MINNESOTA LAWYER

Quandaries and Quagmires: #MeToo in the law firm: emerging issues for 2019

By: Charles Lundberg December 18, 2018

First, a celebratory announcement: This "Quandaries and Quagmires" column just turned 3 years old. In December 2015, Minnesota Lawyer announced that Bill Wernz and I would be writing a monthly ethics column in this newspaper. It's been quite a ride, and it has turned out much differently — much better — than either of us expected. A sincere "thank you" to our editor, Barbara Jones, and to all our faithful readers.

Charles Lundberg

Almost a year ago, this column addressed *"Legal ethics and risk issues as of January 2018,"* identifying several of "the hottest legal ethics and risk issues right now," the then-breaking national news in the areas of legal ethics, law firm risk issues, and the law of lawyering.

In retrospect, some of those topics now seem relatively inconsequential. One of them, however — #MeToo in the Law Firm — has had such an impact on the national legal consciousness that it will inevitably change how good law firms are managed going forward.

Last January's column suggested that the ramifications of the then-recent cultural phenomenon known as the #MeToo Reckoning were only beginning to be felt; it predicted that this new development would likely have some impact on the legal profession, especially with respect to workplace sexual harassment claims.

While it was not then clear what all might develop, I suggested that lawyers and law firms should recognize two undeniable and sobering facts: (1) the standards in this area had just changed fundamentally, and (2) the new standards will now be applied retroactively. In March 2018 I expended on these points for *Bench & Bar of Minnesota*, in an article that focused on "best practices" for law firms in this area. (http://mnbenchbar.com/2018/02/metoo-in-the-law-firm/)

Since that time, the #MeToo Movement has rocked the legal profession like nothing else in recent memory. Just one indication: During a five-week period from late September to early November, I attended five national conferences on legal ethics and risk management. #MeToo in the Law Firm was a featured plenary topic *at every single one.* That's a phenomenon I've never seen on the national ethics circuit before.

Here's just a sampling of the #MeToo issues that have come to the fore in the past few months:

- #MeToo has already effected sweeping changes in the law. Several states (e.g., New York, California, Connecticut, Maine, Delaware) have now adopted statutes mandating harassment training in the workplace.
- #MeToo issues certainly surrounded — no, engulfed — the Senate confirmation hearings for now-Justice Brett Kavanaugh in late September.
- Mandatory arbitration agreements covering employee harassment claims are under severe attack and are not likely to survive. In the last few weeks, Google, Microsoft and Uber agreed to stop using arbitration agreements as they relate to claims of sexual harassment.
- In the law firm context, as a result of a boycott by a group of Harvard law students and a lot of embarrassing publicity, the giant Kirkland & Ellis firm announced recently that it would no longer require arbitration to settle employment disputes involving associates or summer associates. Earlier in the year the Munger Tolles firm released its employees from forced arbitration contracts and issued an apology fewer than 48 hours after a Harvard Law School lecturer posted part of a summer associate's agreement on Twitter. Other large firms are now the focus of this coordinated attack.
- The use of nondisclosure agreements, which was always standard operating procedure for settling harassment claims, is now seen as contrary to the very essence of the #MeToo movement — to allow victims to tell their story and warn others about the perpetrator. Several states (including New York and California) have already enacted statutes limiting the use of nondisclosure agreements in harassment cases. Other states will no doubt follow this year.

- Even more significant, at the end of 2017 Congress enacted Section 162(q) of the Tax Code, which now prevents the deduction of "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."
- For a concise analysis of several serious problems raised by this new law, see Knoblauch, "The 2017 Tax Bill's Quick Response to the #MeToo Movement Has Changed How Sexual Harassment Claims Are Settled," Minnesota Lawyer (Legal Partner Blog, July 18, 2018), https://minnlawyer.com/sponsored_content/the-2017-tax-bills-quick-response-to-the-metoo-movement-has-changed-how-sexual-harassment-claims-are-settled/

- Some very recent statistical studies have demonstrated that harassment in the law firm is a much more serious and pervasive issue than originally thought, and astonishingly likely to go unreported.
- The legal press is all over the #MeToo issue. Law360 and Above the Law, for example, regularly report on law firms who have been caught up in harassment issues — sometimes with lurid details. It would be a gross understatement to say that #MeToo problems pose serious reputational issues for law firms.
- Here's the hottest new issue – Does your firm's new lateral partner candidate have any #MeToo baggage? Although lateral candidates are ordinarily subject to searching scrutiny before they are hired, it appears that, before #MeToo, no one had thought to ask candidates whether they had ever been the subject of a harassment allegation.
- Large firms are now routinely including #MeToo questions in their lateral partner questionnaires, following a couple well-publicized and very embarrassing stories this year about major rainmakers who had moved to new firms, whereupon the new firm learned to its chagrin that their new lateral partner had been the subject of serious harassment claims at his old firm.
- *Minnesota Lawyer* noted a related development in a wire report published here in August. See, *Wall Street is adding new 'Weinstein clause' before deals, Minnesota Lawyer August 1, 2018.* In many corporate merger and purchase agreements, advisers have recently started adding guarantees to guard against the risk of sexual misconduct scandals coming to light post-deal. Buyers are now requiring representations about the behavior of the Sellers's management teams. It's called "the #MeToo rep" — the target attests that no one in a defined group (certain identified managers, directors, or executives) has been accused of sexual harassment. Sometimes the #MeToo rep is time-limited, such as "no allegations of sexual harassment have been made against any employees at senior vice president level or above in the last five years." https://minnlawyer.com/2018/08/01/wall-street-is-adding-new-weinstein-clause-before-deals/

- As reported earlier this month, the federal courts – rocked by the #MeToo scandal involving former 9th Circuit Judge Alex Kozinski – have appointed their first judicial integrity officer, one of the recommendations of the Federal Judiciary Workplace Conduct Working Group, a group of federal judges and senior Judiciary officials formed at the request of Chief Justice John G. Roberts, days after the news about Kozinski broke late last year.

- Business is booming for law firms that have a substantial employment law practice focused on harassment cases, especially those equipped to provide anti-harassment training programs.

- Before the Reckoning, sex harassment in the law firm was thought of primarily as a claim avoidance and defense issue. That has completely changed in the last six months. It is now an issue of *firm culture*, a matter of deepest concern focused on the firm's reputation.

- "This is simply not acceptable at our firm" is the new watchword; "That's not the kind of firm we are." Enlightened firms are getting out in front of the issue by instituting strong firm policies, firm-wide training, and dealing with every single allegation through effective investigation and response.