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PROTECTING THE YOUNG ASSOCIATE: HOW THE *ABA MODEL RULES OF PROFESSIONAL CONDUCT* CAN BETTER PROTECT YOUNG ASSOCIATES IN "BIG LAW" FROM SEXUAL HARASSMENT

I. INTRODUCTION

Women make up 36% of the legal profession. [1] In private practice, women make up 45% of associates, and 25% of partners.[2] Therefore, when a woman at a firm experiences sexual harassment there is a three out of four chance that she will have to report her issue to a male partner. Women in "Big Law"[3] not only face the threat of workplace sexual harassment by partners and supervising attorneys but also clients. The following two hypotheticals illustrate [1] the dilemma facing women attorneys who are sexually harassed by a partner or a supervising attorney; [2] the dilemma facing women attorneys who are sexually harassed by a client.

First, a young associate joins a large firm in Houston, Texas. She is one of the few women in the firm. Her partners routinely bring her in on new cases when the client is a man. In the presence of the associate, the partner will tell the client at the end of each respective preliminary meeting that the young associate is beautiful and single. The partner then encourages

[1] American Bar Association, Section on A Current Glance at Women in the Law, Statistics, *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf.
[2] Id. at 2.
[3] "BigLaw" is an industry nickname for the nation's largest law firms.

both the associate and the client to go out with one another because the young woman associate will "show the client a good time". [4]

Second, a young woman joins a large law firm as an associate; meets with a longtime valued client of the firm, and that valued client touches her leg inappropriately during their first meeting. During the second meeting with the valued client, he makes a sexually explicit remark. The young associate knows that she must continue to meet with this client, but is understandably uncomfortable doing so, and her work product for the valued client is, as a result, negatively affected.

The women in both hypotheticals face the dilemma of reporting their sexual harassment in a firm that does not empower such action. Both young associates will likely have a short list of women partners in the firm to speak to about her predicament. Furthermore, it may occur to them that the client is more monetarily profitable to the firm than they. With two hindrances to reporting their harassment, both will likely choose to stay silent. It is important to note, "Employment discrimination cases have the lowest win rate for plaintiffs of any civil cause of action. [Additionally], the employee can expect some nasty retaliation."[5] Both hypotheticals represent potential realities for young women entering large law firms.

[4] This hypothetical is inspired by a true story from a Miami law firm.
[5] Joanna L. Grossman, Understanding Your Legal Options If You've Been Sexually Harassed, Harv. Bus. Rev., May.- June. 2017, *available at* https://hbr.org/2017/06/understanding-your-legal-options-if-youve-been-sexually-harassed.

II. BACKGROUND

The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature…". [6] Sexual harassment in the workplace has been a popular topic in the media this year because of the "MeToo" movement. Tarana Burke started the "MeToo" movement in response to sexual harassment allegations in the entertainment industry. Women from a plethora of professions who were victims of sexual harassment posted "#MeToo" from their social media profiles as a sign of unity. On Twitter alone, over 12 million hashtags were posted.[7] Women make up 90% of harassment targets.[8] The "MeToo" movement made real the statistics showing sexual harassment disproportionately affecting women.

Though the "MeToo" movement began by highlighting sexual harassment in the entertainment industry it quickly spread to the general professional world. "#LadyLawyerDiaries" was created by two women in "Big Law" to specifically highlight the "MeToo" movement in the legal field. During a February 2018 interview one of the founders of "# LadyLawyerDiaries" said "Women have become more emboldened to talk about things. I've been practicing 16 years now. We did not talk about harassment in the workplace. Women have become comfortable sharing." This level of comfort to share is undoubtedly linked to the

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[6] 29 C.F.R. § 1604.11 (a) (Lexis Advance through the March 28, 2018 issue of the Federal Register. Title 3 is current through Mar 16, 2018).

[7] Editorial, More than 12M "Me Too" Facebook posts, comments, reactions in 24 hours, CBS, Oct. 17, 2017, *available at* https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/.

[8] Supra note 3.

"MeToo" movement, but it may also be linked to the protections afforded to attorneys in the ABA Model Rule 8.4(g).

Rule 8.4 (g) bars attorneys from engaging in conduct that one should "reasonably know" is sexual harassment. Prior to the addition of Rule 8.4 (g), the only language in the rules that spoke against harassment was in the comment to Rule 8.4. The members of the House of Delegates believed that the comment was not enough. This belief was likely based on the rise in sexual harassment nationally. The year Rule 8.4 was adopted, rape was at a seven-year national high.[9] This national statistic was a reflection of the rise of sexual harassment in states. In Washington, DC in each year between 2009 and 2016, more sexual harassment complaints were reported compared to the previous year.[10] Washington, DC saw its highest rate of sexual harassment in almost a decade the same year that the ABA adopted rule 8.4 (g). Though rates of sexual harassment have decreased since its peak in 2016, there is a lot of work to be done. Only 40% of sexual assaults are reported in the workforce.[11] Out of the 40% that are reported an estimated 75% of workplace harassment victims experience retaliation when they speak up. [12]

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[9] The Statistics Portal, Section on Reported forcible rape rate in the United States from 1990 to 2016, 2018, *available at* https://www.statista.com/statistics/191226/reported-forcible-rape-rate-in-the-us-since-1990/#0).

[10] Shirin Arslan, The D.C. Policy Center, Section on Sexual assaults in D.C.: What the data can (and can't) tell us, 2017, *available at* https://www.dcpolicycenter.org/publications/sexual-assaults-d-c-data-can-cant-tell-us/.

[11] Berhanu Alemayehu & Kenneth E. Warner, The Lifetime Distribution of Health Care Costs, 39 HEALTH SERVICES RES. 627, 634 (2004) (reporting that only 40 percent of harassment claims are likely reported).

[12]Editorial, Study finds 75 percent of workplace harassment victims experienced retaliation when they spoke up, Vox, Oct. 15, 2017, *available at* https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts.

The Model Rules encourage states to hold partners and supervising attorneys accountable for the unethical actions of associates under Rule 5.1. The rule reads:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[13]

Partners and supervisors are not only responsible for creating internal policies that associates must follow, but partners and supervising attorneys must also enforce compliance with the policy. However, under the Rules, partners and supervising attorneys do not have a duty to protect associates from physical or emotional harm. Therefore, when a partner becomes knowledgeable of an associate being sexually harassed, the Rules do not impose any affirmative duty to report or to act at all on behalf of the associate.

III. REGULATING PARTERS AND SUPERVIORS

Presently, sexual harassment is considered to be professional misconduct and therefore a violation of the ABA Model Rules of Professional Conduct. Therefore, if an attorney sexually

[13] See MODEL RULES 5.1.

harasses a fellow attorney or a layperson rule 8.4 (g) prohibits that behavior. In the first hypothetical above, the woman who is being sexually harassed by her supervisor can report her supervisor as a breach of an ethical duty, if the state in which she works adopts the language of 8.4 (g). Rule, 8.4 (g) was added to the Model Rules in 2016 by the ABA House of Delegates at the ABA Annual Meeting.[14] The Rule reads that it is professional misconduct for a lawyer to:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[15]

The Rule does not provide any assurance to associates that there will be a record of the harassment; it only provides a broad ban on sexual harassment and other forms of discrimination. Therefore, when an attorney lodges a complaint with the appropriate professional authority, there is no guarantee that there will be a record of the sexual harassment to support the 8.4(g) violation. Lack of evidence makes for a difficult case if not an impossible case for a young associate. States such as Vermont, that have adopted Rule 8.4 (g), have provided attorney's in "Big Law" an additional cause of action. It is important to note that most states have not adopted Rule 8.4 (g). The absence of an 8.4(g) claim leaves young associates when sexually harassed, with a Title VII of the Civil Rights Act of 1964 claim.

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[14] STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY ET AL., REPORT TO THE HOUSE OF DELEGATES 1 (Aug. 8, 2016), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

[15] See MODEL RULES 8.4 (g).

Title VII of the Civil Right Act of 1964 is a federal law that prohibits employment discrimination based on seven enumerated protected classes; one of which is sex, encompassed in this class is sexual harassment.[16] Titles VII does not only apply to government actors. Private actors that employ 15 or more employees are covered under Title VII; this includes all large law firms. [17] Claims of sexual harassment are commonly asserted against employers under Title VII and applicable state statutes. Both state and federal laws recognize two types of sexual harassment claims: quid pro quo claims and hostile work environment claims. A quid pro quo harassment claim is "when an unwelcome request for a sexual favor or a sexual advance is a condition of employment, a promotion, or the receipt of some other employment benefit".[18] A hostile work environment claim occurs where "there is unwelcome physical, verbal, or visual conduct that is sexual and interferes with the work environment such that an individual cannot perform his or her work because of intimidation, or the work environment is too hostile or too offensive".[19] The EEOC through Title VII regulates sex discrimination; sexual harassment falls under this umbrella.

As more states begin the process of adopting Rule 8.4 (g) it is integral to view the rule in a way that will also strengthen a Title VII claim. The issue with Title VII claims is the "unassailable proof" problem. The Supreme Court held, in Desert Palace, Inc. v. Costa,

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[16] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).
[17] Laura V. Farber, Discrimination in Solo and Small Firm, GPSOLO, 2009, at 1, *available at* https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/farber.html.
[18] 29 C.F.R. § 1604.11(a)(1) & (2). Before Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), which recognized hostile work environment sexual harassment under Title VII for the first time, the only actionable sexual conduct was quid pro quo sexual harassment. See, for example, Walter v. KFGO Radio, 518 F. Supp. 1309 (D.C.N.D. 1981).
[19] 477 U.S. 57 (1986) (cited in note 25) (quoting 29 C.F.R. § 1604.11(a)(3)).

employees need not present direct evidence of discriminatory intent when alleging workplace sexual harassment.[20] Of course, direct evidence is rare in sexual harassment cases in law firms. It is equally as difficult to win a case with uncorroborated circumstantial evidence. Courts have minimized the importance of specific evidence of clearly gendered language. In Neuren v, Adduci, a woman associate filed a claim for sex discrimination and retaliation against her law firm.[21] The firm's defense was that the plaintiff had trouble meeting deadlines and lacked interpersonal skills. The only evidence that the woman associate had was circumstantial. The circumstantial evidence was a written evaluation that stated she was "[e]xtremely difficult on secretarial and support staff. A bitch!"[22] The woman associate also pointed to oral statements that were made to her by partners. The D.C. Circuit Court of Appeals held that "this pejorative term may support an inference that an employment decision is discriminatory under different circumstances"; in the case at hand the written review was a mere "crude word choice, and was "grounded in a gender-neutral concern".[23]

Any partner or supervising attorney who took a decent course in Constitutional Law is aware of the Supreme Court case Price Waterhouse v. Hopkins, where the Court held that a performance review that described a woman attorney as "macho" and "in need of charm school" constituted sex discrimination.[24] Therefore, partners and supervising attorneys tend to not memorialize direct evidence of sexual harassment. Lawyers know how to speak in code words,

[20] 539 U.S. 90 (2003).
[21] Neuren v. Adduci, 43 F.3d 1507, 1509 (11th Cir. 1995).
[22] 43 F.3d 1507 (D.C. CIR. 1995).
[23] Id. at 1513.
[24] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

shrugs, nods, and eye-rolls that are not reflected "on the record."[25]Model Rule 8.4 (g) as written does not alone solve this issue. A reporting mechanism should be included in Rule 8.4 (g). Not only should partners and supervising attorneys be barred from sexually harassing associates, but they should also have to document each instance with the consent of the associate affected. This will be a small step in empowering the young associate. A reporting requirement will provide direct evidence that will be useful if an associate chooses to file a civil suit under Title VII. The ABA Model Rules of Professional Conduct can lead the charge by encouraging a reporting requirement which may lead to more successful Title VII claims. The partner or supervising attorney should report the harassment to human resources or a comparable department to best ensure proper record keeping.

IV. PROPOSED AMENDMENT TO MODEL RULE 8.4

It is professional misconduct for a lawyer to:

h. In compliance with (g), fail to report an instance of harassment or discrimination based on race, sex religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status.

i. The attorney must report the occurrence to the Human Resources Department at the firm, or a comparable department.

ii. This clause is void if the associate does not want to report his or her harassment.

[25] See, e.g., MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 123 (2d ed. 1994).

V. REGULATING THE CLIENT

Courts have taken a particular interest in enforcing the states' Model Rules as it applies to the client-lawyer relationship. The client-lawyer relationship is heavily regulated in favor of clients. This position is important because clients are generally more vulnerable than attorneys, however; this is not always the case in "Big Law" where young associates are generally more vulnerable than wealthy clients.[26] The Supreme Court of Colorado held "A lawyer's misconduct in the sexual assault of a client involved a crime of moral turpitude and demanded severe discipline because of the seriousness of the misconduct and the danger he posed to the public."[27] The same concerns that exist when an attorney sexually harasses a client exist when a wealthy client sexually harasses a young associate. There are no protections afforded to attorneys whose clients sexually harass them in the ABA Model Rules of Professional Conduct. According to the *Connecticut Alliance to end Sexual Violence*, one in four women will be sexually assaulted in their lifetime. "In eight out of ten rape cases, the victim knows the perpetrator".[28] Young associates should be able to represent their client without the fear of being sexually harassed. Furthermore, an associate should have comfort that if a client sexually harasses her, her supervising attorney will memorialize the harassment.

ABA Model Rule 5.1 enumerates the duties of law firm partners and supervisory lawyers to associates. The rule establishes a general duty to protect the client from the attorney. Rule 5.1 (c) (2) gives partners and supervising attorneys the affirmative duty to mitigate if possible and

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[26] Iowa Supreme Court Atty. Disciplinary Bd. v. Moothart, 860 N.W.2d 598.
[27] People v. Martin, 271 F.2d 280, 289 (10th Cir. 2006).
[28] Angela Morris, Women Lawyers Join #MeToo Hashtag of Their Own, Law.Com, Feb. 15, 2018, *available at* https://www.law.com/sites/texaslawyer/2018/02/15/women-lawyers-join-metoo-movement-with-hashtag-of-their-own/?slreturn=20180231235144).

when made knowledgeable the unethical actions of an associate.[29] However, there is an important reciprocal duty that is omitted from Rule 5.1: the duty to protect the associate from the client.

Partners and supervising attorneys should hold a duty to their associates that when they are made knowledgeable of sexual harassment they will report it on behalf of the associate (if the associate consents). This will mitigate both hindrances a woman associate faces when she considers reporting the sexual harassment that she has faced. The reluctance to reporting sexual harassment to a male partner will be mitigating by knowing that he has an affirmative duty to report the sexual harassment. In addition, the hindrance of not reporting because she is monetarily less valuable than the client and will likely be fired (if she reports the harassment) will be mitigated when she knows that the harassment she faced will be internally documented, and she will, therefore, have admissible evidence in a civil retaliation lawsuit (under Title VII). An amendment to Rule 5.1 will not eradicate a wealthy client's ability to sexually harass an associate, but it is a necessary step forward in affording young women associates the necessary protection to be better able to excel in her legal career.

VI. PROPOSED AMENDMENT TO MODEL RULE 5.1

i. It is professional misconduct for a lawyer to:

[29] See MODEL RULES 5.1 (c) (2), (the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action).

a. When made knowledgeable, fail to report a client who has sexually harassed an attorney at the same firm in which the partner or supervising attorney and the associate both work.

    i. The attorney must report the occurrence to the Human Resources Department at the firm, or a comparable department.

    ii. This clause is void if the associate does not want to report his or her harassment.

VII. WHY AN AMENDMENT TO RULE 8.4; 5.1 IS NECESSARY

There are few federal protections afforded to young associates at law firms who face sexual harassment. The EEOC through Title VII has provided young associates with a cause of action in federal courts, but it has not adequately afforded young associates the protections from sexual harassment and retaliation within the firm. Many women have used Title VII to sue firms for sexual harassment that resulted in retaliation. The ABA House of Delegates added similar Title VII language to the Rules of Professional Conduct in 2016 to better enforce anti-discrimination policies. If states adopt Rule 8.4 into its Rules of Professional Conduct, attorneys possess an addition claim for workplace sexual harassment. These protections enlarged the young associates' ability to protect herself from sexual harassment.

For the first time, in 2016, women made up a majority of law students, with a little over 50 percent of the seats.[30] Presently, "Women are 50.3 percent of current law school graduates, yet

[30] Elizabeth Olson, Women Make Up Majority of U.S. Law Students for First Time, N.Y. Times, Dec. 16, 2016, at 1, *available at*

they make up just fewer than 35 percent of lawyers at law firms."[31] As women continue to enter the legal field in large numbers, and as the number of women continues to increase in "Big Law", more issues with sexual assault will occur. If the rules are not changed, it will only become a larger and more complicated issue for partners, supervising attorneys, and state legislatures. A simple fix is encouraging a reporting requirement. This is done by imposing a simple duty on partners and supervisors. Rule 5.1 already imposes duties on partners and supervising attorneys. To enlarge their duties would not cause them an undue burden. Most large law firms have sexual harassment policies which include a complaint process. The issue for young associates is not the availability of a policy, but the culture within the firm that empowers a young associate to use the policy. If the young associate knows that the partner has an ethical duty to report her harassment, with her consent, it will empower the young attorney to speak.

To comply with Title VII most employers put into place policies and trainings to prevent sexual harassment, however, neither is required. Policies generally include a way for employees to file a complaint. Though this resource is available to employees, there is no guarantee that a law firm will aid an associate in properly reporting her sexual harassment. Because Title VII does not require sexual harassment training on how to uphold an effective policy with procedures that can be used to address a young associate's concerns many policies fall short. Furthermore, if a partner or a supervising attorney is made aware of a sexual harassment claim, there is no mandate for that attorney to act.

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https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html.

[31] Id.

For the same reasons the ABA added 5.1 (g), they should adopt an amendment that requires partners and supervising attorney to report sexual harassment.

VIII. STATES ARE NOT TAKING THE LEAD

The ABA Model Rules of Professional Conduct is a persuasive authority. No state is required to adopt any provision. Though states are not required to adopt the Model Rules most have in part. This fact illustrates the true authority that the ABA Model Rules possess. However, only one state has adopted rule 8.4 (g); others are in the process of adopting the rule. Comparatively, most states have adopted Rule 5.1. Only two states (New York and New Jersey) expressly authorize disciplinary enforcement against firms in addition to the individual lawyer.[32] New Jersey further required that firms make "reasonable efforts" to ensure non-lawyers' compliance with lawyers' ethical norms.[33]

No state has created provisions that outline an affirmative to partners and supervising attorneys to report instances of sexual assault. Nor has any state-created provisions to its respective Rules of Professional Conduct that protect associates from clients. If the ABA is to adopt such provisions states will likely consider them as well. If states are not willing to prioritize the safety of young associates then the ABA must. Prior to the ABA adopting 8.4 (g) no state had a clause in its Rules of Professional Conduct that prohibited attorneys from discrimination based on protected the protected classes in Title VII. Once the ABA added

[32] Julie O'Sullivan, Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal, 2002, at 3-10.
[33] Id. at 3.

language that prohibited discrimination Vermont adopted similar language, and numerous states are considering the language. The ABA is a highly persuasive body that states take seriously. If the ABA starts to take the safety of young associates more seriously then states will follow its direction.

IX. CONCLUSION

Sexual harassment in "Big Law" affects the victim, and also the firm. The victim is affected by the trauma of the harassment, the fear of being around the harasser, and many other effects that only victims can articulate. The firm is affected when the victim is no longer able to produce on the level in which she or he did prior to the harassment. "Big Law" treats attorneys as money generators. The more time an associate is distracted; the more the associate avoids meetings with clients that are harassing them, the less money that associate is making the firm. Adding a reporting requirement to the Model Rules does not only protect and empower young associates to speak up, it also protects a firm's profitability. It is in the best interest of a law firms to protect the well-being of all employees, especially young associates who are at the beginning of their legal career.