

PRESIDENT'S MESSAGE

SHARON STERN GERSTMAN

#MeToo



During the month of October, dozens of Facebook posts appeared in my newsfeed with #MeToo in the header. The first few of these included the “instructions” that if you had ever been the victim of sexual harassment to post #MeToo and to cut and paste the instructions. Since cutting and pasting is not easy on my iPhone, I did what many others did: I just posted #MeToo.

After a while, everyone knew what the message meant.

My Facebook “friends” are a wide variety of those with whom I have crossed paths. Some are lawyers, some knitters, some tennis players, some bridge players, and some old high school friends. Some of my male friends were surprised at how many of us had posted. I was not surprised. While we come from all walks of life, we posters all had something in common: We all had worked within a male-dominated industry at some point in our lives.

Ask any woman lawyer, journalist, actress, politician, etc. if she has been sexually harassed at any time, and the answer almost certainly will be “yes.” We might not be willing to give you the particulars, but it has happened to almost all of us. It may have been many years ago, when we were younger and more vulnerable (and some would say more attractive). We probably did not report it or even talk about it then, but we are talking about it now.

For me, it was a fairly large number of mostly inappropriate remarks and touching. One such remark came from a supervisor who told me that I could find the reference books at “bazoom” level. Another came from a supervisor who pointed out a co-worker and me (both pregnant) to a room full of people with the remark, “Look what I did.” One judge hugged me inappropriately and asked me, “Does Danny know how lucky he is?” I don’t think a single one of these men thought he was guilty of sexual harassment. After all, any of these behaviors alone probably does not rise to the legal definition of “Quid Pro Quo” or “Hostile Environment,” as set out in New York’s Executive Law §§ 290 *et seq.* But they are uncomfortable and demeaning and have obviously stayed with me.

There have been very public accusations which have resulted in public firings and shamings: Harvey Weinstein, Bill O’Reilly, Roy Price, Bill Cosby, Mark Halperin, to name a few. None of these was a surprise to others in their industries. As Tom Hanks said in an interview, “There has always been the concept of the casting couch.”¹ We are hearing reports of very large settlements in some of these cases. One can only guess what Bill O’Reilly did to Lis Wiehl to cause a \$32 million settlement. We will never know, because there was a non-disclosure agreement.

Non-disclosure has always been at the heart of why this persists. Corporations close ranks and make it unbearable for the women who report the problems. It took incredible fortitude for the women of the Eveleth Taconite Company in Minnesota to bring the first sexual harassment class-action lawsuit in the United States in 1988. The movie *North Country*, based upon the lawsuit, gives a fair account of what women who report harassment are likely to face. Even after the corporation was found liable and the case referred to a referee for damages, the women’s travail was not over. The Special Master called them “histrionic” and published details about their private lives in his 416-page report; the average award was \$10,000. After the Eighth Circuit reversed the judgment, the case settled and the 15 awardees received \$3.5 million.

For decades, law professors Joanna Grossman of Southern Methodist University and Deborah Rhode of Stanford have been advocating for changes to the law and the workplace to address the problem of sexual harassment.

Women who are considering making a formal complaint should be realistic about the financial, psychological, and reputational cost of pursuing it. Defendants typically

SHARON STERN GERSTMAN can be reached at sssterngerstman@nysba.org.

PRESIDENT'S MESSAGE

have deeper pockets than victims, and the price of hiring a lawyer is often prohibitive. To be sure, attorneys specializing in harassment cases are often willing to work on a contingent fee....But unless damages and the likelihood of recovery are substantial, few lawyers will want to take the case. Employment discrimination cases have the lowest win rate for plaintiffs of any civil cause of action. And in sexual harassment cases it is the complainant as much as the harasser who is on trial.²

Now, they have published in *Harvard Business Review*³ a primer for victims to follow. The primer covers what the victim can hope to achieve, keeping a diary, telling friends and family, how to report to the employer, the pros and cons of hiring a lawyer, and the considerations of going public. Still, the authors recognize that the law often does not provide remedies and that most victims will not seek redress:

They wait to see whether the behavior will stop on its own, or they keep silent because they fear that reporting will be futile or that the harasser will retaliate. Rath-

er than filing internal or external complaints, harassment targets tend to resort to informal and non-confrontational remedies. They vent, cope, laugh it off, treat it as some kind of less threatening misunderstanding, or simply try to get on with their jobs (and lives). They may blame themselves, pretend it is not happening, or fall into self-destructive behaviors like eating disorders or drinking problems.⁴

We all know what Anita Hill endured at the hands of an all-male Senate judiciary committee, who asked her why she hadn't spoken up before and why she endured Clarence Thomas's behavior. In her words, "They were exhibiting the exact kind of behavior that keeps people from coming forward."⁵ While many belittled or chose not to believe the harassment she endured, her testimony awakened many to the truth about sexual harassment and its pervasiveness.

As Anita Hill's experience reminds us, law offices are not immune from the pervasiveness of sexual harassment⁶ or other forms of gender-based discrimination. There has been an increase of lawsuits against law firms, large and small, by attorneys who

recognize the need to stand up for women's access to positions of power. The Report of the Commercial and Federal Litigation Section, which was adopted by the House of Delegates on November 4, 2017, reflects both the sad statistics of how women attorneys are left behind when it comes to arguing or trying a case in court and the hope that a concerted effort by judges and law firms can ensure that women have a front and center position in litigation.

Two things are clear: (1) The truth of a corrected version of Donald Trump's famous "Access Hollywood" statement: "When you're a star [or the employer], they [feel powerless to do anything but] let you do it. You can do anything." (2) There is strength when large numbers of women are willing to come forward, and the possibility of change. ■

1. PBS News Hour, October 23, 2017.
2. Grossman and Rhodes, *Understanding Your Legal Options if You've Been Sexually Harassed*, Harvard Business Review, June 22, 2017.
3. *Id.*
4. *Id.*
5. NPR "All Things Considered," October 27, 2017.
6. The American Lawyer, *Sexual Harassment Is Thriving in Big Law*, July 11, 2017.

The Journal's 2017 Statement of Ownership, Management and Circulation

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)	
1. Publication Title	Journal
2. Issue Frequency	Quarterly
3. Issue Date	Sept. 26, 2017
4. Issue Number	9
5. Complete Mailing Address of Known Office of Publication (Street, city, county, state and ZIP+4®)	New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096
6. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not print)	New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096
7. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not issue name)	<p>David C. Wilkes, Esq., 200 White Plains Road, #510, Tarrytown, NY 10591-5809</p> <p>Daniel J. McMahon, New York State Bar Association, One Elk Street, Albany, NY 12207-1096</p>
8. Complete Mailing Address of the individual owner, if owned by a partnership or other unincorporated firm, give its name and address as well as that of each individual owner. If the publication is published by a corporation, give its name and address.	<p>New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096</p> <p>a nonprofit organization</p>
9. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box.	None
10. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates. Check one)	<input checked="" type="checkbox"/> Not for Profit <input type="checkbox"/> For Profit <input type="checkbox"/> Other

11. Publication Title		12. Issue Frequency		13. Issue Date	
Journal		Quarterly		September 2017	
14. Complete Mailing Address of Known Office of Publication (Street, city, county, state and ZIP+4®)					
New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096					
15. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not print)					
New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096					
16. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not issue name)					
<p>David C. Wilkes, Esq., 200 White Plains Road, #510, Tarrytown, NY 10591-5809</p> <p>Daniel J. McMahon, New York State Bar Association, One Elk Street, Albany, NY 12207-1096</p>					
17. Complete Mailing Address of the individual owner, if owned by a partnership or other unincorporated firm, give its name and address as well as that of each individual owner. If the publication is published by a corporation, give its name and address.					
<p>New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096</p> <p>a nonprofit organization</p>					
18. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box.					
None					
19. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates. Check one)					
<input checked="" type="checkbox"/> Not for Profit <input type="checkbox"/> For Profit <input type="checkbox"/> Other					

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)	
1. Publication Title	Journal
2. Issue Frequency	Quarterly
3. Issue Date	Sept. 26, 2017
4. Issue Number	9
5. Complete Mailing Address of Known Office of Publication (Street, city, county, state and ZIP+4®)	New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096
6. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not print)	New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096
7. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not issue name)	<p>David C. Wilkes, Esq., 200 White Plains Road, #510, Tarrytown, NY 10591-5809</p> <p>Daniel J. McMahon, New York State Bar Association, One Elk Street, Albany, NY 12207-1096</p>
8. Complete Mailing Address of the individual owner, if owned by a partnership or other unincorporated firm, give its name and address as well as that of each individual owner. If the publication is published by a corporation, give its name and address.	<p>New York State Bar Association, One Elk Street, Albany, ALB, NY 12207-1096</p> <p>a nonprofit organization</p>
9. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box.	None
10. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates. Check one)	<input checked="" type="checkbox"/> Not for Profit <input type="checkbox"/> For Profit <input type="checkbox"/> Other