Heitner, *Nike's Disassociation from Lance Armstrong Makes Nike a Stronger Brand*, FORBES (Oct. 17, 2012, 10:22 AM), http://www.forbes.com/sites/darrenheitner/2012/10/17/nikes-disassociation-from-lance-armstrong-makes-nike-a-stronger-brand/.

IV
TALENT'S RESPONSE: REVERSE MORALS CLAUSES

Recent developments in the corporate realm have encouraged performers to seek the protection afforded by a morals clause for themselves by using reverse morals clauses. This "reciprocal contractual warranty . . . [is] intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or purchaser of talent's endorsement," and give talent, "the reciprocal right to terminate an endorsement contract based on such defined negative conduct."[154] Such a clause seeks to protect talent from vulnerability they would otherwise have, even if they are aware of the company's misconduct prior to any public scandal.[155] The history and drafting considerations of reverse morals clauses are essential to understanding their function.

A. History of Reverse Morals Clauses

The first example of a reverse morals clause was between Pat Boone and Bill Cosby's record label, Tetragrammaton Records, in 1968.[156] Boone was a religious man with a clean image, and he was concerned about signing a deal with Tetragrammaton due to the provocative cover art featured on the label's new release "Two Virgins," which depicted John Lennon and Yoko Ono nude. Tetragrammaton was "sympathetic to his religious concerns and agreed to a 'reverse morals clause – Boone's contract would lapse if the record company . . . did something unseemly." Ultimately, no formal contract was drawn up.[157] Boone's "novel advocacy of a reverse-morals clause was most likely achievable due to his iconic stature in the entertainment world and his integrity aura in arguably a more conservative era in American history."[158]

Although reverse morals clauses originated with Boone in the 1960s, they have become more relevant due to the financial instability of recent years. The Enron case provides a compelling example of the need for reverse morals clauses in certain cases.[159] In 1999, Enron signed a $100 million, 30-year deal, with the

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[154] Taylor, Pinguelo & Cedrone, *supra* note 119, at 66–67.

[155] Mark Kesten, *Reputation Insurance: Why Negotiating for Moral Reciprocity Should Emerge as a Much Needed Source of Protection for the Employee,* CORNELL HUM. RESOURCE REVIEW, Nov. 23, 2012, http://www.cornellhrreview.org/reputation-insurance-why-negotiating-for-moral-reciprocity-should-emerge-as-a-much-needed-source-of-protection-for-the-employee/.

[156] Taylor, Pinguelo & Cedrone, *supra* note 119, at 80.

[157] *See id.* at 80; *see also* Joseph Reiner, *Pat Boone*, ENCYCLOPEDIA.COM (1995), http://www.encyclopedia.com/topic/Pat_Boone.aspx - 2-1G2:3493100014-full.

[158] Taylor, Pinguelo & Cedrone, *supra* note 119, at 80.

[159] *Id.* at 66.

Houston Astros to name the team's new ballpark Enron Field.[160] Two years later, "Enron filed what was then the largest bankruptcy in American history [and] . . . [s]ince then, the word 'Enron' has been embedded in the national psyche and lexicon as being the icon of corporate avarice and the perpetuation of a Ponzi-type scheme on the public."[161] Because many Astros fans had lost their jobs as a result of the Enron scandal, the Astros spent the next two months trying to buy the balance of the contract for over $2 million to remove Enron's name from the stadium.[162] Even though the Astros secured a new naming rights sponsor, Minute Maid, this change caused it further pecuniary damages because naming rights decrease with rebranding.[163]

Although Enron is a landmark example of the need for a reverse morals clause, it was certainly not the last.[164] In 2009, professional golfer Vijay Singh signed a five-year $8 million endorsement deal with Stanford Financial Group, just one month before allegations that Stanford had participated in a large scale Ponzi scheme surfaced.[165] In 2011, Dior terminated its creative director John Galliano after he was videotaped while shouting anti-Semitic slurs, angering the public and Israeli-born Dior spokesmodel Natalie Portman.[166] These examples illustrate the importance of endorsees protecting themselves with reverse morals clauses.

Because reverse morals clauses are a relatively new development, there is little scholarship and no case law regarding their use, and parties who have drafted them have not released them to the public.[167] However, these clauses are increasingly requested by talent in their contracts, and they serve an important

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[160] *Id.* at 68.

[161] *Id.*

[162] *Id.* at 68–69.

[163] *Id.* at 69; *see also* Ric Jensen & Bryan Butler, *Is Sport Becoming Too Commercialised? The Houston Astros Public Relations Crisis*, 9 INT'L J. SPORTS MARKETING & SPONSORSHIP 23, 27, 29-30 (2007).

[164] Additionally, "in less scandalous cases, where companies that bought the rights for the stadia of the Baltimore Ravens (PSI Net), St. Louis Rams (Trans-World Airlines), St. Louis Blues (Savvis), and Carolina Panthers (National Car Rental) went bankrupt or out of business, the teams were compelled to buy back the naming rights, which can be costly, as reflected in the Baltimore Ravens having to pay $5.9 million to the bankrupt PSI Net in 2002." Taylor, Pinguelo & Cedrone, *supra* note 119, at 70.

[165] Oliver Herzfeld, *Why Jay-Z and Other Talent Should Seek Morals Clause Mutuality*, FORBES (Jan. 2, 2014, 9:24 AM), http://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-seek-morals-clause-mutuality.

[166] *Id.*

[167] *See* Taylor, Pinguelo & Cedrone, *supra* note 119, at 71.

function in times of financial uncertainty.[168] Given that talent have been subject to traditional morals clauses for so long, it seems appropriate they are afforded mutuality.

V
DRAFTING MORALS CLAUSES

In order to ensure that a morals clause is enforceable and inclusive, it is essential that it is properly drafted. Because of the obstacles posed by the modern and evolving moral climate, phrasing is key in both express and reverse morals clauses.

There are several important elements to an effective morals clause. First, the term of the clause must be stipulated. Some clauses only apply to future conduct, while others apply to past conduct.[169] Second, clauses may include acts that have the mere potential to bring harm to the employer, in addition to acts that cause actual injury.[170] If potential injury language is included, the fact finder must examine the facts objectively and subjectively, and stipulate termination if this future injury can be proved.[171] Third, a clause can protect related parties, as opposed to just the employer.[172] Fourth, employers should consider language that both reserves rights not expressed in the contract, and also does not give talent a right to cure.[173] Fifth, the scope of the language of the clause is essential; employers prefer expansive language, while talent prefers narrow language, creating a potential sticking point in contract negotiations.[174] Finally, and most importantly, ambiguity must be minimized to the greatest extent possible.[175]

Even given proper care in drafting, clauses vary widely in breadth. The major issue is the type of transgression covered by the clause. While some clauses protect against only crimes, felonies, or convictions, others are comprehensive enough to encompass any conduct breeding adverse moral sentiment. Charlie Sheen's weak "moral turpitude" clause is an example of the former and the strong

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[168] "Citigroup, the largest government bailout recipient in November 2008, precipitated a scandal of sorts, when it announced that it would charge ahead with the costliest naming-rights deal in sports history with the New York Mets, even though the financial giant had just laid off 52,000 employees and was treading water with almost $20 billion in losses for 2008." *Id.* at 89.

[169] Kressler, *supra* note 9, at 254.

[170] *Id.* at 255.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 255–56.

[175] Katz, *supra* note 10, at 212.

clause in Williams' contract represents the latter. Some agreements are so broad that even alleged violations that turn out to be false,[176] or conduct that "may be considered" a violation, can trigger the clause.[177] If a person has done something in the past that might fall into the categories of conduct included in the clause, the morals clause can be triggered if the past conduct is publicized during the contract term.[178] Remedies can also vary, and can include termination of the agreement and/or the right to remove or withhold credit.[179] Therefore, based on variations in drafting, clauses can differ greatly in their force.

The drafting process for reverse morals clauses differs slightly from that of express morals clauses. As an initial matter, talent must determine the necessity of a reverse morals clause by searching the corporate history of the contracting company. [180] However, not all talent has the leverage to bargain for inclusion of a reverse morals clause, and companies may resist the imposition of moral reciprocity.[181] In addition, drafting concerns are reversed: talent will want a broadly-phrased reverse morals clause, while the employer will desire a narrowly-phrased clause.[182] Finally, talent is concerned with limiting who can invoke the clause and stipulating which corporate entities are bound by it.[183] This will prevent contracting companies from purposely engaging in the proscribed conduct to activate the clause or escaping unscathed when entities violate the agreement.

VI
IMPLICATIONS FOR MORALS CLAUSES IN CONTEMPORARY SOCIETY

The rise of the Internet and development of social media has made morals clauses more important in today's society. "Due to the proliferation of new forms of media, which has greatly increased the speed with which information is disseminated to the public, talented individuals are now significantly more

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[176] Nicolas Cage was accused of being arrested twice for drunk driving and stealing a dog, allegations that turned out to be false, but that could have triggered a morals clause. Pinguelo & Cedrone, *supra* note 8, at 353; *see also* Fox News, *Kathleen Turner Apologizes to Nicolas Cage Over Dog Theft Allegation*, FOX NEWS (Apr. 4, 2008), http://www.foxnews.com/story/2008/04/04/kathleen-turner-apologizes-to-nicolas-cage-over-dog-theft-allegation.html.

[177] SELZ ET AL., *supra* note 26, at § 9:107.

[178] *Id.*

[179] *Id.*

[180] Taylor, Pinguelo, & Cedrone, *supra* note 119, at 92.

[181] *Id.* at 99, 105.

[182] *Id.* at 105.

[183] *Id.* at 105-06.

scrutinized than they have been in the past."[184] An examination of the current moral climate and social media restrictions demonstrate this phenomenon.

A. The State of Morals Today

What constitutes "morality" can be hard to define. "The concept of moral behavior, insofar as it relates to the law, is constantly in a state of flux as it reacts to changes in community standards and incorporating natural evolutionary advancements associated with the growth and development of a society."[185]

American culture has become significantly less concerned with morality. Not only has talent gotten away with misbehavior in the court of public opinion, but contracting companies have also expressed less concern about the moral missteps of talent. Employer leniency can be attributed to the recognition that in the current moral climate, nearly any publicity is good publicity.[186] Christian Slater, Robert Downey Jr., and Charlie Sheen are just a few stars whose misconduct has been tolerated by the industry.[187] Robert Downey Jr. exacted a stunning recovery, going from felon and drug addict to star of one of Hollywood's most lucrative franchises, Ironman.[188]

Different industries have diverse views on morality, which accounts for the discrepancies in morals clause enforcement. Although a newscaster's reputation hinges upon his or her intellectual credibility, a rap artist's depends only on his street credibility, or "street cred."[189] While the former entails avoiding damaging public actions and statements, the latter demands the precise opposite. In the sports and radio industries, morality of the individual athletes and on-air talent seems less of a concern. In radio, provocative statements can be the key to success. Howard

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[184] Pinguelo & Cedrone, *supra* note 8, at 367.

[185] *Id.* at 352; *see generally* Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784 (1989) (examining the circumstances that have contributed to attitudes regarding the relationship between law and morality); Robert P. Burns, *On the Foundations and Nature of Morality*, 31 HARV. J. L. & PUB. POL'Y 7 (2008) (discussing historical observations and arguments relevant to contemporary moral debates).

[186] SELZ ET AL., *supra* note 26, at § 9:107.

[187] *See id.* Each of the stars has had highly-publicized brushes with the law involving drugs and violence. *See, e.g.*, *Actor Christian Slater Gets Jail for Drunk Driving*, L.A. TIMES, Apr. 3, 1990, at B2; *Charlie Sheen Hospitalized in Fair Condition After Overdose*, L.A. TIMES, May 22, 1998, at B4; *Drug Charges Filed Against Robert Downey Jr.*, L.A. TIMES, July 17, 1996, at B4.

[188] Lacey Rose, *Will Charlie Sheen Ever Work Again?*, HOLLYWOOD REPORTER (Feb. 28, 2011, 6:38 PM), http://www.hollywoodreporter.com/news/will-charlie-sheen-ever-work-162554.

[189] *See* RONN TOROSSIAN & KAREN KELLY, FOR IMMEDIATE RELEASE: SHAPE MINDS, BUILD BRANDS, AND DELIVER RESULTS WITH GAME-CHANGING PUBLIC RELATIONS 219 (2011).

Stern made a career out of his outlandish radio behavior, until the FCC imposed formidable fines on the "shock jock," and Stern announced he would leave traditional radio for Sirius Satellite Radio, a medium free of FCC regulation.[190] In sports, being violent is occasionally part of the job description, but athletes struggle to sequester this behavior to the playing field. Players' violent off-field antics have resulted in public criticism of the NFL in recent years. Because each industry has unique concerns, each has a different conception of morality.

Despite the diverse views on morality across industries, public opinion has placed more emphasis on comments than actions. Comments that are homophobic, racist, anti-Semitic, or sympathetic to terrorism have elicited substantial public backlash. For instance, after admitting past use of racial slurs in a deposition, The Food Network dropped celebrity chef Paula Deen and a slew of sponsors.[191] Deen's image has yet to recover from the incident, and she has recently incited controversy again for a racist social media post.[192] Meanwhile, offensive public actions seem to have far less impact. Lindsay Lohan, notorious for her drug use, car accidents, and arrests for driving under the influence, cashed in on her controversial image by advertising car insurance during the Superbowl.[193] Similarly, the public has been largely ambivalent toward Florida State Quarterback Jameis Winston, despite public rape allegations against him. In fact, most of the news surrounding the NFL hopeful centers upon the "risk" of drafting him, rather than disapproval of his actions.[194]

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[190] Sheila Marikar, *Howard Stern's Five Most Outrageous Offenses*, ABC NEWS (May 14, 2012), http://www.abcnews.go.com/Entertainment/howard-sterns-outrageous-offenses/story?id=16327309.

[191] "The Food Network, owned by Scripps Networks Interactive (SNI), let Deen's contract run out, and she was dumped by a slew of sponsors and business partners, including pork producer Smithfield Foods, the casino chain Caesars (CZR), the diabetes drugmaker Novo Nordisk (NVO) and retailers Wal-Mart (WMT), Target (TGT), Home Depot (HD), Sears (SHLD) and JCPenney (JCP)." Aaron Smith, *Paula Deen's Coming Back,* CNN MONEY (Feb. 12, 2014, 3:13PM) http://money.cnn.com/2014/02/12/news/companies/paula-deen-najafi/.

[192] Deen posted a photo of her son in brownface. She later blamed her "Social Media Manager" who was fired after the incident. Emanuella Grinberg, *Paula Deen Under Fire for Photo of Son in Brownface,* CNN (July 7, 2015, 4:05 PM), http://www.cnn.com/2015/07/07/living/paula-deen-brownface-feat/.

[193] *Lindsay Lohan -- I'm the Queen of Car Crashes ... So I'm Selling Insurance!*, TMZ (Jan. 18, 2015, 12:55 AM), http://www.tmz.com/2015/01/18/lindsay-lohan-esurance-commercial/ -ixzz3QnNcOAQd.

[194] *E.g.*, Bill Pennington, *The Tricky Calculus of Picking Jameis Winston*, NY TIMES, Jan. 30, 2015, at D1, available at http://www.nytimes.com/2015/01/31/sports/football/no-1-debate-in-tampa-whether-to-draft-jameis-winston.html?_r=0.

B. Morals Clauses and Social Media

There are a growing number of contractual provisions aimed at promoting confidentiality and prohibiting disparaging remarks on social media platforms, which might fall within the purview of a morals clause. "The virtually instantaneous exposure and, in some cases, embarrassment that can accompany a celebrity's missteps thanks to social networking tools is yet another reason to address and manage that individual's activity through a contractual provision."[195]

Due to this trend, social media restrictions will likely be an increasing presence in morals clauses.[196] For example, ABC guidelines encourage "tweeting", but list seven specific prohibited practices surrounding this activity, including "making disparaging remarks about the show."[197] These restrictions and guidelines are not intended to ban social media, but instead to make talent more mindful of their expression and statements on these platforms.[198] The proliferation of such clauses, and the important role they play in a technologically advancing society has led an industry expert to say, "[e]very celebrity endorsement contract of any kind in the future must have a Twitter/Social Media clause . . . I will be so bold as to state that the failure to not have such a clause would be tantamount to endorsement contract drafting malpractice."[199]

The relationship between morals clauses and social media is complex.[200] First of all, "[e]mployer restrictions on off-duty speech and conduct are troubling in that they squelch expression and individual autonomy and may compromise the employee's right to a private life, especially when restrictions are unilaterally imposed after employment commences."[201] Although there has not been an obvious backlash against these restrictions yet, this is likely due to their novelty. Furthermore, clauses limiting social media expression are in direct tension with

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[195] John G. Browning, *The Tweet Smell of Success: Social Media Clauses in Sports & Entertainment Contracts*, 22 TEX. ENT. AND SPORTS LAW J. 5, 6 (2013).

[196] See Taylor, Pinguelo & Cedrone, *supra* note 119, at 111.

[197] Andrew Wallenstein & Matthew Belloni, *Hey, Showbiz Folks: Check Your Contract Before Your Next Tweet*, HOLLYWOOD REPORTER (Oct. 15, 2009, 1:19 PM), http://www.reporter.blogs.com/thresq/2009/10/check-your-contract-before-your-next-tweet.html.

[198] *Id.*

[199] Browning, *supra* note 195, at 20–21.

[200] Katz, *supra* note 10, at 226.

[201] Patricia Sánchez Abril, Avner Levin & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L. J. 63, 90 (2012) ("Some organizations have restricted their employees' off-duty use of social networking sites or have prohibited using them altogether. For example, the National Football League has prohibited players' access to social media immediately before, during, and after football games.").

another studio practice, leveraging the social media popularity of talent to promote a project.[202] In fact, social media postings have replaced traditional advertising in some talent contract negotiations.[203]

Ensuring that the parties specify what mediums of communication are covered is essential to promoting the proper operation of morals clauses without unfairly trammeling talents' freedom of expression.[204] As social media becomes more prominent and varied in today's society, platforms such as Facebook, Twitter, and Instagram have significantly expanded the scope of what parties must address in talent contracts. Celebrities use these mediums to express themselves, and it is unlikely that they would respond favorably to contractual social media censorship. However, these platforms offer increased, direct contact between celebrities and the public, and create more opportunities for talent to get into trouble.

An offensive post on Instagram takes only moments to complete but could take years to live down. James Franco learned this the hard way when he faced public embarrassment after trying to seduce an underage girl on Instagram.[205] This contrasts starkly with times past, when contact talent had with the public was limited to pre-scripted television and radio appearances or transient personal encounters. Restrictions seem necessary given the dangers these platforms engender; a misstep on any one of them could mean the instantaneous destruction of an entire project, employment relationship, or public persona if the conduct rouses the public enough.

1. Case Study: Twitter

Twitter provides a useful case study of the risks of social media usage and the value of such restrictive clauses. Twitter has become a popular way for celebrities to communicate with fans, but the instantaneous nature of the site begets

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[202] For example, Rihanna was cast in "Battleship" partially because of the exposure she offered through her extensive fan base on social media, including 26 million twitter followers. Browning, *supra* note 195, at 21; *see also* Wallenstein & Belloni, *supra* note 197.

[203] Peter Hess, the co-head of commercial endorsements for Creative Artists Agency said, "We're starting to have in negotiations, 'We'd like to include X number of tweets or Facebook postings.' It's similar to traditional advertising – instead of two commercials, now we want two tweets." Browning, *supra* note 195, at 21.

[204] *See* Katz, *supra* note 13, at 225.

[205] Jay Hathaway, *James Franco Apparently Tried to Hook Up with a Teenager on Instagram*, GAWKER (Apr. 3, 2014, 9:29 AM), http://gawker.com/james-franco-tried-to-hook-up-with-a-17-year-old-on-ins-1557491436.

significant risks of misuse and reputational damage.[206] "Armed with Twitter, talent are just possibly one tweet away from scandal or a morals clause violation."[207]

There are numerous examples of the destructive effects of Twitter use, specifically with regard to its potential to terminate talents' endorsement deals. For example, after the voice of the AFLAC duck, Gilbert Gottfried, tweeted insensitive jokes about a tsunami in Japan, the insurance company terminated his contract.[208] Olympic swimmer Stephanie Rice was dropped from her endorsement deal with Jaguar after she tweeted a homophobic comment.[209] Hanesbrands terminated Rashard Mendenhall, Steelers running back and Champion brands spokesman, for violating his morals clause after he tweeted controversial commentary relating to 9/11.[210] Mendenhall brought a $1 million suit against Hanesbrands for breach of the implied covenant of good faith and fair dealing.[211] "Mendenhall's attorneys began building what will henceforth be known here as the 'Charlie Sheen defense': pointing to another celebrity who has said outrageous things and putting the onus on the other party to explain why one endorsement deal was terminated and another wasn't."[212] Although the suit survived a motion to dismiss, the parties eventually settled.[213] Thus, Twitter presents a compelling example of the destructive effects of social media upon morals clauses.

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[206] Courtney Love, Alice Hoffman, Mark Cuban, and Michael Beasley are among the many celebrities who have experienced backlash from comments made on the social media site. Taylor, Pinguelo & Cedrone, *supra* note 119, at 109–10.

[207] *Id.* at 110–11.

[208] Browning, *supra* note 195, at 20.

[209] *Id.*

[210] Mendenhall tweeted about Osama Bin Laden, "[w]hat kind of person celebrates death? It's amazing how people can HATE a man they never even heard speak. We've only heard one side . . . " And of the 9/11 attacks, the player tweeted, "[w]e'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style." Browning, *supra* note 195, at 20. Hanesbrands claimed that these tweets fell within the purview of the morals clause within Mendenhall's endorsement agreement, because they "concluded that his actions meet the standards set forth in the Agreement of bringing Mr. Mendenhall 'into public disrepute, contempt scandal or ridicule, or tending to shock, insult or offend a majority of the consuming public or any protected class or group thereof . . . .'" Because of these actions, he was considered no longer an effective spokesperson for Champion. Katz, *supra* note 10, at 227.

[211] *Id.*; *see also Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D. N.C. 2012).

[212] Eriq Gardner, *Settlement Reached in Lawsuit Filed by NFL Star Fired as Pitchman for 9/11 Conspiracy Tweets*, HOLLYWOOD REPORTER (Jan. 15, 2013, 3:20 PM), http://www.hollywoodreporter.com/thr-esq/settlement-reached-lawsuit-filed-by-412750.

[213] *Id.*; Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013, 12:02 PM), http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/.

CONCLUSION

You breathe a sigh of relief. Fred Fabricate has been released from his contract based on his morals clause violation. Unfortunately, your enthusiasm is short lived; Fabricate's replacement is not as popular, and the network experiences marked drops in ratings. Were you too hasty in your decision to invoke the morals clause? Is this decline in popularity due to the bad press from the incident, or does America just want their favorite anchor back? You have minimized your financial liability, but at what expense? Will Fabricate's image ever recover, and if so, will you lose out on the profit?

This hypothetical presents many of the same concerns surrounding morals clauses today. Companies use the clauses to temper the link between themselves and talent, controlling their unpredictable behavior and protecting themselves from their potential missteps. Nonetheless, it is often unclear when these clauses have been triggered, when they should be invoked, and the potential repercussions that may occur.

Diverse conceptions of morality and opposition to inhibiting freedom of expression present distinct obstacles to morals clauses today. Although morals clauses have played an important role in motion picture, television, athletics, and advertising contracts for over a century, it is unclear what effect they will have in the future.

On the one hand, morals clauses may lose their relevance entirely due to the increasingly lax moral climate. Under this view, morals matter far less, and there is no sense in attempting to censor them. An initial criticism of this argument is that although cosmopolitan regions of the country have relaxed views on morality, there are still many sectors of the population with a strong religious consciousness and correspondingly rigorous conception of moral conduct. Because these individuals also form a captive audience for the industries in question, their attitudes must also be considered by both courts and employers in enforcing morals clauses. The deeply imbedded cultural opposition to stigmatized concepts of racism, homophobia, anti-Semitism, terrorism and violence also contradict this trend.

In the alternative, morals clauses may only become more important as social media and the speed with which information is disseminated increases public awareness of and contact with talent. The consistent scandal surrounding celebrity expression on social media and the upswing of contractual clauses addressing these issues evidences this inclination.

Despite the merits of the argument that the morals clause is in decline, the clauses remain relevant, effectual, nuanced, and flexible. Even in the case of Brian Williams, a context in which a morals clause is not the most obvious recourse, the provision has demonstrated its pervasive power. Given the proliferation of social media and the backlash of talent through reverse morals clauses, this dynamic area of contract law shows no sign of fading into obscurity.

#MeToo Hits Movie Deals: Studios Race to Add 'Morality Clauses' to Contracts

6:50 AM PST 2/7/2018 by Tatiana Siegel

Illustration by: Zohar Lazar

Sex abuse insurance? It could happen. Broad language allowing stars and distributors to be dropped if accused of misconduct is beginning to be included in negotiations in the wake of the Harvey Weinstein and Kevin Spacey situations.

Moral turpitude? It's a concept that showbiz talent soon will be well-acquainted with. The term, which means "an act or behavior that gravely violates the sentiment or accepted standard of the community," is popping up in contracts of actors and filmmakers in the wake of the #MeToo movement that has rocked Hollywood.

Fox is just one of the studios that is trying to insert broad morality clauses into its talent deals, giving it the ability to terminate any contract "if the talent engages in conduct that results in adverse publicity or notoriety or risks bringing the talent into public disrepute, contempt, scandal or ridicule."

A Paramount source says it long has had standards of conduct that it asks employees and talent to adhere to and that it's reviewing its approach in the new era. At the same time, several smaller distributors have begun to add a clause in their longform contracts that gives them an out if a key individual in a film — whether during or before the term of the contract — committed or is charged with an act considered under state or federal laws to be a felony or crime of moral turpitude.

Studios and buyers are responding to the real financial losses incurred in the aftermath of a flurry of sexual harassment and assault accusations and admissions that have enveloped everyone from Kevin Spacey to Brett Ratner to Jeremy Piven since October, when Harvey Weinstein first was outed as a predator.

Netflix took a $39 million write-down following numerous assault accusations involving *House of Cards*' Spacey, who also was poised to play Gore Vidal in a movie for the streamer. CFO David Wells didn't name Spacey or *The Ranch* star Danny Masterson, who left the Netflix series following rape accusations, but said the write-down was "related to the societal reset around sexual harassment."

Similarly, *All the Money in the World* financier Imperative Entertainment had to pony up $10 million to replace Spacey with Christopher Plummer for eleventh-hour reshoots on the Sony film. Spacey did not have a morality clause in his contracts, according to sources, and was paid for the entire final season of *House of Cards* — even though he won't appear in any of the episodes — and for *All the Money in the World*.

Lawyer Schuyler Moore has begun to add a morality clause to contracts in an effort to protect his distributor clients from being saddled with the next #MeToo-tainted film. "Any distributor can say, 'I'm not picking up this film if somebody involved in the film has some charge like that.' Absolutely. I'm doing it, and [these clauses] are enforceable," says the Greenberg Glusker partner. "And it's just a question of drafting it in a way that works."

As such, there's a new version of liability affecting Hollywood, and studios and buyers are scrambling to figure out how to handle it. Naturally, talent reps are balking.

"I'm all for [#MeToo]. I totally support it. But I think [broad morality clauses] create a bad precedent," says attorney Linda Lichter. "It's one thing to say someone is a criminal. It's another thing to say someone has been accused by someone and you can fire them and not pay them."

Others claim studios and buyers are hypocritical if they are unwilling to include a morality clause covering their own executives. Directors and talent endure economic hardship when their films are bought by a company whose top execs, like Weinstein, become synonymous with sexual ignominy. Adds a top agent: “It’s too far reaching legally. And it should cut both ways as buyers have culpability as well.”

But distributors, all of whom declined to be named for competitive reasons, say their hands are being forced by their ancillary partners including cable providers and pay-TV networks who now are including morality clauses in their long-form contracts.

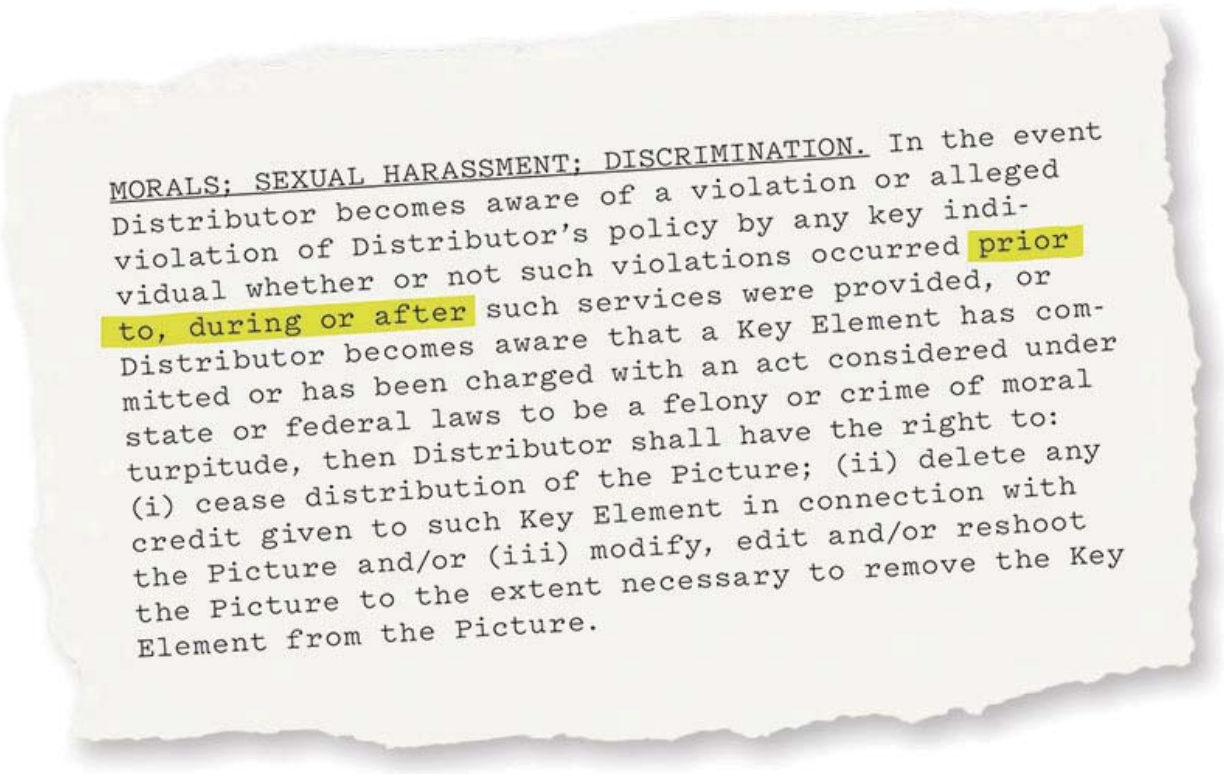
On the flip side, Fox Searchlight lost millions on the release of *The Birth of a Nation* after revelations that star-filmmaker Nate Parker had stood trial for rape when he was a college student (Parker was acquitted) and that his accuser later took her own life.

In the post-Weinstein landscape, a number of distributors have been left in vulnerable positions. YouTube Red dropped Morgan Spurlock's *Super Size Me 2: Holy Chicken!* following the filmmaker's admission of sexual misconduct, but not before paying $3.5 million that sources say it likely won't get back. The Orchard dodged a bullet when its $5 million acquisition of Louis C.K.'s *I Love You, Daddy* became unreleasable after a wave of harassment accusations were leveled at the comedian. Though C.K. was not legally obliged to take back the film, he wrote The Orchard a check to reimburse the company for what it had paid toward the film's release.

"Everyone is trying to cover their asses as much as possible," says one distribution exec whose company recently began adding morality clauses to its contracts.

One producer insists that restrictive clauses will spark an inability to finance movies. "If there is anything downstream that impedes the ability of a financier to recoup his investment, the financier will not invest," says this producer, adding that bond companies do not currently address the potential of a key figure negatively impacting a film because of a sex scandal. Film Finances Inc., the top bond completion company working in Hollywood, declined to comment.

"There's definitely an opportunity for a company to come up with some sort of sex abuse insurance," says the producer. That's a point echoed by Lichter. "The studios should start thinking about whether there's some kind of insurance for this type of thing," she says. "This is a whole new territory."



MORALS; SEXUAL HARASSMENT; DISCRIMINATION. In the event Distributor becomes aware of a violation or alleged violation of Distributor's policy by any key individual whether or not such violations occurred prior to, during or after such services were provided, or Distributor becomes aware that a Key Element has committed or has been charged with an act considered under state or federal laws to be a felony or crime of moral turpitude, then Distributor shall have the right to: (i) cease distribution of the Picture; (ii) delete any credit given to such Key Element in connection with the Picture and/or (iii) modify, edit and/or reshoot the Picture to the extent necessary to remove the Key Element from the Picture.

One film distributor began adding this “morality clause” language to its talent contracts as of the new year.

Lacey Rose contributed to this report.

A version of this story first appeared in the Feb. 7 issue of The Hollywood Reporter magazine. To receive the magazine, click here to subscribe.

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Netflix, Amazon Look Past Sundance for Their Own Blockbusters

REEL LEGAL

Evolving talent agreements after Weinstein and #MeToo

By Jed Enlow Apr 12, 2018

Morals clauses allow termination for scandalous or unsavory actions, including "Moral Terpitude."

If your cookware company was about to release a print campaign with Mario Batali's face plastered all over it, the day after he issued his infamous cinnamon roll apology for sexual misconduct, there could be a big problem.

Companies may have substantial funds and resources invested in projects or campaigns that must be shelved and/or replaced.

Harvey Weinstein, Matt Lauer, Garrison Keillor, Mario Batali, Charlie Rose, Russell Simmons, Kevin Spacey. Unfortunately this is only a fraction of a list of celebrities who recently seemed to be on top of their respective worlds until allegations sent their likeability and brand values in to a nosedive.

I'm not here to discuss the merits and details of these instances, and certainly don't intend to reduce the impact to victims of horrendous actions into a marketing discussion. However, at the end of the day there are business consequences to media creators, brands, and advertisers when talent or endorsers go through an incident that destroys their market value in an instant.

Talent and endorsement agreements commonly account for damaging allegations (and worse) with language known as "morals clauses." These clauses allow termination of agreements with talent for scandalous or unsavory actions, including those of "Moral Terpitude," which is defined as "an act or behavior that gravely violates the sentiment or accepted standard of the community." Often these clauses are very broad, and allow discretion for the producer to decide when actions are offensive enough to warrant termination under a morals clause.

Jed Enlow

Below is a typical morals clause:

> If Artist does anything that is or will be an offense involving moral turpitude under federal, state or local laws or which may bring Company or Artist into public disrepute, contempt, scandal, or ridicule, or which insults or offends the community or any substantial organized group thereof, then Company will have the right at its option to terminate this Agreement by written notice to Artist.

Kevin Spacey was famously replaced in All The Money In The World after his indiscretions came to light. It's hard to fathom how many marketing campaigns had to be scrapped or overhauled in the past several months of fallout from the Harvey Weinstein allegations and resulting #Metoo movement. While morals clauses provide some protection in allowing companies to terminate talent without further payment, companies may need to get more creative to recover costs from lost content. Some may

try to find a way to hold offenders liable for lost costs through indemnity obligations or consequential damages.

On the other hand, some companies end up with a positive PR and marketing result from the goodwill associated with terminating talent agreements in response to bad behavior. All The Money In The World surely got increased press coverage because of the reshoots to replace Kevin Spacey with Christopher Plummer, and the additional controversy over fee differences for Mark Wahlberg and Michelle Williams. I'm sure the film's marketing people weren't devastated by the unexpected bonus press coverage leading up to awards season, and in a sense this might have mitigated the losses from re-shoots and rebranding.

At times, brands go to great lengths to demonstrate their commitment to causes by terminating partnerships, programs, and talent relationships. In recent weeks, Dick's Sporting Goods stopped selling assault style weapons, and many companies have terminated relationships with the NRA in the wake of public backlash to school shootings. Nike in the past terminated an endorsement deal with Manny Pacquiao for homophobic remarks, and it is not uncommon to see lists of advertisers who drop their ad-buys for programs that are known to have a political slant in one direction. While the primary motivator for these decisions is probably the morals and beliefs of company leaders, there is surely consideration given to the market benefit of consumer reactions and press coverage.

In the age of social media, many celebrities seem more outspoken about social issues, in part because their opinions are easily distributed to the world. Entertainers, athletes and other public personalities no longer need the press to spread their messages, and their voices can become hugely influential. It was recently reported that a tweet from Kylie Jenner was responsible for a $1.3 Billion loss in value to Snapchat.

Personal brands are the basis for many celebrity careers, and they need protection as well. It might be wise for some celebrities to negotiate for reverse morals clauses. A reverse morals clause would allow talent to terminate an agreement if the producer or Company engages in activity that is damaging to the reputation of the talent. For example, if Beats Audio suddenly came out against any kneeling during the national anthem, how could Colin Kaepernick continue to endorse their products? If Ashley Judd signed a multi-picture deal and then discovered that the studio head was accused of harassment and assault, should she be able to terminate the deal without penalty? Many celebrities build their brands based on political and policy positions, and the impact if a

partner came out against or contrary to their position could do more damage to their following than the compensation in the agreements.

The wave of change to talent agreements, will likely include discussions about "inclusion riders," brought to light in Frances McDormand's Best Actress speech at the Oscars. Inclusion Riders presumably would require producers to include a certain number or percentage of women or minorities in their projects. It remains to be seen how successful talent will be in negotiating for, or more importantly enforcing these riders. Parties on both sides of talent transactions might also consider expanding their definitions in morals clauses to include certain political activity as well, in this political climate of inflamed rhetoric and political boycotts. It is clear that the entertainment industry is feeling the impact of recent sexual assault and harassment revelations, and talent agreements will likely see an overhaul as a consequence. Critics may argue that the first amendment protects the rights of all companies and individuals to voice their opinions, but that has no bearing on the terms of their talent contracts.

Jed Enlow is a Chicago-based entertainment attorney who helps clients navigate the evolving issue of content creation and ownership, finding practical solutions to their content issues. A former partner at Leavens, Strand & Glover, his current clients include the *Pickler & Ben* show, where he is production attorney, and his previous experience includes work for *Steve Harvey* and *The Oprah Winfrey Show*.

BACKTALK

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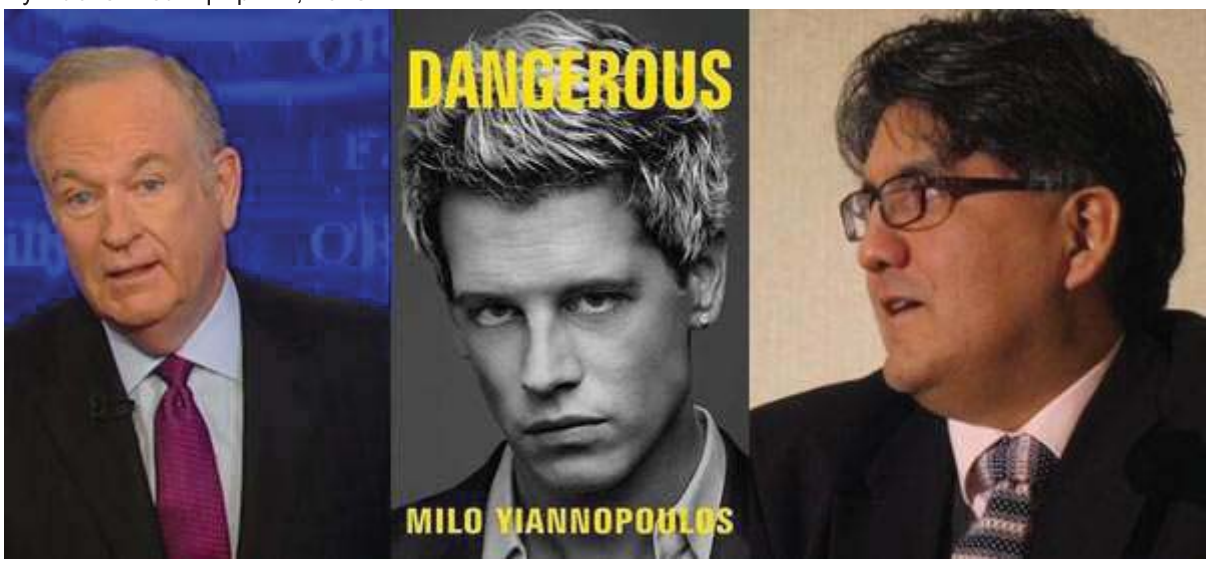
In the #MeToo Moment, Publishers Turn to Morality Clauses

Once an anomaly in author contracts, morality clauses are becoming a standard tool for publishers looking to protect themselves against misbehaving authors

By Rachel Deahl | Apr 27, 2018



Until recently, the term "moral turpitude" is not one that crossed the lips of too many people in book publishing. But Bill O'Reilly, Milo Yiannopoulos, Sherman Alexie, Jay Asher, and James Dashner changed all that.

A legal term that refers to behavior generally considered unacceptable in a given community, moral turpitude is something publishers rarely worried themselves about. No longer.

Major publishers are increasingly inserting language into their contracts—referred to as morality clauses—that allows them to terminate agreements in response to a broad range of behavior by authors. And agents, most of whom spoke with *PW* on the condition of anonymity, say the change is worrying in an industry built on a commitment to defending free speech.

"This is very much a direct response to #MeToo," said one agent when asked about publishers' growing insistence on morality clauses. Most sources interviewed for this article agreed with this sentiment, citing the way sexual misconduct allegations and revelations are ending careers and changing the way companies do business. But it's not just sexual harassment charges (which embroiled bestselling authors O'Reilly, Alexie, Asher, and Dashner) that publishers are scrambling to protect themselves against. It's also the fallout that can come from things their authors say.

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The situation with Yiannopoulos highlights this. S&S's purchase of his book *Dangerous* in December 2016 caused a backlash in certain circles of the industry, with some complaining that the right-wing provocateur peddled in hate speech and should not be given a platform by a major publisher.

In February 2017, after the deal received bad press and several of S&S's authors threatened to leave it, the publisher canceled Yiannopoulos's book. The cancelation coincided with the resurfacing of an old interview Yiannopoulos gave, in which he appeared to condone child abuse.

S&S said that it canceled *Dangerous* because the manuscript was not to its liking. (The language in most author contracts gives publishers quite a bit of latitude in determining what constitutes a suitable manuscript.) Some felt, however, that the publisher was looking for a reason to drop the "alt-right" bad boy. Yiannopoulos sued S&S but wound up dropping the case earlier this year.

The controversy surrounding *Dangerous* highlights the stakes for publishers at a moment when platforms and reputations can be built, or destroyed, with a tweet. For agents, the Yiannopoulos case underlines some of the biggest concerns about morality clauses: the threat of muzzling speech.

"The gist of it," one agent said in reference to a clause in Penguin Random House's boilerplate, "is that [the publisher] wants the right to cancel an author's book anytime the author says or does something the publisher doesn't agree with. It's crazy."

Another agent, who admitted to having concerns about some of the morality clauses he's seen, said he nonetheless understands publishers' rationale for using them. "There are obviously a lot of very complex things going on here," he said, speaking to the way publishers are reacting to the shifting social climate. He also noted that most publishers he's dealt with have been open to changing these clauses. "When you go back to [publishers] and remind them that authors are allowed protected speech, political or otherwise, my experience is that they've been very responsive."

But the agent who called these clauses "crazy" said he felt that more nefarious possibilities lie ahead. "Once Medusa's head is removed from the box, a whole series of events can occur," he complained. "Maybe [the publisher] signs up three books for $1 million, and the first book doesn't do so well, and they use this clause to get around what's legal and fair. This is like dropping a pebble in a pond: there are a lot of ripples."

Mary Rasenberger, president of the Authors Guild, who has seen some of the morality clauses publishers are using, said she also understands why houses are moving in this direction. "There are instances where it is appropriate to cancel a contract with someone—if, say, they are writing a book on investing and they're convicted of insider trading." But Rasenberger has concerns about the new boilerplates she's been seeing. "These clauses need to be very narrowly drawn. The fear is that clauses like these can quash speech that is unpopular, for whatever reason."

Another agent admitted to being distressed by the fact that some of the morality clauses she's seen "are going very far." She said that though she and many of her colleagues think it's "not unfair for a publisher to expect an author to be the same person when it publishes the book as when it bought the book," she's worried how extreme some of the language in these new clauses is.

"If you're buying bunny books or Bible books, these clauses make sense," said Lloyd Jassin, a lawyer who specializes in publishing contracts, referring to deals for children's books and Christian books. He wondered, though, about a publisher trying to hold authors of any other type of book to a moral standard. Noting that morality clauses are about money, not morality (specifically, they're about a publisher's ability to market an author), he posed a hypothetical. "Is the author of *The El Salvador Diet*, which touts a fish-only regimen, allowed to be photographed eating at Shake Shack? That goes to the heart of the contract." He paused and added: "This is definitely a free speech issue."

Sources at the major publishing houses, who also spoke on the condition of anonymity, said agents have been largely

receptive to the fact that publishers need to protect themselves from unexpected—and potentially extreme—behavior by authors. None of the sources at the publishers said they felt free speech was at issue here.

“[The agents] have gotten [these clauses] and understood they’re addressing the current marketplace reality,” said one insider at a major house. A source from another Big Five house said, “We’re not trying to be the morals police here,” before adding that this change is simply “a sign of the times.”

Richard Curtis, a veteran agent with his own firm, disagreed. “The Terror was also a sign of the times,” he said (referring to the period following the French Revolution when thousands were put to death by the revolutionary government). For Curtis, the answer to morality clauses is to fight them into nonexistence. “The agents must find their cojones to stand up against this kind of control. They must.”

A version of this article appeared in the 04/30/2018 issue of *Publishers Weekly* under the headline: In the #MeToo Moment, Publishers Turn to Morality Clauses

Warner Bros becomes the first major studio to embrace inclusion company-wide

By **LUCHINA FISHER and MICHAEL ROTHMAN via GMA**
Sep 6, 2018, 2:18 PM ET

Ava DuVernay talks inclusion riders, working with Oprah in 'A Wrinkle In Time'

Months after Frances McDormand popularized the term "inclusion riders," Warner Bros became the first major studio to adopt a company-wide commitment to diversity and inclusion.

WarnerMedia, the parent company of Warner Bros, announced on Wednesday that the studio, along with its sister companies HBO and Turner, will launch the initiative with the film "Just Mercy," starring Michael B. Jordan.

The "Black Panther" star was one of the first actors to commit to using inclusion riders, which allow actors to require diversity in the cast and crew of a film production as part of their contracts.

The term went viral after Frances McDormand used it during her powerful acceptance speech after winning the best actress Oscar earlier this year. "I have two words to leave with you tonight, ladies and gentlemen: Inclusion rider," she said, concluding her speech.

Frances McDormand accepts the award for best performance by an actress in a leading role at the Oscars, March 4, 2018.

More: Frances McDormand 'just found out' about inclusion riders, and 'we're not going back'

A week later, Jordan announced that his company, Outlier Society Productions, would add inclusion riders on all future deals.

On Wednesday, the 31-year-old actor said on social media, "Inclusivity has always been a no-brainer for me, especially as a black man in this business. It wasn't until Frances McDormand spoke the two words that set the industry on fire — inclusion rider — that I realized we could standardize this practice."

He continued, "Earlier this year I formally pledged my production company, Outlier Society, to this way of doing business. And today, the @warnermediagroup family has announced a new policy that accomplishes our shared objectives. I applaud them for taking this enormous step forward and I'm proud that our film, 'Just Mercy,' — which begins production today — will be the first to formally represent the future we have been working toward, together."

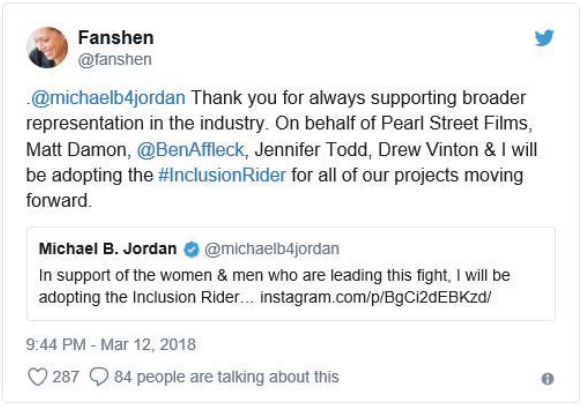
He concluded his post with, "This is just the beginning..."

Inclusivity has always been a no-brainer for me, especially as a black man in this business. It wasn't until Frances McDormand spoke the two words that set the industry on fire —inclusion rider — that I realized we could standardize this practice. Earlier this year I formally pledged my production company, Outlier Society, to this way of doing business. And today,the @warnermediagroup family has announced a new policy that accomplishes our shared objectives. I applaud them for taking this enormous step forward and I'm proud that our film, Just Mercy, — which begins production today — will be the first to formally represent the future we have been working toward, together. This is just the beginning...

A post shared by Michael B. Jordan (@michaelbjordan) on Sep 5, 2018 at 10:45am PDT

More: Matt Damon, Ben Affleck's company will use inclusion riders on future projects

Oscar winners Brie Larson, Matt Damon and Ben Affleck have also committed to using inclusion riders.



But WarnerMedia is the first major entertainment company to establish a company-wide policy embracing the concept behind inclusion riders. In a statement, obtained by ABC News, the company said that it "pledges to use our best efforts to ensure that diverse actors and crew members are considered for film, television and other projects, and to work with directors and producers who also seek to promote greater diversity and inclusion in our industry."

The statement continued, "To that end, in the early stages of the production process, we will engage with our writers, producers and directors to create a plan for implementing this commitment to diversity and inclusion on our projects, with the goal of providing opportunities for individuals from under-represented groups at all levels. And, we will issue an annual report on our progress."

Warner Bros becomes the first major studio to embrace inclusion company-wide - ABC News

Ben Affleck and Matt Damon speak onstage during the 89th Annual Academy Awards at Hollywood & Highland Center on … m

Stacy L. Smith, the founder of the Annenberg Inclusion Initiative at the University of Southern California, was the first to float the idea of inclusion riders at a TED conference in 2016, at which she presented a slew of "really depressing" facts about gender inequality in film.

"An equity rider by an A-lister in their contract can stipulate that those roles reflect the world in which we actually live," Smith during her TED Talk. "Now, there's no reason why a network, a studio or a production company cannot adopt the same contractual language in their negotiation processes."

Smith went on to explain the advantages of actors' pursuing riders, which she offered as a possible solution to the "inclusion crisis in Hollywood."

> "The typical feature film has about 40 to 45 speaking characters in it. I would argue that only eight to 10 of those characters are actually relevant to the story," she added. "The remaining 30 or so roles, there's no reason why those minor roles can't match or reflect

the demography of where the story is taking place."

More: Hollywood has made 'no progress' for female characters on screen, study shows

Earlier this year, Smith released her latest report showing that there has been "no progress" for women on-screen over the last decade. An analysis of the top 100 films from 2017 found only 31.8 percent of the characters with dialogue were women -- about the same amount as it has been for the past 11 years.

Meanwhile, white men occupied more than twice the number of speaking roles as women in 2017.

"Even with the cacophony of voices crying out for inclusion and workplace safety... Hollywood hasn't really responded to the only thing that would create change," Smith told ABC News at the time of the study's release.

She cited hiring as the single best way to create parity. "Until those hiring practices change, none of these numbers are going to change," she said.

Warner Bros' announcement was greeted favorably by industry watchers.

"The inclusion rider creates an opportunity for leaders like Michael B. Jordan and Warner Bros to use their powers for good, bringing inclusion and diversity to an industry that has traditionally lacked both," Kalpana Kotagal, partner at Cohen Milstein Sellers and Toll and a co-author of the inclusion rider, told ABC News in an emailed statement. "Commitments like this are exactly what the inclusion rider was designed to galvanize, both in Hollywood and far beyond."

Melissa Silverstein, the founder of the website Women and Hollywood, also cheered the news.

"A studio taking the lead like this is a really strong indication that this is going to be something that is going to make them money and they also believe they are doing the right thing," she told ABC News.

As for Jordan being one of the first actors to come out strongly in favor of inclusion riders, she said, "He pushed and that's what you need. You need leaders to stand up and say this is what we're going to do. It's no coincidence that the person that runs the (Warner Bros) studio is a person of color (Kevin Tsujihara)."

Hollywood, which is often slow to change is finally recognizing what audiences have been saying for some time: "the world has shifted, and they are saying that with their dollars," Silverstein said.

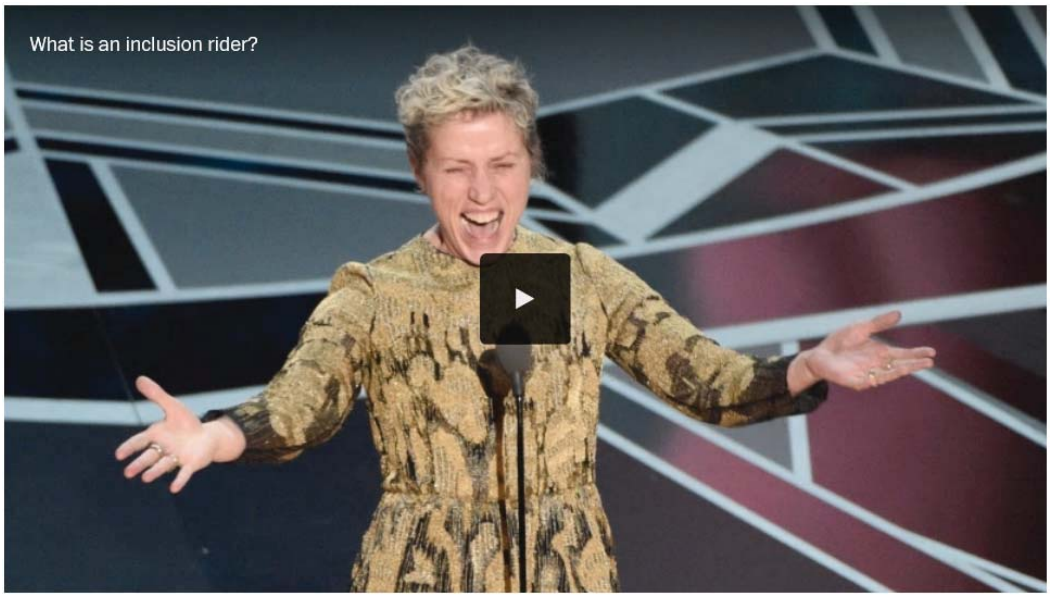
She pointed to the recent success of "Black Panther" and "Wonder Woman" and the current box-office leader "Crazy Rich Asians" as examples of diversity paying off at the box office.

"The days of the white-male protagonist being the only thing we have access to at the multiplex are over," she said. "And I will be happy when it also moves into the awards."

The Washington Post
Democracy Dies in Darkness

Opinions

The ‘inclusion rider’ should be a Hollywood standard



Frances McDormand used her Oscars best actress acceptance speech to highlight “inclusion riders.” Here’s how it could change representation in films. (Amber Ferguson/The Washington Post)

By Kalpana Kotagal
Opinions
March 9

Kalpana Kotagal is a partner in the Civil Rights & Employment practice group at Cohen Milstein Sellers & Toll and chair of the firm’s Hiring and Diversity Committee.

Last Sunday evening, I turned off the Academy Awards just a few minutes before Frances McDormand won her much-deserved Oscar. The following morning, I awoke to the startling — but wonderful — news that, while I slept, a project I had been quietly working on for months had been catapulted into public awareness by the year’s best actress during her acceptance speech.

McDormand had concluded her remarks with two cryptic words — “inclusion rider” — which prompted a flurry of Web searches around the globe to figure out what she was talking about. As an author of the inclusion rider, I was personally thrilled by the shout-out; as a woman of color living in a society that still struggles to fully value and promote diversity, I think McDormand’s elevation of the inclusion rider was critically important for all of us.

For decades, Hollywood has been run primarily by straight, white men. One tragic consequence of this reality has become all too clear through the #MeToo movement. A less visible result is that women, people of color, members of the LGBTQ community and other underrepresented groups have disproportionately faced more difficult hurdles to break into the industry —whether in front of or behind the camera. We see this reflected in the pool of Oscar nominees. This year, for example, Greta Gerwig became only the fifth woman, and Jordan Peele only the fifth African American, to be nominated as best director. Ever. The industry’s monolithic leadership model has contributed to a lack of variety in storytelling as well — limiting which stories get told and which movies get made. We are finally starting to see cracks in that monolith, but they are still just cracks.

In basic terms, the inclusion rider is an addendum to a leading actor’s contract that stipulates a process for ensuring minority representation in the audition and interview pools for a film or television project, and establishes objectives and tracking requirements for casting and hiring. The rider creates a flexible mechanism for Hollywood’s most influential players to wield their power to create opportunities for people from underrepresented groups to enter the industry.

The provision also imposes financial penalties on projects that don’t engage in good-faith efforts to find qualified individuals from diverse backgrounds and opportunities to publicize and celebrate successes. It has generally been used as it was written, but it can be adapted to fit a particular contract.

It is important to note that, while the inclusion rider mandates consideration and encourages hiring, it is in no way a quota. In the highly competitive industry of Hollywood, building a team that is both qualified and diverse is not a heavy lift, and concerns about “reverse discrimination” are misplaced.

The need for a new model for the industry has long been clear, but the path toward achieving it has been less obvious. The inclusion rider grew from multiple people approaching the problem from different perspectives. My background as a civil rights and employment lawyer gave me deep experience crafting workplace best practices. Stacy Smith, the founder and director of the University of Southern California’s Annenberg Inclusion Initiative, has researched and fought for equality in film and television for years, as has Fanshen Cox DiGiovanni , the head of strategic outreach at Pearl Street Films. It was my colleague Anita Hill who saw the potential for collaboration and brought us together. Together, we transformed Stacy’s general concept for an inclusion rider into a detailed framework grounded in specific legal language.

The true power of the inclusion rider is that it simply embodies best employment practice. A study published in the journal Financial Management this year found that companies that promote diverse workforces — specifically including women, people of color and members of the LGBTQ community — develop more innovative product pipelines, which lead to stronger financial performance. I strongly believe that once the entertainment industry begins to adopt the practices stipulated in the text of the inclusion rider, and experiences the associated benefits, it will embrace them as standard. The same could happen in other industries as well, including media, health care, financial services and technology. If inclusion riders become commonplace over the next few years, I believe they could be rendered obsolete within 10 or 20 years. Nothing would make me happier.

I am grateful to McDormand for opening a national conversation about the inclusion rider and what it could achieve. Now is the time for A-listers to step up, to use their clout to open the floodgates to talent in all its forms and origins, and to help build an entertainment industry that truly reflects — and celebrates — our multifaceted world.

Mixing Work and Athletics: A Primer on Sports Law from the #MeToo Perspective

Introduction

As the #MeToo movement continues to grow, professionals in all fields are compelled to take a second look at their actions, policies, and practices to stay up to date on all requirements – legal, societal, and others – and minimize risk of legal exposure. This primer aims to explain and clarify some of the high-profile legal authorities on how the #MeToo movement could affect professional and amateur athletes, and the teams or universities they call "home," in the coming years. This primer is intended to touch on the high points of the ever-changing legal landscape of #MeToo, and is not meant to be an exhaustive review of all relevant points. It should be used for educational and informational purposes only and is not legal advice or an opinion about specific facts.

Selected Federal, New York State, and New York City Authorities Relevant for the #MeToo Movement

Title VII

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, the primary federal statutory authority prohibiting harassment based on sex and gender in the workplace. Harassment is prohibited as a form of discrimination. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 106 S.Ct. 2399, 2404 (1986) (citing Guidelines published by the EEOC in 1980). Only very recently did the Second Circuit hold that Title VII prohibits discrimination based on an individual's sexual orientation. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (also equating gender stereotyping to sexual harassment "and other evils long recognized as violating Title VII," *id.* at 115).

Title IX

Whereas Title VII applies in the workplace, Title IX applies to educational institutions that receive federal financial assistance from the U.S. Department of Education, and is enforced by the Department's Office for Civil Rights. Title IX requires these institutions – which includes most universities with major athletic teams – to operate in a nondiscriminatory manner. Because there is still an open question on whether student-athletes are employees of their respective educational institutions, Title IX, rather than Title VII, is the federal authority used to prohibit discrimination on college campuses.

Title VII and Title IX (and now New York State, as discussed below) both protect non-employees from harassment by employees. This means that an employer may be held liable if an employee sexually harasses a non-employee, such as a student, vendor, or contractor. For example, if an assistant coach sexually harasses student-athletes on a university's basketball team, the student-athletes may be able to hold the university liable for the assistant coach's actions. Under the New York State law, penalties may be more severe if the student-athletes can show that the assistant coach was a repeat offender and/or that the school failed to take steps to protect the student-athletes.

Tax Cuts and Jobs Act of 2017

In December 2017, Congress passed the Tax Cuts and Jobs Act, which contained one small but potentially powerful provision in response to #MeToo. Under § 162(q) of the Internal Revenue Code, effective January 1, 2018, the dollar value of settlement or "hush" payments, as well as the attorneys' fees incurred in achieving those settlements or payments, can no longer be deducted on federal tax returns, if the settlement or payment includes a non-disclosure provision. This could vastly increase the cost to alleged harassers (or their employers) of these payments, since it implicates an entirely new calculation as to how settlements and other payments will affect the individual's (or company's) bottom line.

Interestingly, although § 162 is titled "trade or business expenses," tax experts have questioned whether this amendment could apply to, and therefore inadvertently harm, alleged victims or claimants on the receiving side of sexual-harassment settlements or provisions. As discussed below, publicity of a sexual-harassment claim is a potential barrier to reporting or litigating these claims, and claimants and alleged victims might prefer to sign a non-disclosure agreement if it could protect their identities or careers. However, if claimants are affected by this new § 162(q), they may be compelled to rethink including a non-disclosure provision on settlement or other payment agreements. Alternatively, claimants may simply increase the dollar value that they seek, in order to compensate for the new prohibition on deductions. (Conversely, alleged harassers, on the other side of the equation, will be seeking to minimize these payments as much as possible, to limit the impact on their bottom line.)

New York State Laws on Sexual Harassment

On April 12, 2018, New York State passed a handful of statutory amendments as part of its budget bill for the upcoming financial year. These included amendments to the New York State Human Rights Law and the New York Labor Law, all intended to prevent workplace sexual harassment. The major points of these laws are summarized in the appendices attached hereto.

New York City #Stop Sexual Harassment in NYC Act

In May 2018, New York City also passed a set of laws aimed at preventing workplace sexual harassment. The major points are summarized in the appendices attached hereto.

Impact for Student-Athletes and Other "Non-Employees"

Under the recently added New York Labor Law § 296-d, non-employees (such as contractors, vendors, consultants, and student-athletes) have a new avenue for redress against an employer (such as a university or professional sports team) if they are sexually harassed by that employer's employee(s), under certain circumstances. This law applies equally to both educational institutions and professional sports leagues. Before the enactment of § 296-d, non-employees had little-to-no recourse when sexually harassed in an employer's workplace by that employer's employees. Now, employers may be held liable if their employees sexually harass non-employees in the workplace, as long as the employer i) knew or should have known that the non-employee was subject to harassment and ii) failed to take "immediate and appropriate corrective action."

While most schools are already held to this standard under federal Titles VII and IX, the New York State law increases the avenues and methods for redress for sexual harassment committed

by a school employee against a non-employee, such as a student-athlete. Outside of the school context, this also means that any member(s) of the general public can hold professional sports teams or leagues accountable for the actions of their players. This is particularly impactful when considering what might constitute evidence such that an employer "should have known" that an employee might end up sexually harassing a non-employee in the workplace. As discussed above, being able to show that the harasser was a "repeat offender" – perhaps if he or she has appeared in the news for such behavior in the past – or even showing that, due to the individual's demeanor or other history, the employer should have known that sexual harassment could be an issue in the future, could implicate harsher penalties for the employer.

Behaviors Considered "Sexual Harassment"

The definition of sexual harassment, and in particular, actionable sexual harassment, may change depending on the context. Under Title VII, sexual harassment is defined as "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."

The definition under the New York State Human Rights Law – which is now required to be included in all anti-sexual-harassment policies for employers in New York – is a bit more expansive. There, sexual harassment is considered "unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;
- Such conduct is made either explicitly or implicitly a term or condition of employment; or
- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment."

Each jurisdiction also provides examples of sexual harassment. The National Collegiate Athletic Association (NCAA) has also published examples of interactions that could constitute sexual harassment:

NCAA Examples	NY City, NY State, and Federal Examples
- Posting of sexually suggestive pictures; - Consistently telling "dirty" jokes or stories in front of the team; - Tolerating staff or student-athletes who make sexually suggestive remarks about other staff or students within earshot of others; - Allowing the use of derogative terms with a sexual connotation to be used	- Physical acts of a sexual nature, such as: o Touching, pinching, patting, kissing, hugging, grabbing, brushing against another employee's body or poking another employee's body; o Rape, sexual battery, molestation or attempts to commit these assaults. - Unwanted sexual advances or propositions, such as: o Requests for sexual favors accompanied by implied or overt threats concerning

to describe coworkers or team members; - Allowing frequent physical contact, even when it is not sexual.	the target's job performance evaluation, a promotion or other job benefits or detriments; o Subtle or obvious pressure for unwelcome sexual activities. - Sexually oriented gestures, noises, remarks or jokes, or comments about a person's sexuality or sexual experience, which create a hostile work environment. - Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look. - Sexual or discriminatory displays or publications anywhere in the workplace, such as: o Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic. This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace. - Hostile actions taken against an individual because of that individual's sex, sexual orientation, gender identity and the status of being transgender, such as: o Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job; o Sabotaging an individual's work; o Bullying, yelling, name-calling. - Sexual comments - Jokes - Innuendo - Pressure for dates - Sexual touching - Sexual gestures - Sexual graffiti

New York City's Unique Take

Under federal law (and in many states), a claimant must be able to demonstrate that sexual harassment was "severe and pervasive." However, New York City's standard is much more claimant-friendly. To prove sexual harassment under New York City laws, a claimant need only show that the interaction rose above the level of "petty slights and trivial inconveniences." *See, e.g., Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102 (2013) (denying defendant's motion for summary judgment in determining that plaintiff could show that the actions amounted to more than "petty slights and trivial inconveniences"). Thus, while claimants may still be held to the "severe and pervasive" standard for purposes of calculating damages, they are more likely to be able to establish liability when bringing a claim under this New York City standard.

Bringing a Civil Action for, and Defenses against, Sexual Harassment

Barriers to Reporting and Litigating

Barriers to reporting sexual harassment can include, but are certainly not limited to:

1. uncertainty about how to report, what the process looks like, what might ensue, and how it could affect the reporter's (or alleged harasser's) career;
2. awkwardness over having to discuss sexual matters with a workplace administrator;
3. helplessness if the reporting process is difficult to navigate, or if the workplace administrator (e.g. HR) doesn't provide satisfactory, tangible closure;
4. overworking, where the reporter is too busy with other areas of their life to take the time and effort required to report and cooperate with an investigation;
5. fear over potential consequences, not only within the immediate workplace but how it might affect the reporter outside of work; and
6. stigma and stereotyping, which encompasses many considerations, but particularly if the reporter is a man, since there is a misperception about whether men can be sexually harassed.

Barriers to litigating are often similar to barriers to reporting, but with the additional consideration of unwanted publicity: whereas internal investigations are often kept as confidential as possible, the information contained in a complaint filed in court is wholly public. As discussed elsewhere in this document and attached hereto, federal and New York State legislation have made it much more expensive to include non-disclosure agreements in claims for sexual harassment. Thus, even before getting to court, a claimant must now pay even closer attention to how public he or she is willing to get with a settlement or "hush" payment.

Mandatory Arbitration Provisions

As of July 11, 2018, New York State prohibits employers from including mandatory arbitration provisions of any contract to be "null and void" to the extent that the provision applies to sexual-harassment claims. However, the law has a savings clause which states that it does not apply where it would be "inconsistent with" federal law, i.e., the Federal Arbitration Act. As a result, if the contract (generally, a settlement agreement) falls within the ambit of the FAA, then NY's prohibition will not apply.

Non-Disclosure Agreements

Under NY State law, settlements for sexual harassment claims may not include NDAs unless such provisions are at the "complainant's preference." It is not entirely clear what that means (for example, whether it is a per se violation if an employer drafts an agreement that includes an NDA without the complainant explicitly asking for it), but NY State has suggested that a complainant's "preference" will be evidenced upon his/her signing the agreement.

Conclusion

In the ongoing #MeToo movement, legislatures of all jurisdictions are taking a closer look at their laws against sexual harassment, including the standards of proof and liability to which claimants are held, avenues for redress, and other considerations. While this discussion focused on recent developments in New York City and New York State, it is highly likely that other states will follow with similar provisions banning mandatory arbitration, placing restrictions on non-disclosure agreements, and, meanwhile, increasing means for reporting sexual harassment. For example, California has considered adopting the New York City standard of imposing liability for any interaction amounting to more than "petty slights and trivial inconveniences." *See* "California to Consider New York City's Legal Standard for Sexual Harassment," THE OBSERVER (Jan. 11, 2018), *available at* https://observer.com/2018/01/new-york-california-sexual-harassment-legal-standard/ (last visited Oct. 3, 2018). The New York State and New York City documents that follow this document are examples of the stricter steps that jurisdictions may begin to see across the country. For example, in New York City, employers are required to hand new hires a Fact Sheet on workplace sexual harassment, as well as post a notice on workplace sexual harassment. In the rest of New York State, employers are required to make available a standardized complaint form for employees (or non-employees) to report alleged instances of sexual harassment. As claims for sexual harassment may be actionable in the jurisdiction in which they occur, it is imperative that sports leagues or teams that travel throughout the country remain up-to-date on the latest legislative moves in each jurisdiction, and maintain a watchful eye for any other #MeToo developments in the coming months and years.

Legal Alert

New York State Announces Final Workplace Sexual Harassment Rules

This is on top of implications from the federal Tax Cuts and Jobs Act, enacted in December 2017, and New York City's #Stop Sexual Harassment in NYC Act, enacted in May 2018. The analysis below integrates recent changes from federal, NY State, and NY City authorities to provide a holistic picture of what this all really means for employers.

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	I have an office within the five boroughs of NYC, and nowhere else in New York.	I have an office in upstate New York or Long Island and in New York City.	I have an office in upstate New York or Long Island, and at least one employee goes into NYC.	All of my offices are outside of New York, but at least one employee performs services within the five boroughs of NYC.	I have an office in upstate New York or Long Island, and my employees never go into NYC.	All of my offices are outside of New York, but at least one employee spends a "portion of their time" within New York State.
May not deduct value of settlement payments, or related attorneys' fees, if settlement includes an NDA	x	x	x	x	x	x
May not include NDA's* in settlements, unless at the claimant's preference; and if so, must allow 21 days to consider and 7 days to revoke	x	x	x	x	x	x
May not impose mandatory arbitration on sexual-harassment claims	x	x	x	x	x	x
Annual training	x	x	x	x	x	x
New policy	x	x	x	x	x	x
Non-employees are protected by laws	x	x	x	x	x	x
Claimant has 3 years to bring a claim	x	x	x	x		
Fact sheet for new hires	x	x	*	*		
Display poster	x	x	*	*		

Awaiting final clarification on how this will apply

Current as of October 4, 2018

Settling A Claim Related to Sexual Harassment and Including a Non-Disclosure Provision:

If a settlement for sexual-harassment includes a non-disclosure agreement, employers may no longer deduct the amount of the settlement, nor attorneys' fees related to the settlement.

Within New York State, employers may only include non-disclosure agreements in settlement of sexual harassment claims if:

- Inclusion of a non-disclosure provision is the claimant's preference; *and*
- The claimant is given 21 days to consider the agreement and 7 days post-execution to revoke acceptance.

Prohibition on Mandatory Arbitration of Sexual-Harassment Claims:

In New York State, while employers may still include mandatory-arbitration provisions in employment agreements or other documents, employers may no longer apply these provisions to sexual harassment claims. Any agreements that do include these claims will be declared null and void to the extent that they purport to include sexual-harassment claims, and they will not be enforced.

Providing Annual Trainings:

The first annual training must be completed by **October 9, 2019**. We strongly recommend holding your training well before the deadline, as effective trainings are a potential key way to minimize legal vulnerability.

In New York, if an employer already conducted a compliant training earlier in 2018, the employer need not hold a new training. If the prior training was only partially compliant, the employer will need to hold a "supplemental" training, to fill in the gaps before October 9, 2019.

Employers with offices located within and outside the State do not need to train the employees in out-of-state offices, unless those employees spend "a portion of their time" in New York State.

The training must be "interactive." Examples include:

- Web-based training that includes questions at the end of each section; or
- Web-based training that includes the opportunity for employees to submit questions online and receive responses in a timely manner; or
- In-person training in which a presenter asks questions of employee-participants, or gives them time to ask questions during the training; *or*
- For any training, including a feedback survey for employees to submit after the training.

The final NY State rules encourages employers to hold additional, separate trainings for managers or supervisors beyond the training used for all other employees.

Given the prohibition on deducting the cost of sexual-harassment settlements that include non-disclosure agreements, and related attorney's fees, it is more important than ever that employers remain fully committed to avoiding exposure to a claim of workplace sexual harassment. We recommend the use of live trainers for the trainings for managers and supervisors, to enhance the likelihood they will truly understand how to identify and address the problem before it becomes a significant issue or litigation.

Implementing a New Policy

All New York State employers are required to implement a new policy, in compliance with State requirements, by **October 9, 2018.** Employers must distribute, in writing or via email, a particularly detailed policy which describes examples of sexual harassment, forums for redress, investigation procedures, a statement against retaliation, and other information.

Employers must also create a standard complaint form for employees to report workplace sexual harassment. The policy must indicate where employees can find the complaint form.

Protection for Non-Employees:

The New York State law protects all individuals who are sexually harassed in the workplace, whether or not they are on your payroll. If anyone in that category, such as a contractor, consultant, volunteer, or unpaid intern, is sexually harassed by your employees in your or their workplace, your company could be held liable.

Three Years to Bring a Claim:

New York City currently requires all claims under the New York City Human Rights Law to be brought within one year of the interaction that led to the claim. However, if a claimant makes an allegation of gender-based discrimination (which includes, but is not limited to, sexual harassment), the claimant now

has three years to bring that claim.

New Hires:

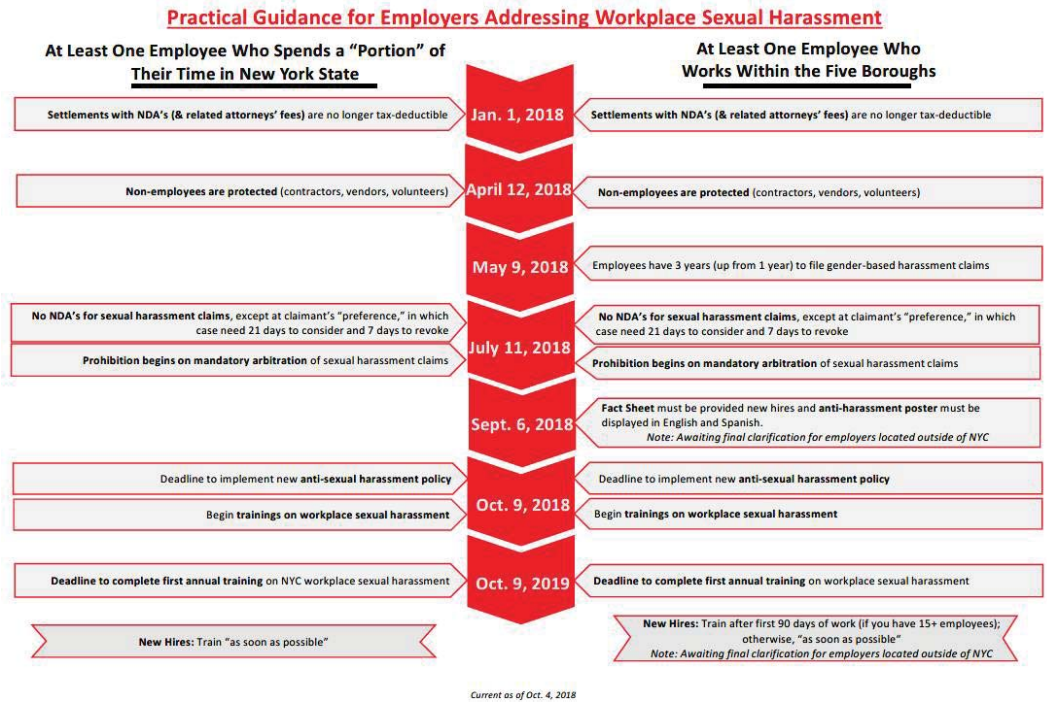
Fact Sheet: All new hires in New York City must be provided with this fact sheet upon commencement of work.

Poster Display: All New York City employers must display this poster in the workplace.

New-Hire Trainings: New hires in upstate New York and Long Island must undergo training "as soon as possible." For new hires working in NYC, the training is only required once they have been employed for 90 days, and have worked within the five boroughs for at least 80 hours in the current calendar year.

The training requirement for a new hire is deemed satisfied if that new hire can verify that he/she has undergone training with a previous employer in the same calendar year. However, the burden is still on the new employer to ensure that the employee is familiar with the new policies and his/her responsibilities under them.

> **Please Note:** The NYC Commission on Human Rights has not yet clarified whether employers located outside of New York City, who have at least one employee performing work within the five boroughs, will be required to provide fact sheets and display the poster.



New York State Workplace Sexual Harassment Rules

Practical Guidance for Employers

	I have an office within the five boroughs of NYC, and nowhere else in New York.	I have an office in upstate New York or Long Island and in New York City.	I have an office in upstate New York or Long Island, and at least one employee goes into NYC.	All of my offices are outside of New York, but at least one employee performs services within the five boroughs of NYC.	I have an office in upstate New York or Long Island, and my employees never go into NYC.	All of my offices are outside of New York, but at least one employee spends a "portion of their time" within New York State.
May not deduct value of settlement payments, or related attorneys' fees, if settlement includes an NDA	X	X	X	X	X	X
May not include NDA's* in settlements, unless at the claimant's preference; and if so, must allow 21 days to consider and 7 days to revoke	X	X	X	X	X	X
May not impose mandatory arbitration on sexual-harassment claims	X	X	X	X	X	X
Annual training	X	X	X	X	X	X
New policy	X	X	X	X	X	X
Non-employees are protected by laws	X	X	X	X	X	X
Claimant has 3 years to bring a claim	X	X	X	X		
Fact sheet for new hires	X	X	*	*		
Display poster	X	X	*	*		

* Awaiting final clarification on how this will apply

Current as of October 4, 2018

Practical Guidance for Employers Addressing Workplace Sexual Harassment

Current as of Oct. 4, 2018

Model Complaint Form for Reporting Sexual Harassment

[Name of employer]

New York State Labor Law requires all employers to adopt a sexual harassment prevention policy that includes a complaint form to report alleged incidents of sexual harassment.

If you believe that you have been subjected to sexual harassment, you are encouraged to complete this form and submit it to [*person or office designated; contact information for designee or office; how the form can be submitted]*. You will not be retaliated against for filing a complaint.

If you are more comfortable reporting verbally or in another manner, your employer should complete this form, provide you with a copy and follow its sexual harassment prevention policy by investigating the claims as outlined at the end of this form.

For additional resources, visit: ny.gov/programs/combating-sexual-harassment-workplace

COMPLAINANT INFORMATION

Name:

Work Address: Work Phone:

Job Title: Email:

Select Preferred Communication Method: ☐Email ☐Phone ☐In person

SUPERVISORY INFORMATION

Immediate Supervisor's Name:

Title:

Work Phone: Work Address:

Adoption of this form does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

COMPLAINT INFORMATION

1. Your complaint of Sexual Harassment is made about:

   Name: Title:

   Work Address: Work Phone:

   Relationship to you: ☐Supervisor ☐Subordinate ☐Co-Worker ☐Other

2. Please describe what happened and how it is affecting you and your work. Please use additional sheets of paper if necessary and attach any relevant documents or evidence.

3. Date(s) sexual harassment occurred:

   Is the sexual harassment continuing? ☐Yes ☐No

4. Please list the name and contact information of any witnesses or individuals who may have information related to your complaint:

The last question is optional, but may help the investigation.

5. Have you previously complained or provided information (verbal or written) about related incidents? If yes, when and to whom did you complain or provide information?

If you have retained legal counsel and would like us to work with them, please provide their contact information.

Signature: _____ *Date:* _____

Instructions for Employers

If you receive a complaint about alleged sexual harassment, follow your sexual harassment prevention policy.

An investigation involves:

- Speaking with the employee
- Speaking with the alleged harasser
- Interviewing witnesses
- Collecting and reviewing any related documents

While the process may vary from case to case, all allegations should be investigated promptly and resolved as quickly as possible. The investigation should be kept confidential to the extent possible.

Document the findings of the investigation and basis for your decision along with any corrective actions taken and notify the employee and the individual(s) against whom the complaint was made. This may be done via email.

STOP SEXUAL HARASSMENT ACT FACTSHEET

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster **and** as an information sheet distributed to individual employees at the time of hire. This document satisfies the information sheet requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to $250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, can require the violator to undergo training, and can mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718–722–3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at **www.dhr.ny.gov**.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at **www.eeoc.gov**.

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@NYCCHR

NYC.gov/HumanRights

NYC Commission on Human Rights

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Commissioner/Chair

New York State Bar Association –
Entertainment, Arts and Sports Law Section Meeting

"Sports, Drugs and Rock & Roll - The Evolving Landscape of Drugs and Scandals in Sports and Entertainment"

#MeToo and Legislation Geared Toward the Prevention of Sexual Harassment

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New Legislation on Sexual Harassment in New York and California Holds Insights Into the #MeToo Movement's Impact on Employers Nationwide

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Allison E. Ianni, Esq., Partner, Goldberg Segalla LLP
Peter J. Woo, Esq., Partner Goldberg Segalla, LLP

The #MeToo movement and its widespread publicity of issues involving sexual harassment in the workplace have sparked new legislation affecting all employers. During his State of the State Address in January, Governor Andrew Cuomo articulated proposed changes to legislation surrounding sexual harassment and prevention in the workplace for public agencies and contractors. The New York State 2018-2019 budget signed on April 12, 2018 contains provisions and new guidelines that were negotiated into the budget and which affect sexual harassment prevention policies, training, and settlements of sexual harassment cases immediately. Not to be left out, the New York City Council, on April 11, 2018, passed a package of legislation referred to as the "Stop Sexual Harassment in NYC Act," described by the City Council as critical to creating safe workplaces in New York City. These pieces of legislation will significantly affect the handling of sexual harassment cases by all employers in the State of New York — and offer insight into what employers operating elsewhere should expect. California has been the latest state to propose some widespread sweeping legislation to combat sexual harassment in the workplace, and others are sure to follow.

New York State Legislation on Sexual Harassment

In the fiscal year 2019 budget, the New York State Legislature passed several new laws aimed at preventing workplace sexual harassment, including banning mandatory arbitration and requiring anti-harassment policies and training. Governor Cuomo signed them into law on April 12, 2018. Below are the highlights of the changes for employers. On August 23, 2018, the New

York State Department of Labor launched a website containing proposed guidance, model policies, frequently asked questions (FAQs) and information regarding the new requirements. It was subject to public comment through September 12, 2018. On September 30, 2018, the final guidance was released to the public.

Definition of Sexual Harassment

Although "sexual harassment" was not completely defined in the legislation that was passed, it was defined in the FAQs, model policy, and training. It follows the traditional definition that has been outlined by the Equal Employment Opportunity Commission (EEOC) and case law, but also includes sexual orientation, gender identity, and transgender status. The definition also includes "sex stereotyping," which includes conduct or personality traits that do not conform to other people's ideas or perceptions, including harassment because an individual is performing a job traditionally performed by the opposite sex.[1]

Employers Liable For Sexual Harassment Of Non-Employees

Employers may be held liable under the state Human Rights Law, amended section 296-d[2] for an employee's sexual harassment of a non-employee, such as an independent contractor, subcontractor, vendor, consultant, or other person providing services pursuant to a contract in the workplace if the employer knew or should have known that the non-employee was being sexually harassed in the employer's workplace and failed to take immediate and appropriate corrective action. The extent of the employer's control over the harassing employee "shall be considered." The vague language in the law leaves room for interpretation by courts, and it

[1] Guidance and Policies Released September 30, 2018, FAQ's - https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers
[2] N.Y. Exec. Law § 296-d

remains to be seen how this law will be enforced. What is clear, however, is that employers face potential liability from a new class of individuals. This will result in changes in the way employers and vendors carry on business, as well as how regulatory and enforcement agencies conduct investigations.

Mandatory Arbitration for Sexual Harassment Prohibited

Employers cannot require employees to submit to arbitration for sexual harassment claims.[3] Any findings of fact or decision reached in claims that are subject to arbitration cannot be protected from judicial review. Any prohibited clause in a contract will be null and void. This law only applies to arbitration agreements entered into after July 11, 2018 and does not apply to collective bargaining agreements.

Use of Non-Disclosure Agreements for Sexual Harassment Settlements Limited

Any settlement of a sexual harassment claim may not include confidentiality provisions unless:

- all parties are provided with the non-disclosure terms or conditions;
- the complainant is given 21 days to consider the non-disclosure terms or conditions;
- after agreeing to and signing the non-disclosure terms or conditions, the complainant is given seven days to revoke the agreement.[4]

This law applies to any sexual harassment settlements, including private settlements, whether entered into before or during litigation. The complainant cannot waive the 21-day period by evidencing agreement within a shorter time frame (like the Age Discrimination in Employment Act).

[3] N.Y. Civ. Prac. L & R. § 7515 (2018).
[4] N.Y. Civ. Prac. L & R. § 5003-b (2018).

Required Sexual Harassment Policy and Annual Training

Effective **October 9, 2018**, all employers in New York State will be required to implement an anti-sexual harassment policy and to conduct annual interactive sexual harassment training pursuant to section 201-g of the New York Labor Law for all existing employees[5] by October 9, 2019.[6] While the proposed guidance required new employees be trained within 30 days of hire, the final guidance merely indicates that the state encourages training of new employees "as soon as possible".[7]

The policy must be in writing and must be distributed to all employees. While the law does not require an employee's signed acknowledgment of receipt, it is highly recommended.[8] In addition, distribution by electronic means is permissible as long as the employee has access to the policy during working hours and may print a hard copy.[9]

The guidance and documents released include:

- 20-page "training script" for employers[10]
- Draft policy[11]
- Model complaint form (which much be attached or included with the policy)[12]
- Minimum standards for the policy and training[13]
- Model power point for the training[14]

[5] Employees includes ALL employees, part time, seasonal and temporary.
[6] FAQ's https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelTraining.pdf
[11] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelPolicy.pdf
[12] https://www.ny.gov/sites/ny.gov/files/atoms/files/CombatHarassmentComplaint%20Form.pdf
[13] https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf ; https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionTraining.pdf
[14] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionDRAFTTrainingPPT.pdf

- Sexual Harassment Prevention Employer Toolkit[15]

Employers may instead develop their own policies and programs, as long as they meet the minimum requirements set forth in the law.

The final documents clarified "interactive" training[16]:

> New York State law requires all sexual harassment training to be interactive. It requires some form of employee participation, meaning the training may:
> - Be web-based with questions asked of employees as part of the program;
> - Accommodate questions asked by employees;
> - Include a live trainer made available during the session to answer questions; and/or
> - Require feedback from employees about the training and the materials presented.

Required Sexual Harassment Certification in Government Bids

Effective January 1, 2019, any company bidding for a state contract with a state agency[17] will be required to certify, under penalty of perjury, that it has written sexual harassment policies and provides annual sexual harassment training to its employees in compliance with the model policies, trainings, and guidelines. For non-competitive bids or any other sales to state agencies, the agency may choose to require the same certification.

What Employers Can Do Now

1. Examine and update sexual harassment and other harassment and discrimination policies. Note, even though the law does not cover other forms of discrimination, we recommend including the other forms of discrimination, as well as reasonable accommodations, into the annual training requirement and policy.

[15] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionToolkitforEmployers.pdf
[16] The definition is found in the training script and FAQ's.
[17] N.Y. State Finance Law § 139-1(1)(a)

2. Make sure any employee handbook or posting is updated to contain the new policy.
3. Post the employer's harassment and discrimination policy prominently in the workplace and in areas where non-employees are likely to be present.
4. Consider distributing the employer's harassment and discrimination policy to all non-employees and their contractors and employees so that the non-employees are aware of the company's mechanism for filing complaints. Provide for regular distribution on a schedule. Consider incorporating an obligation on the vendor/contractor to train its employees for sexual harassment in the contract, as well as to provide defense and indemnification in the event of an incident.
5. Begin to develop training. We are available to consult with the company for guidance pending the final release of the model policy, training, and regulations by the New York State Department of Labor and New York State Division of Human Rights.

Overview of New York City Law Regarding Sexual Harassment

On May 9, 2018, Mayor Bill DiBlasio signed into effect the New York City Stop Sexual Harassment in NYC Act, amending the New York City Human Rights Law (NYCHRL) to include mandates aimed at addressing sexual harassment in the workplace.

Mandatory Anti-Harassment Training

Effective April 1, 2019, the act requires employers with 15 or more employees (including interns) to conduct annual anti-sexual harassment training for all employees, including supervisory and managerial employees. The required training must cover topics including definitions and examples of sexual harassment, education on bystander intervention, and explanations of how to

bring complaints both internally and with the applicable federal, state, and city administrative agencies.

The act clarifies that, while such training must be "interactive," it need not be live or conducted by an in-person instructor to satisfy the interactivity requirement. The training must be conducted on an annual basis for existing employees; new employees who work 80 or more hours per year on a full or part-time basis in New York City must receive the training after 90 days of initial hire. If an employee has received training at one employer within the training cycle, he or she would be not required to receive additional training at a different employer until the next annual cycle. The act also provides that if an employer is subject to training requirements in multiple jurisdictions, it will be in compliance with the act so long as any annual training that is provided to employees addresses, at a minimum, the substantive requirements of the act. Additionally, the act requires employers to obtain from each employee a signed acknowledgment that he or she attended the training, which may be electronic.

The NYC Commission on Human Rights will be required to develop publicly available online sexual harassment training modules for employers' use. The act specifies that use of the modules will satisfy the requirements of the act so long as the employer supplements the module with information about the employer's own internal complaint process to address sexual harassment claims.

Notice of Anti-Harassment Rights and Responsibilities

Effective September 6, 2018, the act requires employers to conspicuously display an anti-sexual harassment rights and responsibilities poster in their employee breakrooms or in other

common areas in which employees gather. The Commission has published a poster to comply with that requirement on its website[18].

The act further provides that, also beginning on September 6, 2018, employers must distribute a fact sheet on sexual harassment to new hires, and may comply with that obligation by including it in an employee handbook. That fact sheet, which contains the same information as the poster, is also published on the commission's website[19]. The act requires that both the poster and information sheet be displayed, at a minimum, in both English and Spanish.

The act also requires the commission to post resources about sexual harassment on its website, including an explanation about sexual harassment as a form of unlawful discrimination, specific examples of sexual harassment and retaliation, information on bystander intervention, and information about filing a complaint through the commission and other government agencies.

Expansion of Anti-Discrimination Protections Under the NYCHRL

Effective immediately upon signing, the act amended the NYCHRL to permit claims of gender-based harassment by all employees, regardless of the size of the employer. (Currently, the anti-discrimination provisions of the NYCHRL apply only to employers with four or more employees.) The act also extends the statute of limitations for filing complaints with the commission of "claim[s] of gender-based harassment" under the NYCHRL from one year to three years after the alleged harassing conduct occurred — making the limitations period for administrative charges coextensive with the limitations period for filing claims in court. The act also amends the policy statement of the NYCHRL to state that "gender-based harassment threatens the terms, conditions, and privileges of employment."

[18] See: https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Notice-8.5x11.pdf
[19] See: https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf

Requirements for City Contractors

Effective July 8, 2018, the act also amends the New York City Charter to require city contractors to include their practices, policies, and procedures "relating to preventing and addressing sexual harassment" as part of an existing report required for certain contracts pursuant to the City Charter and corresponding rules.

California Legislation Released to Combat Sexual Harassment

At the end of August 2018, California lawmakers passed a series of bills that grew out of the #MeToo movement. These bills were aimed at tackling the problem of sexual harassment as well as harassment and discrimination more broadly and contain a batch of new mandates for employers. On September 30, 2018, Governor Jerry Brown signed into law several of these bills.

No Waiver of Right to Testify Regarding Sexual Harassment

AB 3109 makes unlawful any settlement or contract term that requires a party to waive the right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment. Specifically, the law applies where a party's testimony is required or requested pursuant to a court order, subpoena, or written request from an administrative agency or the legislature.

Non-Disclosure Clauses in Settlement Agreements

The Governor signed into law SB 820, which will prohibit confidentiality clauses in settlement agreements that prevent the disclosure of factual information relating to claims of sexual harassment, sexual assault, and sex discrimination. Additionally, courts will no longer be able to restrict the disclosure of such facts in relevant civil proceedings. However, the law will

allow a settlement agreement term that shields the identity of a claimant, and all facts that could lead to the disclosure of his or her identity, if included at the request of the claimant.

The Sexual Harassment Omnibus Bill

The strongest, and largest, sexual harassment bill is SB 1300. One provision of the bill says harassment cases are "rarely appropriate for disposition on summary judgment" and another instructs courts that the legal standard for sexual harassment "should not vary by type of workplace." Procedural rules would not be changed but the bill raises the bar for an employer to get summary judgment by making it harder for them to show that a single incident isn't enough to constitute harassment. SB 1300 would:

- Adopt or reject specified judicial decisions regarding sexual harassment — in each case expanding employer liability. Specifically, SB 1300 would (1) prohibit reliance on *Brooks v. City of San Mateo* to determine what conduct is sufficiently severe or pervasive to constitute actionable harassment, (2) disapprove any language in *Kelley v. Conco Companies* that might support different standards for hostile work environment harassment depending on the type of workplace, and (3) affirm *Nazir v. United Airlines, Inc.'s* "observation that hostile working environment cases involve issues 'not determinable on paper.'"
- Expand an employer's potential liability under the FEHA for acts of nonemployees to all harassment (removing the "sexual" limitation).
- Prohibit an employer from requiring an employee to sign (in specified circumstances) 1) a release of FEHA claims or rights or 2) a document prohibiting disclosure of information about unlawful acts in the workplace.
- Prohibit a prevailing defendant from being awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.
- Authorize (but not require) an employer to provide bystander intervention training to its employees.

Sexual Harassment Training

SB 1343 extended California's requirement that employers with 50 or more employees provide supervisory personnel with antiharassment training to employers with five or more

employees. Further, the law will now require employers to ensure that all *non-supervisory* complete sexual harassment training.

Defamation Protection for Employers

AB 2770 treats internal sexual harassment complaints and decisions as "privileged communications" so long as they are disclosed without malice. The bill broadened the scope of the privilege and allows former employers to inform potential employers that they would not rehire a job applicant based on a prior determination by the former employer that the job applicant committed sexual harassment. As such, the "privileged" statement cannot be used to support a defamation suit under California law.

Expanding Harassment Liability in Entertainment and Politics

SB 224 includes additional examples of potential defendants who can be found liable for harassment under the California Civil Code. A defendant may be liable where he or she "holds himself out as being able to help the plaintiff establish a business, services, or professional relationship with the defendant or a third party." The law now includes elected officials, lobbyists, directors, and producers as potential defendants in a harassment suit.

Corporate Board Diversity

The legislature took aim at gender imbalance at the top of businesses in SB 826 mandating that public companies based in the state have at least one female (people who self-identify as women, regardless of their designated sex at birth) on their boards of directors by the end of 2019. By the end of 2021, corporations with five or more directors will be required to include at least two female members. Corporations failing to comply would face penalties ($100,000 for a first violation and $300,000 fine for further violations).

Sexual Harassment Policy for All Employers in New York State

NEW YORK STATE | Combating Sexual Harassment

Introduction

[*Employer Name*] is committed to maintaining a workplace free from sexual harassment. Sexual harassment is a form of workplace discrimination. All employees are required to work in a manner that prevents sexual harassment in the workplace. This Policy is one component of [*Employer Name's*] commitment to a discrimination-free work environment. Sexual harassment is against the law[1] and all employees have a legal right to a workplace free from sexual harassment and employees are urged to report sexual harassment by filing a complaint internally with [*Employer Name*]. Employees can also file a complaint with a government agency or in court under federal, state or local antidiscrimination laws.

Policy:

1. [*Employer Name's*] policy applies to all employees, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business, regardless of immigration status, with [*Employer Name*]. In the remainder of this document, the term "employees" refers to this collective group.

2. Sexual harassment will not be tolerated. Any employee or individual covered by this policy who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action (e.g., counseling, suspension, termination).

3. Retaliation Prohibition: No person covered by this Policy shall be subject to adverse action because the employee reports an incident of sexual harassment, provides information, or otherwise assists in any investigation of a sexual harassment complaint. [*Employer Name*] will not tolerate such retaliation against anyone who, in good faith, reports or provides information about suspected sexual harassment. Any employee of [*Employer Name*] who retaliates against anyone involved in a sexual harassment investigation will be subjected to disciplinary action, up to and including termination. All employees, paid or unpaid interns, or non-employees[2] working in the workplace who believe they have been subject to such retaliation should inform a supervisor, manager, or [*name of appropriate person*]. All employees, paid or unpaid interns or non-employees who believe they have been a target of such retaliation may also seek relief in other available forums, as explained below in the section on Legal Protections.

[1] While this policy specifically addresses sexual harassment, harassment because of and discrimination against persons of all protected classes is prohibited. In New York State, such classes includeage, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

[2] A non-employee is someone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace. Protected non-employees include persons commonly referred to as independent contractors, "gig" workers and temporary workers. Also included are persons providing equipment repair, cleaning services or any other services provided pursuant to a contract with the employer.

Adoption of this policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

4. Sexual harassment is offensive, is a violation of our policies, is unlawful, and may subject [*Employer Name*] to liability for harm to targets of sexual harassment. Harassers may also be individually subject to liability. Employees of every level who engage in sexual harassment, including managers and supervisors who engage in sexual harassment or who allow such behavior to continue, will be penalized for such misconduct.

5. [*Employer Name*] will conduct a prompt and thorough investigation that ensures due process for all parties, whenever management receives a complaint about sexual harassment, or otherwise knows of possible sexual harassment occurring. [*Employer Name*] will keep the investigation confidential to the extent possible. Effective corrective action will be taken whenever sexual harassment is found to have occurred. All employees, including managers and supervisors, are required to cooperate with any internal investigation of sexual harassment.

6. All employees are encouraged to report any harassment or behaviors that violate this policy. [*Employer Name*] will provide all employees a complaint form for employees to report harassment and file complaints.

7. Managers and supervisors are **required** to report any complaint that they receive, or any harassment that they observe or become aware of, to [*person or office designated*].

8. This policy applies to all employees, paid or unpaid interns, and non-employees and all must follow and uphold this policy. This policy must be provided to all employees and should be posted prominently in all work locations to the extent practicable (for example, in a main office, not an offsite work location) and be provided to employees upon hiring.

What Is "Sexual Harassment"?

Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law. Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

- Such conduct is made either explicitly or implicitly a term or condition of employment; or

- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

A sexually harassing hostile work environment includes, but is not limited to, words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an

individual because of that individual's sex. Sexual harassment also consists of any unwanted verbal or physical advances, sexually explicit derogatory statements or sexually discriminatory remarks made by someone which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, which interfere with the recipient's job performance.

Sexual harassment also occurs when a person in authority tries to trade job benefits for sexual favors. This can include hiring, promotion, continued employment or any other terms, conditions or privileges of employment. This is also called "quid pro quo" harassment.

Any employee who feels harassed should report so that any violation of this policy can be corrected promptly. Any harassing conduct, even a single incident, can be addressed under this policy.

Examples of sexual harassment

The following describes some of the types of acts that may be unlawful sexual harassment and that are strictly prohibited:

- Physical acts of a sexual nature, such as:
  - Touching, pinching, patting, kissing, hugging, grabbing, brushing against another employee's body or poking another employee's body;
  - Rape, sexual battery, molestation or attempts to commit these assaults.

- Unwanted sexual advances or propositions, such as:
  - Requests for sexual favors accompanied by implied or overt threats concerning the target's job performance evaluation, a promotion or other job benefits or detriments;
  - Subtle or obvious pressure for unwelcome sexual activities.

- Sexually oriented gestures, noises, remarks or jokes, or comments about a person's sexuality or sexual experience, which create a hostile work environment.

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look.

- Sexual or discriminatory displays or publications anywhere in the workplace, such as:
  - Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic. This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

- Hostile actions taken against an individual because of that individual's sex, sexual orientation, gender identity and the status of being transgender, such as:
  - Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
  - Sabotaging an individual's work;
  - Bullying, yelling, name-calling.

Who can be a target of sexual harassment?

Sexual harassment can occur between any individuals, regardless of their sex or gender. New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace. Harassers can be a superior, a subordinate, a coworker or anyone in the workplace including an independent contractor, contract worker, vendor, client, customer or visitor.

Where can sexual harassment occur?

Unlawful sexual harassment is not limited to the physical workplace itself. It can occur while employees are traveling for business or at employer sponsored events or parties. Calls, texts, emails, and social media usage by employees can constitute unlawful workplace harassment, even if they occur away from the workplace premises, on personal devices or during non-work hours.

Retaliation

Unlawful retaliation can be any action that could discourage a worker from coming forward to make or support a sexual harassment claim. Adverse action need not be job-related or occur in the workplace to constitute unlawful retaliation (e.g., threats of physical violence outside of work hours).

Such retaliation is unlawful under federal, state, and (where applicable) local law. The New York State Human Rights Law protects any individual who has engaged in "protected activity." Protected activity occurs when a person has:

- made a complaint of sexual harassment, either internally or with any anti-discrimination agency;
- testified or assisted in a proceeding involving sexual harassment under the Human Rights Law or other anti-discrimination law;
- opposed sexual harassment by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of harassment;
- reported that another employee has been sexually harassed; or
- encouraged a fellow employee to report harassment.

Even if the alleged harassment does not turn out to rise to the level of a violation of law, the individual is protected from retaliation if the person had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of harassment.

Reporting Sexual Harassment

Preventing sexual harassment is everyone's responsibility. [*Employer Name*] cannot prevent or remedy sexual harassment unless it knows about it. Any employee, paid or unpaid intern or non-employee who has been subjected to behavior that may constitute sexual harassment is encouraged to report such behavior to a supervisor, manager or [*person or office designated*]. Anyone who witnesses or becomes aware of potential instances of sexual harassment should report such behavior to a supervisor, manager or [*person or office designated*].

Reports of sexual harassment may be made verbally or in writing. A form for submission of a written complaint is attached to this Policy, and all employees are encouraged to use this complaint form. Employees who are reporting sexual harassment on behalf of other employees should use the complaint form and note that it is on another employee's behalf.

Employees, paid or unpaid interns or non-employees who believe they have been a target of sexual harassment may also seek assistance in other available forums, as explained below in the section on Legal Protections.

Supervisory Responsibilities

All supervisors and managers who receive a complaint or information about suspected sexual harassment, observe what may be sexually harassing behavior or for any reason suspect that sexual harassment is occurring, **are required** to report such suspected sexual harassment to [*person or office designated*].

In addition to being subject to discipline if they engaged in sexually harassing conduct themselves, supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.

Supervisors and managers will also be subject to discipline for engaging in any retaliation.

Complaint and Investigation of Sexual Harassment

All complaints or information about sexual harassment will be investigated, whether that information was reported in verbal or written form. Investigations will be conducted in a timely manner, and will be confidential to the extent possible.

An investigation of any complaint, information or knowledge of suspected sexual harassment will be prompt and thorough, commenced immediately and completed as soon as possible. The investigation will be kept confidential to the extent possible. All persons involved, including complainants, witnesses and alleged harassers will be accorded due process, as outlined below, to protect their rights to a fair and impartial investigation.

Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment. [*Employer Name*] will not tolerate retaliation against employees who file complaints, support another's complaint or participate in an investigation regarding a violation of this policy.

While the process may vary from case to case, investigations should be done in accordance with the following steps:

- Upon receipt of complaint, [*person or office designated*] will conduct an immediate review of the allegations, and take any interim actions (e.g., instructing the respondent to refrain from communications with the complainant), as appropriate. If complaint is verbal, encourage the individual to complete the "Complaint Form" in writing. If he or she refuses, prepare a Complaint Form based on the verbal reporting.

- If documents, emails or phone records are relevant to the investigation, take steps to obtain and preserve them.

- Request and review all relevant documents, including all electronic communications.

- Interview all parties involved, including any relevant witnesses;

- Create a written documentation of the investigation (such as a letter, memo or email), which contains the following:
    - A list of all documents reviewed, along with a detailed summary of relevant documents;
    - A list of names of those interviewed, along with a detailed summary of their statements;
    - A timeline of events;
    - A summary of prior relevant incidents, reported or unreported; and
    - The basis for the decision and final resolution of the complaint, together with any corrective action(s).

- Keep the written documentation and associated documents in a secure and confidential location.

- Promptly notify the individual who reported and the individual(s) about whom the complaint was made of the final determination and implement any corrective actions identified in the written document.

- Inform the individual who reported of the right to file a complaint or charge externally as outlined in the next section.

Legal Protections And External Remedies

Sexual harassment is not only prohibited by [*Employer Name*] but is also prohibited by state, federal, and, where applicable, local law.

Aside from the internal process at [*Employer Name*], employees may also choose to pursue legal remedies with the following governmental entities. While a private attorney is not required to file a complaint with a governmental agency, you may seek the legal advice of an attorney.

In addition to those outlined below, employees in certain industries may have additional legal protections.

State Human Rights Law (HRL)

The Human Rights Law (HRL), codified as N.Y. Executive Law, art. 15, § 290 et seq., applies to all employers in New York State with regard to sexual harassment, and protects employees, paid or unpaid interns and non-employees, regardless of immigration status. A complaint alleging violation of the Human Rights Law may be filed either with the Division of Human Rights (DHR) or in New York State Supreme Court.

Complaints with DHR may be filed any time **within one year** of the harassment. If an individual did not file at DHR, they can sue directly in state court under the HRL, **within three years** of the alleged sexual harassment. An individual may not file with DHR if they have already filed a HRL complaint in state court.

Complaining internally to [*Employer Name*] does not extend your time to file with DHR or in court. The one year or three years is counted from date of the most recent incident of harassment.

You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that sexual harassment has occurred. Probable cause cases are forwarded to a public hearing before an administrative law judge. If sexual harassment is found after a hearing, DHR has the power to award relief, which varies but may include requiring your employer to take action to stop the harassment, or redress the damage caused, including paying of monetary damages, attorney's fees and civil fines.

DHR's main office contact information is: NYS Division of Human Rights, One Fordham Plaza, Fourth Floor, Bronx, New York 10458. You may call (718) 741-8400 or visit: www.dhr.ny.gov.

Contact DHR at (888) 392-3644 or visit dhr.ny.gov/complaint for more information about filing a complaint. The website has a complaint form that can be downloaded, filled out, notarized and mailed to DHR. The website also contains contact information for DHR's regional offices across New York State.

Civil Rights Act of 1964

The United States Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws, including Title VII of the 1964 federal Civil Rights Act (codified as 42 U.S.C. § 2000e et seq.). An individual can file a complaint with the EEOC anytime within 300 days from the harassment. There is no cost to file a complaint with the EEOC. The EEOC will investigate the complaint, and determine whether there is reasonable cause to believe that discrimination has occurred, at which point the EEOC will issue a Right to Sue letter permitting the individual to file a complaint in federal court.

The EEOC does not hold hearings or award relief, but may take other action including pursuing cases in federal court on behalf of complaining parties. Federal courts may award remedies if discrimination is found to have occurred. In general, private employers must have at least 15 employees to come within the jurisdiction of the EEOC.

An employee alleging discrimination at work can file a “Charge of Discrimination.” The EEOC has district, area, and field offices where complaints can be filed. Contact the EEOC by calling 1-800-669-4000 (TTY: 1-800-669-6820), visiting their website at www.eeoc.gov or via email at info@eeoc.gov.

If an individual filed an administrative complaint with DHR, DHR will file the complaint with the EEOC to preserve the right to proceed in federal court.

Local Protections

Many localities enforce laws protecting individuals from sexual harassment and discrimination. An individual should contact the county, city or town in which they live to find out if such a law exists. For example, employees who work in New York City may file complaints of sexual harassment with the New York City Commission on Human Rights. Contact their main office at Law Enforcement Bureau of the NYC Commission on Human Rights, 40 Rector Street, 10th Floor, New York, New York; call 311 or (212) 306-7450; or visit www.nyc.gov/html/cchr/html/home/home.shtml.

Contact the Local Police Department

If the harassment involves unwanted physical touching, coerced physical confinement or coerced sex acts, the conduct may constitute a crime. Contact the local police department.

Model Complaint Form for Reporting Sexual Harassment

NEW YORK STATE | Combating Sexual Harassment

[Name of employer]

New York State Labor Law requires all employers to adopt a sexual harassment prevention policy that includes a complaint form to report alleged incidents of sexual harassment.

If you believe that you have been subjected to sexual harassment, you are encouraged to complete this form and submit it to [*person or office designated; contact information for designee or office; how the form can be submitted]*. You will not be retaliated against for filing a complaint.

If you are more comfortable reporting verbally or in another manner, your employer should complete this form, provide you with a copy and follow its sexual harassment prevention policy by investigating the claims as outlined at the end of this form.

For additional resources, visit: ny.gov/programs/combating-sexual-harassment-workplace

COMPLAINANT INFORMATION

Name:

Work Address: Work Phone:

Job Title: Email:

Select Preferred Communication Method: ☐Email ☐Phone ☐In person

SUPERVISORY INFORMATION

Immediate Supervisor's Name:

Title:

Work Phone: Work Address:

Adoption of this form does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

COMPLAINT INFORMATION

1. Your complaint of Sexual Harassment is made about:

   Name: Title:

   Work Address: Work Phone:

   Relationship to you: ☐Supervisor ☐Subordinate ☐Co-Worker ☐Other

2. Please describe what happened and how it is affecting you and your work. Please use additional sheets of paper if necessary and attach any relevant documents or evidence.

3. Date(s) sexual harassment occurred:

   Is the sexual harassment continuing? ☐Yes ☐No

4. Please list the name and contact information of any witnesses or individuals who may have information related to your complaint:

The last question is optional, but may help the investigation.

5. Have you previously complained or provided information (verbal or written) about related incidents? If yes, when and to whom did you complain or provide information?

If you have retained legal counsel and would like us to work with them, please provide their contact information.

Signature: _____ *Date:* _____

Instructions for Employers

If you receive a complaint about alleged sexual harassment, follow your sexual harassment prevention policy.

An investigation involves:

- Speaking with the employee
- Speaking with the alleged harasser
- Interviewing witnesses
- Collecting and reviewing any related documents

While the process may vary from case to case, all allegations should be investigated promptly and resolved as quickly as possible. The investigation should be kept confidential to the extent possible.

Document the findings of the investigation and basis for your decision along with any corrective actions taken and notify the employee and the individual(s) against whom the complaint was made. This may be done via email.

New Legislation on Sexual Harassment Will Significantly Affect the Handling of These Cases for Municipalities

Kristin Klein Wheaton

The #MeToo movement and its widespread publicity of issues involving sexual harassment in the workplace have sparked new legislation affecting all employers, including public employers. During his State of the State Address in January, Governor Andrew Cuomo articulated proposed changes to legislation surrounding sexual harassment and prevention in the workplace for public agencies and contractors. The New York State 2018-2019 budget, signed on April 12, 2018, contains provisions and new guidelines that were negotiated into the budget and which affect sexual harassment prevention policies, training and settlements of sexual harassment cases immediately ("Legislation").[1] Not to be left out, the New York City Council, on April 11, 2018, passed a package of legislation referred to as the "Stop Sexual Harassment in NYC Act," described by the City Council as critical to creating safe workplaces in New York City.[2] These pieces of legislation will significantly impact the handling of sexual harassment cases by municipalities.

New York State Legislation

The legislation contained in the New York State budget includes amendments to the New York Executive Law, New York Finance Law, New York Labor Law, New York Civil Practice Law and Rules (CPLR) Law, New York Public Officers Law and New York General Obligations Law relating to the prevention, training and settlement of sexual harassment claims. Significantly, the legislation only applies to "sexual harassment," which is undefined. Earlier versions of the bill contained a definition of sexual harassment, but the definition was left out of the final legislation.

"The sexual harassment policy and annual training must meet the newly imposed requirements under section 201-g of the New York State Labor Law."

Significantly, individuals who are not employees are protected in the new legislation. The New York Executive Law has been amended to expand the unlawful discriminatory practice of an employer to include sexual harassment of non-employees in its workplace, including contractor, subcontractor, vendor, consultant or any other person providing services pursuant to contract in the workplace, or someone who is an employee of such contractor, subcontractor, vendor, consultant or other person providing service pursuant to a contract in the workplace.[3] Accordingly, all employers, including public entities, will now also need to expend resources investigating complaints made by non-employees in their work-places and take corrective action to the extent that a non-employee is committing harassment against an employee or an employee is harassing a non-employee, or face liability for failure to do so. Fortunately, the legislation provides that in reviewing cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered.[4] Other forms of harassment and harassment based upon protected classes, including, but not limited to, race, age or sex discrimination (that is not sexual harassment) are not covered by this legislation.

Kristin Klein Wheaton

Requirements for State Contractors

The legislation imposes new requirements upon contractors that contract with the "state or any public department or agency thereof" where competitive bidding is required.[5] Effective January 1, 2019, each state contractor shall be required to submit a certification with all bids, under penalty of perjury, that the bidder has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment training to all of its employees.[6] The sexual harassment policy and annual training must meet the newly imposed requirements under section 201-g of the New York State Labor Law.[7] Any bid that does not meet this requirement will not be considered. It is in the discretion of the state department or agency to require the certification of contracts for services that are not subject to competitive bidding.[8] In

the event the contractor is unable to make the certification, it must provide a signed statement "which sets forth in detail the reasons therefor."[9]

Requirements for All Employers, Including Municipalities

Effective October 9, 2018, all employers, including municipalities, must adopt the model sexual harassment policy promulgated pursuant to the amended Labor Law that equals or exceeds the standards set forth by the New York State Department of Labor, in consultation with the New York State Division of Human Rights.[10] The model sexual harassment prevention policy shall 1) prohibit sexual harassment consistent with the guidance issued by the Department of Labor and provide examples of prohibited conduct that would constitute unlawful sexual harassment; 2) "include but not be limited to, information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment and a statement that there may be applicable local laws"; 3) "include a standard complaint form"; 4) "include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties"; 5) inform employees of their rights of redress and all available forums for resolving complaints administratively and judicially (this would include notification about the opportunity to file a complaint with the New York State Division of Human Rights and United States Equal Employment Opportunity Commission); 6) clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment, as well as supervisors and managers that knowingly allow such behavior to continue; and 7) "clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful."[11]

In addition, annual interactive training on sexual harassment must be provided by all employers, including municipalities, effective October 9, 2018.[12] The New York State Department of Labor, in consultation with the New York State Division of Human Rights, shall develop a model training program. The legislation provides that the training shall include 1) "an explanation of sexual harassment consistent with guidance issued by the Department [of Labor] in consultation with the Division of Human Rights"; 2) "examples of conduct that would constitute unlawful sexual harassment"; 3) "information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment"; and 4) "information concerning employees' rights of redress and all available forums for adjudicating complaints."[13] In addition, the annual training must address supervisory responsibilities for the prevention of sexual harassment, and address conduct by supervisors that may constitute sexual harassment.[14] Accordingly, the interactive training provided by municipalities must meet or exceed the requirements of the model training and must be provided to employees and supervisors on an annual basis. "Interactive" is not defined in the legislation so it appears to be an open question whether the training needs to be in-person live training or whether online training that has some interactive features will suffice. It appears that recorded training that has no interactive component may be deemed inadequate. The author recommends "live" training or interactive online training, pending further guidance from the Department of Labor.

Reimbursement by Employee Adjudicated to Have Committed Sexual Harassment

Most municipal lawyers have represented municipalities, officers and employees in claims of sexual harassment for years. The law is well established that municipalities are barred from defending and indemnifying employees for acts committed outside of the scope of their employment, for intentional wrongdoing and recklessness on the part of the employee and for punitive damages. The new legislation requires certain employees of municipalities to pay back the municipality for damages awarded in a sexual harassment case.

New York Public Officers Law § 18 has been amended to add a new section 18-a, effective immediately, which provides for reimbursement to the public entity for an award paid owing to an employee who is adjudicated to have committed harassment. Public entities include, but are not limited to, counties, towns, cities, villages, political subdivisions, school districts, BOCES or other governmental entities or entities operating a public school, college, community college or university, a public improvement or special district, public authorities, commissions, agencies or public benefit corporations and any other separate corporate instrumentality of the state.[15] "Employee" is broadly defined to include "commissioner, member of a public board or commission, trustee, director, officer, employee, or any other person holding a position by election, appointment, or employment in the service of the public entity, whether or not compensated" including a former employee or judicially appointed representative.[16] The new section provides that "any employee who has been subject to a final judgment of personal liability for intentional wrongdoing related to a claim of sexual harassment, shall reimburse any public entity

that makes a payment to a plaintiff for an adjudicated award based on a claim of sexual harassment resulting in a judgment."[17] The tortious employee is required to reimburse the public entity within 90 days of the public entity's payment of the award and if the employee fails to do so, the public entity can garnish the employee's wages.[18] There is an additional amendment to New York Public Officers Law which adds section 17-a containing similar legislation applicable to employees of New York State and its agencies.

Fortunately, language that was in the draft bill which appeared to prohibit even the payment of settlements by municipalities, versus final judgments for sexual harassment cases, did not make it into the final legislation. Notwithstanding, there are questions regarding this new provision that may present practical problems for the municipality's lawyer. Does this language create a conflict of interest for the legal counsel between the duty to represent the municipality and defend the employee? For example, even if the municipality's investigation reveals that the employee acted appropriately, there is always a chance that a final judgment could find that the employee was individually liable (for example as an aider or abettor under the Human Rights Law) if the litigation proceeds to a hearing before an administrative agency or trial. Does the fact that the employee may ultimately have to pay a judgment personally create a conflict of interest in both the strategy of proceeding to trial on a case or deciding to settle, as well as in the defense of a claim? These situations are similar to potential conflicts of interest that arise when a plaintiff institutes a case under 42 U.S.C. § 1983 against a municipality and individual employees and seeks punitive damages against individual public employees. There seems to be a question of whether any disclosure to the employee who is accused of harassment as to the possibility of personal financial responsibility is recommended and/or ethically required. If required, should it be in writing? Should there be any waiver of a potential conflict of interest signed by the employee where the attorney is representing both the municipality and the employee? It will be interesting to see whether this new legislation has any impact on the handling of the defense of these cases.

Confidentiality

Non-disclosure or confidentiality agreements are prohibited in sexual harassment claims, except under limited conditions, effective July 11, 2018. New provisions in the New York General Obligations Law and the CPLR prohibit all employers, including municipalities, from utilizing confidentiality agreements in the settlement or resolution of any claim, "the factual foundation for which involves sexual harassment" unless confidentiality is the complainant's preference.[19] Borrowing from the Age Discrimination in Employment Act, the legislation provides that any such term (of confidentiality) must be provided to all parties and the complainant shall have 21 days to consider the provision, and if he or she agrees to confidentiality, it must be stated in a separately executed written agreement subject to revocation by the complainant within seven days after signing it.[20]

The CPLR has also been amended to add a new section under judgements that prohibits non-disclosure or confidentiality agreements as a condition of discontinuing or settling a case "the factual foundation of which involves sexual harassment" unless confidentiality is the plaintiff's preference.[21] The CPLR has also been amended to include provisions identical to those included in the General Obligations Law, including a 21-day consideration period, and seven-day revocation period, as well as the requirement of an additional written agreement evidencing the preference of the plaintiff to keep the matter confidential.[22]

Bar to Mandatory Arbitration Provision in Cases of Sexual Harassment

Finally, effective July 11, 2018, in limited circumstances, the new legislation bars mandatory arbitration provisions in contracts relating to claims of sexual harassment, except where inconsistent with federal law.[23] A new provision has been added to Article 75 of the CPLR that prohibits mandatory arbitration clauses that require that the parties submit to mandatory arbitration to resolve any allegation of claim of an unlawful discriminatory practice or sexual harassment as a condition of the enforcement of the contract or obtaining remedies under the contract.[24] The legislation does state under "exceptions" that "[n]othing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon."[25] Accordingly, under this legislation, mandatory arbitration clauses are not barred altogether other than in cases of sexual harassment. In the event there is any conflict between a collective bargaining agreement and the legislation, the legislation specifies that the collective bargaining agreement shall control.[26]

Stop Sexual Harassment in New York City Act

The New York City Council also passed a package of 11 bills—together referred to as the Stop Sexual Harassment in NYC Act (the "Act"). These bills are being hailed as the nation's farthest reaching anti-sexual

harassment laws. At the beginning of May, Mayor Bill de Blasio signed the bills into law. The respective bills that make up the Act have different implications for different employers. For example, certain employers will be required to conduct an ongoing assessment of risk factors associated with sexual harassment,[27] report annually on workplace sexual harassment,[28] be evaluated through a climate survey of their employees,[29] display anti-sexual harassment posters at their workplace,[30] and conduct annual anti-sexual harassment training for their employees.[31] The respective bills have various effective dates, some of which are effective immediately. While the legislation seems geared toward private employers, the exact impact on municipalities located in New York City should be followed closely.

Conclusion

While there are still some unanswered questions, what is certain is that there will be more legislation and regulations to come. The state legislation expressly directs issuance of guidance and regulations by the New York State Department of Labor, in consultation with the New York State Division of Human Rights. Some of the criticism of the legislation is that it does not go far enough since it does not cover other types of discrimination beyond sexual harassment. Also, while the proposed budget bill contained very detailed requirements for the conduct of investigations, the final bill does not specifically address what needs to be done in order to have a legally compliant investigation. For now, the case law addressing prompt investigations, as well as the EEOC's recommended best practices for investigations, may be the guidepost.[32] It may be assumed that some of the language in the proposed legislation that did not make it into the final bill may find its way into the regulations and guidance.

Employers may be wondering whether other discrimination claims should be treated similarly with respect to the annual training and development of a written policy. It seems that it may be a matter of time before additional legislation is enacted that applies to other forms of discrimination as well. Given that sexual harassment training and policies are often included in an overall harassment and discrimination prevention program that includes all forms of discrimination, it may make sense for municipalities to apply the same investigation and policy requirements to other forms of discrimination and have one policy that covers all forms of harassment and discrimination. In any event, municipal lawyers everywhere in New York State will be busy the next several months implementing the requirements of this new law.

Endnotes

1. 2018 Sess. Laws of N.Y. Ch. 57 (S.7507-C) (McKinney's 2018).
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3. N.Y. Executive Law § 296-d.
4. *Id.*
5. N.Y. State Finance Law § 139-1(1)(a).
6. *Id.*
7. *Id.*
8. *Id.* at § 139-1(1)(b).
9. *Id.* at § 139-1(3).
10. N.Y. Labor Law § 201-g(1)(b).
11. *Id.* at § 201-g(1)(a).
12. *Id.* at § 201-g(2)(a).
13. *Id.*
14. *Id.* at § 201-g(2)(b).
15. N.Y. Public Officers Law § 18-a(1)(a).
16. *Id.* at § 18-a(1)(b).
17. *Id.* at § 18-a(2).
18. *Id.* at § 18-a(3).
19. N.Y. General Obligations Law § 5-336.
20. *Id.*
21. N.Y. Civil Practice Law and Rules § 5003-b.
22. *Id.*
23. *Id.* at § 7515.
24. *Id.*
25. *Id.* at § 7515(4)(b)(ii).
26. *Id.* at § 7515(4)(c).
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31. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354915&GUID=7A944D7E-BD65-490F-96BE-DCC3CFDBFA46&Options=ID|Text|&Search=Harassment; http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354925&GUID=D9986F4A-C3A9-4299-BAA8-5A1B1A1AD31E&Options=ID|Text|&Search=Harassment.
32. EEOC Checklist for Employers, "Checklist Three: A Harassment Reporting System and Investigations," found at https://www.eeoc.gov/eeoc/task_force/harassment/checklist3.cfm.

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Model Sexual Harassment Prevention Training

OCTOBER 2018 EDITION

NEW YORK STATE | Combating Sexual Harassment

Purpose of this Model Training

New York State is a national leader in the fight against sexual harassment in the workplace and the 2019 Budget includes legislation to further combat it.

Under the new law, every employer in New York State is **now required to establish a sexual harassment prevention policy** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established a model sexual harassment prevention policy for employers to adopt, available at www.ny.gov/programs/combating-sexual-harassment-workplace. Or, employers may adopt a similar policy that meets or exceeds the minimum standards of the model policy.

In addition, every employer in New York State is **now required to provide employees with sexual harassment prevention training** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established this model training for employers to use. Or, employers may use a training program that meets or exceeds the minimum standards of the model training.

An employer's sexual harassment prevention training **must be interactive**, meaning it requires some level of feedback by those being trained.

The training, which may be presented to employees individually or in groups; in person, via phone or online; via webinar or recorded presentation, should include as many of the following elements as possible:

- Ask questions of employees as part of the program;
- Accommodate questions asked by employees, with answers provided in a timely manner;
- Require feedback from employees about the training and the materials presented.

How to Use This Training

This model training is presented in a variety of formats, giving employers maximum flexibility to deliver the training across a variety of worksite settings, while still maintaining a core curriculum.

Available training elements include:

1. **Script** for in-person group training, available in PDF and editable Word formats
2. **PowerPoint** to accompany the script, available online and for download, also in PDF
3. **Video** presentation, viewable online and for download
4. **FAQs**, available online to accompany the training, answering additional questions that arise

Instructions for Employers

- This training is meant to be a model that can be used as is, or adapted to meet the specific needs of each organization.

- Training may include additional interactive activities, including an opening activity, role playing or group discussion.

- If specific employer policies or practices differ from the content in this training, the training should be modified to reflect those nuances, while still including all of the minimum elements required by New York State law (shown on Page 4).

- The training should detail any internal process employees are encouraged to use to complain and include the contact information for the specific name(s) and office(s) with which employees alleging harassment should file their complaints.

- It should also be modified to reflect the work of the organization by including, for example, industry specific scenarios.

- To every extent possible, this training should be given consistently (using the same delivery method) across each organization's workforce to ensure understanding at every level and at every location.

- It is every employer's responsibility to ensure all employees are trained to employer's standards and familiar with the organization's practices.

- All employees must complete initial sexual harassment prevention training before Oct. 9, 2019.

- All employees must complete an additional training at least once per year. This may be based on calendar year, anniversary of each employee's start date or any other date the employer chooses.

- All new employees should complete sexual harassment prevention training as quickly as possible.

- Employers should provide employees with training in the language spoken by their employees. When an employee identifies as a primary language one for which a template training is not available from the State, the employer may provide that employee an English-language version. However, as employers may be held liable for the conduct of all of their employees, employers are strongly encouraged to provide a the policy and training in the language spoken by the employee.

- On occasion, a participant may share a personal or confidential experience during the training. If this happens, the trainer should interrupt and recommend the story be discussed privately and with the appropriate office contact. After the training, follow up with this individual to ensure they are aware of the proper reporting steps. Managers and supervisors must report all incidents of harassment.

Minimum Training Standards Checklist

An employer that does not use this model training -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their training meets or exceeds the following minimum standards.

The training **must**:

- ☐ Be interactive;
- ☐ Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Include examples of unlawful sexual harassment;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to targets of sexual harassment;
- ☐ Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- ☐ Include information addressing conduct by supervisors and additional responsibilities for supervisors.

NEW YORK STATE

Sexual Harassment Prevention Training

ELEMENT 1: TRAINING SCRIPT

OCTOBER 2018 EDITION

Table of Contents

Trainer Introduction

- Welcome to our annual training on sexual harassment prevention.
- My name is _____[*name*]_____ and I am the _____[*title*]____ at _____[*organization*]_____.
- In recent years, the topic of sexual harassment in the workplace has been brought into the national spotlight, bringing with it renewed awareness about the serious and unacceptable nature of these actions and the severe consequences that follow.
- The term “sexual harassment” may mean different things to different people, depending on your life experience.
- Certain conduct may seem acceptable or have seemed acceptable in the past. That does not mean it is acceptable to the people we work with.
- The purpose of this training is to set forth a common understanding about what is and what is not acceptable in our workplace.

Sexual Harassment in the Workplace

- New York State has long been committed to ensuring that all individuals have an equal opportunity to enjoy a fair, safe and productive work environment.
- Laws and policies help ensure that diversity is respected and that everyone can enjoy the privileges of working in New York State.
- Preventing sexual harassment is critical to our continued success. Sexual harassment will not be tolerated.
- This means any harassing behavior will be investigated and the perpetrator or perpetrators will be told to stop.
- It also means that disciplinary action may be taken, if appropriate. If the behavior is sufficiently serious, disciplinary action may include termination.
- Repeated behavior, especially after an employee has been told to stop, is particularly serious and will be dealt with accordingly.
- This interactive training will help you better understand what is considered sexual harassment.
- It will also show you how to report sexual harassment in our workplace, as well as your options for reporting workplace sexual harassment to external state and federal agencies that enforce anti-discrimination laws.
- These reports will be taken seriously and promptly investigated, with effective remedial action taken where appropriate.

What is Sexual Harassment?

- Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law.

- Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

- Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

    1. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

    2. Such conduct is made either explicitly or implicitly a term or condition of employment; or

    3. Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

- There are two main types of sexual harassment.

Hostile Environment

- A hostile environment on the basis of sex may be created by any action previously described, in addition to unwanted words, signs, jokes, pranks, intimidation, physical actions or violence, either of a sexual nature or not of a sexual nature, directed at an individual because of that individual's sex.

- Hostile environment sexual harassment includes:

    - Sexual or discriminatory displays or publications anywhere in the workplace, such as displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic.

        - This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

        - This also includes sexually oriented gestures, noises, remarks, jokes or comments about a person's sexuality or sexual experience.

    - Hostile actions taken against an individual because of that individual's sex, such as:

        - Rape, sexual battery, molestation or attempts to commit these assaults.

        - Physical acts of a sexual nature (including, but not limited to, touching, pinching, patting, grabbing, kissing, hugging, brushing against another employee's body or poking another employee's body)

- Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
- Sabotaging an individual's work;
- Bullying, yelling, name-calling.

Quid Pro Quo Sexual Harassment

- Quid pro quo sexual harassment occurs when a person in authority trades, or tries to trade, job benefits for sexual favors.
- Quid pro quo is a legal term meaning a trade.
- This type of harassment occurs between an employee and someone with authority, like a supervisor, who has the ability to grant or withhold job benefits.
- Quid pro quo sexual harassment includes:
    - Offering or granting better working conditions or opportunities in exchange for a sexual relationship
    - Threatening adverse working conditions (like demotions, shift alterations or work location changes) or denial of opportunities if a sexual relationship is refused
    - Using pressure, threats or physical acts to force a sexual relationship
    - Retaliating for refusing to engage in a sexual relationship

Who can be the Target of Sexual Harassment?

- Sexual harassment can occur between any individuals, regardless of their sex or gender.
- New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace.

Who can be the Perpetrator of Sexual Harassment?

- The perpetrator of sexual harassment can be anyone in the workplace:
- The harasser can be a **coworker** of the recipient
- The harasser can be a **supervisor** or **manager**
- The harasser can be any third-party, including: a **non-employee**, **intern**, **vendor**, **building security**, **client**, **customer** or **visitor**.

Where Can Workplace Sexual Harassment Occur?

- Harassment can occur **whenever and wherever** employees are fulfilling their work responsibilities, including in the field, at any employer-sponsored event, trainings, conferences open to the public and office parties.
- Employee interactions during non-work hours, such as at a hotel while traveling or at events after work can have an impact in the workplace.
- Locations off site and off-hour activities can be considered extensions of the work environment.
- Employees can be the target of sexual harassment through calls, texts, email and social media.
- Harassing behavior that in any way affects the work environment is rightly the concern of management.

Sex Stereotyping

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of either sex should act or look.
- Harassing a person because that person does not conform to gender stereotypes as to “appropriate” looks, speech, personality, or lifestyle is sexual harassment.
- Harassment because someone is performing a job that is usually performed, or was performed in the past, mostly by persons of a different sex, is sex discrimination.

Retaliation

- Any employee who has engaged in “protected activity” is protected by law from being retaliated against because of that “protected activity.”

- “Protected activities” with regard to harassment include:

    - Making a complaint to a supervisor, manager or another person designated by your employer to receive complaints about harassment

    - Making a report of suspected harassment, even if you are not the target of the harassment

    - Filing a formal complaint about harassment

    - Opposing discrimination

    - Assisting another employee who is complaining of harassment

    - Providing information during a workplace investigation of harassment, or testifying in connection with a complaint of harassment filed with a government agency or in court

What is Retaliation?

- Retaliation is any action taken to alter an employee’s terms and conditions of employment (such as a demotion or harmful work schedule or location change) because that individual engaged in any of the above protected activities. Such individuals should expect to be free from any negative actions by supervisors, managers or the employer motivated by these protected activities.

- Retaliation can be any such adverse action taken by the employer against the employee, that could have the effect of discouraging a reasonable worker from making a complaint about harassment or discrimination.

- The negative action need not be job-related or occur in the workplace, and may occur after the end of employment, such as an unwarranted negative reference.

What is Not Retaliation

- A negative employment action is not retaliatory merely because it occurs after the employee engages in protected activity.

- Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity.

The Supervisor's Responsibility

- Supervisors and managers are held to a high standard of behavior. This is because:
    - They are placed in a position of authority by the employer and must not abuse that authority.
    - Their actions can create liability for the employer without the employer having any opportunity to correct the harassment.
    - They are required to report any harassment that is reported to them or which they observe.
    - They are responsible for any harassment or discrimination that they should have known of with reasonable care and attention to the workplace for which they are responsible.
    - They are expected to model appropriate workplace behavior.

Mandatory Reporting

- Supervisors **must report any harassment** that they observe or know of, even if no one is objecting to the harassment.
- If a supervisor or manager receives a report of harassment, or is otherwise aware of harassment, it must be promptly reported to the employer, without exception,
    - Even if the supervisor or manager thinks the conduct is trivial
    - Even if the harassed individual asks that it not be reported
- Supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.
- Supervisors and managers will also be subject to discipline for engaging in any retaliation.

What Should I Do If I Am Harassed?

- We cannot stop harassment in the workplace unless management knows about the harassment. It is everyone’s responsibility.
- You are encouraged to report harassment to a supervisor, manager or other another person designated by your employer to receive complaints (as outlined in the sexual harassment prevention policy) so the employer can take action.
- Behavior does not need to be a violation of law in order to be in violation of the policy.

- We will provide you with a complaint form to report harassment and file complaints, but if you are more comfortable reporting verbally or in another manner, we are still required to follow the sexual harassment prevention policy by investigating the claims.

- If you believe that you have been subjected to sexual harassment, you are encouraged to complete the Complaint Form and submit it to:

    - [*Person or office designated*]

    - [*Contact information for designee or office*]

    - [*How the Complaint Form can be submitted*]

- You may also make reports verbally.

- Once you submit this form or otherwise report harassment, our organization must follow its sexual harassment prevention policy and investigate any claims.

- You should report any behavior you experience or know about that is inappropriate, as described in this training, without worrying about whether or not if it is unlawful harassment.

- Individuals who report or experience harassment should cooperate with management so a full and fair investigation can be conducted and any necessary corrective action can be taken.

- If you report harassment to a manager or supervisor and receive an inappropriate response, such as being told to “just ignore it,” you may take your complaint to the next level as outlined in our policy under “Legal Protections And External Remedies.”

- Finally, if you are not sure you want to pursue a complaint at the time of potential harassment, document the incident to ensure it stays fresh in your mind.

What Should I Do If I Witness Sexual Harassment?

- Anyone who witnesses or becomes aware of potential instances of sexual harassment should report it to a supervisor, manager or designee.

- It can be uncomfortable and scary, but it is important to tell coworkers "that's not okay" when you are uncomfortable about harassment happening in front of you.

- It is unlawful for an employer to retaliate against you for reporting suspected sexual harassment or assisting in any investigation.

Investigation and Corrective Action

- Anyone who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action, up to and including termination.
- [*Name of Company*] will investigate all reports of harassment, whether information was reported in verbal or written form.
- An investigation of any complaint should be commenced immediately and completed as soon as possible.
- The investigation will be kept confidential to the extent possible.
- Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment.
    - It is illegal for employees who participate in any investigation to be retaliated against.

Investigation Process

- Our organization also has a duty to take appropriate steps to ensure that harassment will not occur in the future. Here is how we will investigate claims.
- [*Person or office designated*] will conduct an immediate review of the allegations, and take any interim actions, as appropriate
- Relevant documents, emails or phone records will be requested, preserved and obtained.
- Interviews will be conducted with parties involved and witnesses
- Investigation is documented as outlined in the sexual harassment policy
- The individual who complained and the individual(s) accused of sexual harassment are notified of final determination and that appropriate administrative action has been taken.

Additional Protections and Remedies

- In addition to what we've already outlined, employees may also choose to pursue outside legal remedies as suggested below.

New York State Division of Human Rights (DHR)

- A complaint alleging violation of the Human Rights Law may be filed either with DHR or in New York State Supreme Court.
- Complaints may be filed with DHR any time **within one year** of the alleged sexual harassment. You do not need to have an attorney to file.
- If an individual did not file at DHR, they can sue directly in state court under the Human Rights Law, **within three years** of the alleged sexual harassment.
- An individual may not file with DHR if they have already filed a Human Rights Law complaint in state court.
- For more information, visit: **www.dhr.ny.gov**.

United States Equal Employment Opportunity Commission (EEOC)

- An individual can file a complaint with the EEOC anytime **within 300 days** from the alleged sexual harassment. You do not need to have an attorney to file.
- A complaint must be filed with the EEOC before you can file in federal court.
- For more information, visit: **www.eeoc.gov**.
- *NOTE: If an individual files an administrative complaint with DHR, DHR will automatically file the complaint with the EEOC to preserve the right to proceed in federal court.*

Local Protections

- Many localities enforce laws protecting individuals from sexual harassment and discrimination.
- You should contact the county, city or town in which you live to find out if such a law exists.
- Harassment may constitute a crime if it involves things like physical touching, coerced physical confinement or coerced sex acts. **You should also contact the local police department**.

Other Types of Workplace Harassment

- Workplace harassment can be based on other things and is not just about gender or inappropriate sexual behavior in the workplace.

- Any harassment or discrimination based on a protected characteristic is prohibited in the workplace and may lead to disciplinary action against the perpetrator.

    - Protected characteristics include age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

- Much of the information presented in this training applies to all types of workplace harassment.

Summary

- After this training, all employees are should understand what we have discussed, including:

    - How to recognize harassment as inappropriate workplace behavior

    - The nature of sexual harassment

    - That harassment because of any protected characteristic is prohibited

    - The reasons why workplace harassment is employment discrimination

    - That all harassment should be reported

    - That supervisors and managers have a special responsibility to report harassment.

- With this knowledge, all employees can achieve appropriate workplace behavior, avoid disciplinary action, know their rights and feel secure that they are entitled to and can work in an atmosphere of respect for all people.

- Find the Complaint Form [*insert information here*].

- For additional information, visit: **ny.gov/programs/combating-sexual-harassment-workplace**

Sexual Harassment Case Studies

- Let’s take a look at a few scenarios that help explain the kind of behaviors that can constitute sexual harassment.

- These examples describe inappropriate behavior in the workplace that will be dealt with by corrective action, including disciplinary action.

- Remember, it is up to **all employees** to report inappropriate behavior in the workplace.

Example 1: Not Taking “No” for an Answer

Li Yan's coworker Ralph has just been through a divorce. He drops comments on a few occasions that he is lonely and needs to find a new girlfriend. Li Yan and Ralph have been friendly in the past and have had lunch together in local restaurants on many occasions. Ralph asks Li Yan to go on a date with him—dinner and a movie. Li Yan likes Ralph and agrees to go out with him. She enjoys her date with Ralph but decides that a relationship is not a good idea. She thanks Ralph for a nice time, but explains that she does not want to have a relationship with him. Ralph waits two weeks and then starts pressuring Li Yan for more dates. She refuses, but Ralph does not stop. He keeps asking her to go out with him.

Question 1. When Ralph first asked Li Yan for a date, this was sexual harassment. True or False?

FALSE: Ralph's initial comments about looking for a girlfriend and asking Li Yan, a coworker, for a date are not sexual harassment. Even if Li Yan had turned Ralph down for the first date, Ralph had done nothing wrong by asking for a date and by making occasional comments that are not sexually explicit about his personal life.

Question 2. Li Yan cannot complain of sexual harassment because she went on a date with Ralph. True or False?

FALSE: Being friendly, going on a date, or even having a prior relationship with a coworker does not mean that a coworker has a right to behave as Ralph did toward Li Yan. She has to continue working with Ralph, and he must respect her wishes and not engage in behavior that has now become inappropriate for the workplace.

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Li Yan complains to her supervisor, and the supervisor (as required) reports her complaint to the person designated by her employer to receive complaints. Ralph is questioned about his behavior and he apologizes. He is instructed by the designated person to stop. Ralph stops for a while but then starts leaving little gifts for Li Yan on her desk with accompanying love notes. The love notes are not overtly offensive, but Ralph's behavior is starting to make Li Yan nervous, as she is afraid he may start stalking her.

Question 3. Ralph's subsequent behavior with gifts and love notes is not sexual harassment because he has stopped asking Li Yan for dates as instructed. He is just being nice to Li Yan because he likes her. True or False?

FALSE: Li Yan should report Ralph's behavior. She was entitled to have effective assistance in getting Ralph to stop his inappropriate workplace behavior. Because Ralph has returned to pestering Li Yan after being told to stop, he could be subject to serious disciplinary action for his behavior.

Example 2: The Boss with a Bad Attitude

Sharon transfers to a new location with her employer. Her new supervisor, Paul, is friendly and helps her get familiar with her new job duties. After a few days, when no one else is around, Paul comes over to Sharon's work area to chat. Paul talks about what he did last night, which was to go to a strip club. Sharon is shocked that Paul would bring up such a topic in the workplace and says nothing in response. Paul continues talking and says that all the women in the office are so unattractive that he needs to get out and “see some hot chicks” once in a while. He tells Sharon he is glad she joined the staff because, unlike the others, she is “easy on the eyes.” Sharon feels very offended and demeaned that she and the other women in her workplace are being evaluated on their looks by their supervisor.

Question 1. Because Paul did not tell Sharon that she is unattractive, he has not harassed her. True or False?

FALSE: Paul has made sexually explicit statements to Sharon, which are derogatory and demeaning to Sharon and her female coworkers. It does not matter that Paul supposedly paid Sharon a “compliment.” The discussion is still highly offensive to Sharon, as it would be to most reasonable persons in her situation.

Question 2. By bringing up his visit to the strip club, Paul is engaging in inappropriate workplace behavior. True or False?

TRUE: Simply bringing up the visit to the strip club is inappropriate in the workplace, especially by a supervisor, and it would be appropriate for Sharon to report this conduct. A one-time comment about going to a strip club is behavior that Paul would be told to stop, even though it probably would not rise to the level of unlawful harassment, unless it was repeated on multiple occasions.

Question 3. Paul should be instructed to stop making these types of comments, but this is not a serious matter. True or False?

FALSE: Paul's comments about the female employees are a serious matter and show his contempt for women in the workplace. Paul is required to model appropriate behavior, and must not exhibit contempt for employees on the basis of sex or any protected characteristic. Sharon should not have to continue to work for someone she knows harbors such contempt for women, nor should the other employees have to work for such a supervisor. Management should be aware of this, even if the other employees are not, and Paul should be disciplined and, most likely, removed from his current position.

Example 3: No Job for a Woman?

Carla works as a licensed heavy equipment operator. Some of her male coworkers think it is fun to tease her. Carla often hears comments like “Watch out, here she comes–that crazy woman driver!” in a joking manner. Also, someone keeps putting a handmade sign on the only port-a-potty at the worksite that says, “Men only.”

Question 1. Women in traditionally male jobs should expect teasing and should not take the joking comments too seriously. True or False?

FALSE: Whether Carla is being harassed depends in part on Carla's opinion of the situation; that is, whether she finds the behavior offensive. However, if at any point Carla does feel harassed, she is entitled to complain of the behavior and have it stopped, regardless of whether and for how long she has endured the behavior without complaint. Carla can always say when enough is enough.

Question 2. Carla cannot complain, because the site supervisor sometimes joins in with the joking behavior, so she has nowhere to go. True or False?

FALSE: Carla can still complain to the supervisor who is then on notice that the behavior bothers Carla and must be stopped. The supervisor's failure to take Carla's complaint seriously, constitutes serious misconduct on his or her part. Carla can also complain directly to the person designated by her employer to receive complaints, either instead of going to the supervisor, or after doing so. The employer is responsible for assuring that all employees are aware of its anti-harassment policies and procedures.

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Some of Carla's other coworkers are strongly opposed to her presence in the traditionally all-male profession. These coworkers have sometimes said things to her like, “You're taking a job away from a man who deserves it,” “You should be home with your kids,” and “What kind of a mother are you?” Also, someone scratched the word “bitch” on Carla's toolbox.

Question 3. These behaviors, while rude, are not sexual harassment because they are not sexual in nature. True or False?

FALSE: The behaviors are directed at her because she is a woman and appear to be intended to intimidate her and cause her to quit her job. While not sexual in nature, this harassment is because of her sex and will create a hostile work environment if it is sufficiently severe or frequent.

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Carla complains about the jokes and other behaviors, and an investigation is conducted. It cannot be determined who defaced Carla's toolbox. Her coworkers are told to stop their behavior or face disciplinary charges. The supervisor speaks with Carla and tells her to come to him immediately if she has any further problems. Carla then finds that someone has urinated in her toolbox.

Question 4. There is nothing Carla can do because she can't prove who vandalized her toolbox. True or False?

FALSE: Carla should speak to her supervisor immediately, or contact any other person designated by her employer to receive complaints directly. Although the situation has become very difficult, it is the employer's responsibility to support Carla and seek a solution. An appropriate investigation must be promptly undertaken and appropriate remedial action must follow.

Example 4: Too Close for Comfort

Keisha has noticed that her new boss, Sarah, leans extremely close to her when they are going over the reports that she prepares. She touches her hand or shoulder frequently as they discuss work. Keisha tries to move away from her in these situations, but she doesn't seem to get the message.

Question 1. Keisha should just ignore Sarah's behavior. True or False?

FALSE: If Keisha is uncomfortable with Sarah's behavior, she has options. If she feels comfortable doing so, she should tell Sarah to please back off because her closeness and touching make her uncomfortable. Another option is to complain directly to a person designated by her employer to receive complaints, who will speak with Sarah. Although this may not be sufficiently severe or pervasive to create an unlawful harassment situation (unless it was repeated by Sarah after she was told to stop), there is no reason for Keisha to be uncomfortable in the workplace. There is no valid reason for Sarah to engage in this behavior.

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Before Keisha gets around to complaining, Sarah brushes up against her back in the conference room before a meeting. She is now getting really annoyed but still puts off doing anything about it. Later Sarah "traps" Keisha in her office after they finish discussing work by standing between her and the door of the small office. Keisha doesn't know what to do, so she moves past her to get out. As she does so, Sarah runs her hand over Keisha's breast.

Question 2. Sarah's brushing up against Keisha in the conference room could just be inadvertent and does not give Keisha any additional grounds to complain about Sarah. True or False?

FALSE: Sarah is now engaging in a pattern of escalating behavior. Given the pattern of her "too close" and "touching" behavior, it is unlikely that this was inadvertent. Even before being "trapped" in Sarah's office, Keisha should have reported all of the behaviors she had experienced that had made her uncomfortable.

Question 3. Sarah touching Keisha's breast is inappropriate but is probably not unlawful harassment because it only happened once. True or False?

FALSE: Any type of sexual touching is very serious and does not need to be repeated to constitute sexual harassment. Keisha should immediately report it without waiting for it to be repeated. Sarah can expect to receive formal discipline, including possible firing.

Example 5: A Distasteful Trade

The following scenario will explain many aspects of quid pro quo sexual harassment.

Tatiana is hoping for a promotion to a position that she knows will become vacant soon. She knows that her boss, David, will be involved in deciding who will be promoted. She tells David that she will be applying for the position, and that she is very interested in receiving the promotion. David says, “We'll see. There will be a lot of others interested in the position.”

A week later, Tatiana and David travel together on state business, including an overnight hotel stay. Over dinner, David tells Tatiana that he hopes he will be able to promote her, because he has always really enjoyed working with her. He tells her that some other candidates “look better on paper” but that she is the one he wants. He tells her that he can “pull some strings” to get her into the job and Tatiana thanks David. Later David suggests that they go to his hotel room for “drinks and some relaxation.” Tatiana declines his “offer.”

Question 1. David's behavior could be harassment of Tatiana. True or False?

TRUE: David's behavior as Tatiana's boss is inappropriate, and Tatiana should feel free to report the behavior if it made her uncomfortable. It is irrelevant that this behavior occurs away from the workplace. Their relationship is that of supervisor and supervisee, and all their interactions will tend to impact the workplace.

David's behavior, at this point, may or may not constitute quid pro quo harassment; David has made no threat that if Tatiana refuses his advance he will handle her promotion any differently. However, his offer to “pull some strings” followed by a request that they go to his hotel room for drinks and relaxation might be considered potentially coercive. Certainly, if David persists in his advances—even if he never makes or carries out any threat or promise about job benefits—then this could create a hostile environment for Tatiana, for which the employer could be strictly liable because David is a management employee.

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After they return from the trip, Tatiana asks David if he knows when the job will be posted so that she can apply. He says that he is not sure, but there is still time for her to “make it worth his while” to pull strings for her. He then asks, “How about going out to dinner this Friday and then coming over to my place?”

Question 2. David engaged in sexual harassment. True or False?

TRUE: It is now evident that David has offered to help Tatiana with her promotion in exchange for sexual favors.

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Tatiana, who really wants the position, decides to go out with David. Almost every Friday they go out at David's insistence and engage in sexual activity. Tatiana does not want to be in a relationship with David and is only going out with him because she believes that he will otherwise block her promotion.

Question 3. Tatiana cannot complain of harassment because she voluntarily engaged in sexual activity with David. True or False?

FALSE: Because the sexual activity is unwelcome to Tatiana, she is a target of sexual harassment. Equally, if she had refused David's advances, she would still be a target of sexual harassment. The offer to Tatiana to trade job benefits for sexual favors by someone with authority over her in the workplace is quid pro quo sexual harassment, and the employer is exposed to liability because of its supervisor's actions.

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Tatiana receives the promotion.

Question 4. Tatiana cannot complain of harassment because she got the job, so there is no discrimination against her. True or False?

FALSE: Tatiana can be the recipient of sexual harassment whether or not she receives the benefit that was used as an inducement.

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Tatiana breaks off the sexual activities with David. He then gives her a bad evaluation, and she is removed from her new position at the end of the probationary period and returns to her old job.

Question 5. It is now “too late” for Tatiana to complain. Losing a place of favor due to the break up of the voluntary relationship does not create a claim for sexual harassment. True or False?

FALSE: It is true that the breakup of a relationship, if truly consensual and welcomed at the time, usually does not create a claim for sexual harassment. However, the “relationship” in this case was never welcomed by Tatiana. David's behavior has at all times been inappropriate and a serious violation of the employer’s policy. As the person who abused the power and authority of a management position, David has engaged in sexual harassment.

Example 6: An Issue about Appearances

Leonard works as a clerk typist for a large employer. He likes to wear jewelry, and his attire frequently includes earrings and necklaces. His boss, Margaret, thinks it's “weird” that, as a man, Leonard wears jewelry and wants to be a clerical worker. She frequently makes sarcastic comments to him about his appearance and refers to him “jokingly” as her office boy. Leonard, who hopes to develop his career in the area of customer relations, applies for an open promotional position that would involve working in a “front desk” area, where he would interact with the public. Margaret tells Leonard that if he wants that job, he had better look “more normal” or else wait for a promotion to mailroom supervisor.

Question 1. Leonard's boss is correct to tell him wearing jewelry is inappropriate for customer service positions. True or False?

FALSE: Leonard's jewelry is only an issue because Margaret considers it unusual for a man to wear such jewelry. Therefore, her comments to Leonard constitute sex stereotyping.

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Margaret also is “suspicious” that Leonard is gay, which she says she “doesn't mind,” but she thinks Leonard is “secretive.” She starts asking him questions about his private life, such as “Are you married?” “Do you have a partner?” ”Do you have kids?” Leonard tries to respond politely “No” to all her questions but is becoming annoyed. Margaret starts gossiping with Leonard's coworkers about his supposed sexual orientation.

Question 2. Leonard is the recipient of harassment on the basis of sex and sexual orientation. True or False?

TRUE: Leonard is harassed on the basis of sex because he is being harassed for failure to adhere to Margaret's sex stereotypes.

Leonard is also harassed on the basis of his perceived sexual orientation. It does not matter whether or not Leonard is a gay man in order for him to have a claim for sexual orientation harassment.

Leonard might also be considered a target of harassment on the basis of gender identity, which is a form of sex and/or disability discrimination prohibited by the Human Rights Law. Leonard should report Margaret's conduct, which is clearly a violation of the sexual harassment policy, to a person designated by his employer to receive complaints (i.e. his employer’s “designee”).

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Leonard decides that he is not going to get a fair chance at the promotion under these circumstances, and he complains to the employer's designee about Margaret's behavior. The designee does an investigation and tells Margaret that Leonard's jewelry is not in violation of any workplace rule, that she is to consider him for the position without regard for his gender, and that she must stop making harassing comments, asking Leonard intrusive questions, and gossiping about his personal life. Margaret stops her comments, questions, and gossiping, but she then recommends a woman be promoted to the open position. The woman promoted has much less experience than Leonard and lacks his two-year degree in customer relations from a community college.

Question 3. Leonard has likely been the target of discrimination on the basis of sex, sexual orientation and/or retaliation. True or False?

TRUE: We don't know Margaret's reason for not recommending Leonard for the promotion, but it is not looking good for Margaret. It appears that she is either biased against Leonard for the same reasons she harassed him, or she is retaliating because he complained, or both.

Leonard should speak further with the employer’s designee, and the circumstances of the promotion should be investigated. If it is found that Margaret had abused her supervisory authority by failing to fairly consider Leonard for the promotion, she should be subject to disciplinary action. This scenario shows that sometimes more severe action is needed in response to harassment complaints, in order to prevent discrimination in the future.

STOP SEXUAL HARASSMENT ACT FACTSHEET

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster **and** as an information sheet distributed to individual employees at the time of hire. This document satisfies the information sheet requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to $250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, can require the violator to undergo training, and can mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718–722–3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at **www.dhr.ny.gov**.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at **www.eeoc.gov**.

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NYC Commission on Human Rights

BILL DE BLASIO
Mayor

CARMELYN P. MALALIS
Commissioner/Chair

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NYC Commission on Human Rights

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EMPLOYMENT AND LABOR

Goldberg Segalla Will Help You Meet the 2018 New York Anti-Sexual Harassment Requirements and Build a Stronger Workplace Environment

Earlier this year, New York State and City passed major legislation to address and prevent sexual harassment in the workplace. Among these new measures are requirements to update employer policies and procedures as well as to enact annual anti-sexual harassment training for employees. Several of the deadlines are fast-approaching, including one to implement a compliant anti-harassment policy by October 9.

Are you ready? Following our commitment to advancing the education of our clients, Goldberg Segalla will teach you how to comply with the new laws and help you develop a healthier company culture for all employees.

Goldberg Segalla is a one-stop shop for efficiently managing risk:

1. Our team of highly experienced Employment and Labor attorneys will review and update your anti-sexual harassment policies, procedures, and strategies to help ensure that your business meets the new requirements — all for a flat fee.
2. We'll help you develop anti-sexual harassment training that is customized for your business and compliant with New York law, again for a convenient flat fee.
3. We'll administer your business's customized training to your employees, utilizing a hybrid flat fee/discounted hourly rate plan for maximum value.

At Goldberg Segalla, we take our commitment to client service very seriously. Our attorneys draw from a wealth of experience handling all manner of employment and labor issues to help you meet and exceed the new legal obligations. As with all of our practice philosophies, we're dedicated to bringing you into compliance with these laws by finding a unique approach that makes sense for your business.

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