Teachable Moments of the #MeToo Movement For Corporate Counsel

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Introduction

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Elaine has more than 30 years' experience as a trial lawyer. Her practice focuses primarily on employment litigation, civil rights litigation and business torts, in addition to counseling and training clients on employment issues. She is a national speaker on employment law and litigation techniques. She has been recognized by USA Chambers as a leader in Labor & Employment, was inducted in the College of Labor and Employment lawyers and recognized as one of the Best Lawyers in America.

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Vicki has 30 years of experience handling corporate law matters, including mergers and acquisitions, securities law compliance, corporate governance and joint ventures. She has a deep background advising senior management, boards and committees on fiduciary duty issues, SEC reporting requirements, activist proxy matters and insider trading matters. She has been recognized repeatedly by Best Lawyers in America for various corporate areas of law, including corporate governance and M&A, and was honored to be named Kansas City, MO “Lawyer of the Year” for Mergers and Acquisitions in the 2020 edition of Best Lawyers.
Outline

1. Background of #MeToo Movement
2. Overview of Relevant Ethical Rules
3. #MeToo: A Case Study involving General Counsel in a Difficult Situation
4. #MeToo Reactions – Social media, press
5. Questions/ Discussion
#MeToo Background

Charges up 14%; lawsuits up 50%

The total number of sexual harassment charges in 2018 was 7,609
#MeToo Background

CBS chief executive Les Moonves is departing amid probe into allegations of sexual misconduct.

McDonald’s Workers Across US Protest Against Sex Harassment

The Humane Society’s sexual harassment scandal just won’t end.

Supreme Court Nominee Kavanaugh Denies Sexual Misconduct Allegation

CBS fires Charlie Rose after sexual-misconduct claims surface; PBS drops his show.

Paul Marciano Will Leave Guess After Sexual Harassment Settlements

Five women who accused the co-founder of unwanted attention or touching will receive $500,000 in total.

NBC News fires Matt Lauer after sexual misconduct review.

Harvey Weinstein appears in court charged with rape and other sexual offences.

Mass firings at Uber as sexual harassment scandal grows.

More than 20 employees are out after an investigation of 213 human resources claims.
#MeToo Background

Men and Women, Alone Together

Women: Is it appropriate or inappropriate to do the following activities alone with a man who is not your spouse? Men: With a woman who is not your spouse?

<table>
<thead>
<tr>
<th>Activity</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Having a drink</td>
<td>20%</td>
<td>41%</td>
</tr>
<tr>
<td>Having dinner</td>
<td>38%</td>
<td>43%</td>
</tr>
<tr>
<td>Having lunch</td>
<td>43%</td>
<td>62%</td>
</tr>
<tr>
<td>Driving in a car</td>
<td>47%</td>
<td>58%</td>
</tr>
<tr>
<td>Having a work meeting</td>
<td>63%</td>
<td>66%</td>
</tr>
</tbody>
</table>

Source: Morning Consult survey of 5,282 registered voters, conducted May 2 to 5. Questions were shown in random order. The grey bar represents those who said they did not know or had no opinion.
How Does #MeToo Relate to Legal Ethics?

• The “Old Model Rule” (2002)


  – A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).
ABA Model Rule 8.4(g)

• The “New Model Rule” (2016)
• Rule 8.4(g), Misconduct (2016) - American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct*:
  
  It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.
ABA New Model Rule 8.4(g) Comment 4

- The Comment to the New Rule also gives more guidance:

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

• Colorado Supreme Court added new (i) to Rule 8.4 in September 2019:
  – (i) engage in conduct the lawyer knows or should reasonably know constitutes sexual harassment where the conduct occurs in connection with the lawyer’s professional activities
  – Comment 5A: “Professional activities” not limited to those that occur in lawyer-client relationship
CO Rule 8.4 Cases

• Public censure, rather than private censure
  – Appropriate sanction for attorney who made offensive and sexually harassing comments to prospective divorce client at time of prospective client's vulnerability, thus adversely reflecting on attorney's fitness to practice law.  People v. Meier, 954 P.2d 1068 (Colo. 1998).

• Sexual relationship between lawyer and client
  – At minimum, almost always violate rules prohibiting lawyers from engaging in conduct adversely reflecting on lawyer's fitness to practice law.  People v. Good, 893 P.2d 101 (Colo. 1995).
What about Kansas?

• So far, Kansas has not adopted ABA Model Rule 8.4(g)
  – But courts have used existing rules to address harassment
KS Rule 8.4: Maintaining the Integrity of the Profession: Misconduct

- It is professional misconduct for a lawyer to:
  - (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .
  - (d) engage in conduct that is prejudicial to the administration of justice;
  - (e) state or imply an ability to influence improperly a government agency or official; . . .
  - (g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

- See, e.g., In re Depew, 237 P.3d 24 (Kan. 2010) (sexually harassing court employees violated Rules 8.4(d) and 8.4(g)).
Code of Conduct for U.S. Judges, Canon 3B(4)-provides a “judge should not engage in any form of harassment of court personnel.”

Judicial Rule 4(a) prohibits “[a]busive or [h]arassing behavior” which includes “engaging in unwanted or offensive, or abusive conduct, including sexual harassment.”

Following investigation by 10th Circuit, it publicly reprimanded the District Judge.
(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;
   - (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.
Corporate legal departments and government legal departments are not insulated from potential organizational liability.

Comment [1] of Rule 5.1:

- Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c).
- Includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law;
- Lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and
- Lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.
#MeToo: A Case Study

“Well-Known” Resort
“Well-Known” Resort: Introduction

• State Gambling Commission Report: over the course of several years, employees in positions of authority were aware of certain allegations of sexual misconduct against Well-Known Resort CEO involving employees, but disregarded company policies when it came to handling those allegations.

• In some instances, senior leaders and in-house counsel — with the help of outside counsel — made efforts to conceal allegations against Well-Known Resort CEO that came to their attention.

• "Their efforts at secrecy made it exceedingly difficult, if not impossible, for gaming regulators to detect potentially derogatory information through typical regulatory means, which rely heavily on robust and voluntary self-disclosures," the report said.

• The report raised several ethics issues for the attorneys involved.
“Well-Known” Resort: Timeline

- In 2005, Well-Known Resort settled with an employee who told a supervisor that CEO raped and impregnated her. No internal investigation was conducted - instead a $7.5 million settlement agreement was reached.

- In 2006, GC#1 is forced to resign based on comments made by CEO; GC#2 begins working for Well-Known Resort.

- In 2009, CEO’s ex-wife told GC#2 about the 2005 settlement. GC#2 maintained that CEO’s ex-wife never told her about a rape allegation.

- In 2013, after an investigation, State Gaming Commission deemed Well-Known Resort suitable for the first phase of its application for the license.

- In September 2014, the State Gaming Commission awarded Well-Known Resort the gaming license.

- At no time during the 2013 suitability assessment did anyone disclose any sexual misconduct allegations involving CEO to state gaming agency investigators.

- In July 2018, GC#2 resigns.
Counsel’s Role

• What was counsel’s role?
  – The gaming agency investigators detailed the role played by GC#1.
  – According to the report, GC#1 learned of the 2005 settlement with employee after receiving an invoice from an outside lawyer that he hadn't authorized.
  – GC#1 considered informing the board and ultimately sought advice from Outside Counsel.
  – GC#1 told investigators that he and Outside Counsel decided he "was not under a legal or ethical obligation to disclose the matter to the board."
Know Your Client

• Who was the GC’s client?

• Within a few months of GC#1’s inquiry into the settlement matter, the CEO told GC#1 that he needed his "loyalty to him first and to the company second" and that he was looking for "a brother and a lawyer," according to the report.

• CEO gave GC#1 the choice of working for the company on an at-will basis or leaving with severance, the report says. GC#1 ultimately resigned from his position as general counsel in early 2006.

• That’s when GC#2 stepped in.

• In July 2018, GC#2 stepped down from the general counsel post at “Well-Known” Resort after being named in litigation related to former CEO’s alleged years of sexual misconduct against employees.
  – February 2018 lawsuit filed in Nevada District Court claimed GC#2 “knowingly and intentionally breached her fiduciary duties by concealing and failing to police, investigate and act as the company’s chief legal officer to address the known credible allegations of intentional egregious misconduct and violations of law” by CEO involving Well-Known Resort.
If no crime was committed, we don’t have to report, right?

Wrong, remember the ABA Model Rules have expanded to include “It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination . . . in conduct related to the practice of law.”

In the course of Well-Known Resort’s application for its gambling license, GC#1 did not report the alleged sexual misconduct of CEO.

GC#1 later told state gambling investigators that "certainly if there was an allegation of criminal misconduct, that it was that serious, I think there would've been an obligation [to report], or at least an inclination to advise at least the Gaming Control Board chairperson," according to the report.
Did well-known resort’s legal team follow company code of conduct?

- Report notes the company failed to train the CEO on its "zero tolerance" policy for any form of sexual harassment, which it has maintained since 2004.
- Training and compliance often fall under the legal department's responsibilities. Experts say every employee, including those in the C-suite, must be included in workplace behavior training.
- According to the report, GC#2 told investigators that prior general counsel claimed to have trained CEO on “zero tolerance” sexual harassment policy. But there were no records to corroborate the claim, according to the report.
Lessons Learned

• What can we learn?
  – Implement internal reporting and investigating procedures, which may also require the use of outside counsel.
  – Notify Board members of credible allegations of misconduct.
  – Remember, the criminal act standard should not be the guide.
  – Implement your policies. If it is a zero tolerance policy, work to train, document and enforce the policy.
  – Know your client – ABA Model Rule 1.13 “Organization as Client.”
CO Rule 1.13 “Organization as Client”

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
CO Rule 1.13 “Organization as Client” Comment

• The Entity as the Client
  – Remember when GC#1 resigned from Well-Known Resort?

• Clarifying the Lawyer's Role
  – Hint: as GC, you are not the CEO’s “brother”
Col Rule 1.13 “Organization as Client”

- Wearing different hats
  - Is the advice predominantly legal or business oriented?
KS Rule 1.13 “Organization as Client”

• (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

• (b) . . . In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

  – (1) asking for reconsideration of the matter;
  – (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
  – (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.
#MeToo Reactions

**reaction**

noun
noun: reaction; plural noun: reactions

- an action performed or a feeling experienced in response to a situation or event.
- "Carrie's immediate reaction was one of relief"
- synonyms: response; More

- a person's ability to respond physically and mentally to external stimuli.
- "a skilled driver with quick reactions"

- an adverse physiological response to a substance that has been breathed in, ingested, or touched.
- "such allergic reactions as hay fever and asthma"

- a chemical process in which two or more substances act mutually on each other and are changed into different substances, or one substance changes into two or more other substances.

- PHYSICS
  - an analogous transformation of atomic nuclei or other particles.

- a mode of thinking or behaving that is deliberately different from previous modes of thought and behavior.
- "the work of these painters was a reaction against fauvism"
- synonyms: backlash, counteraction, recoil
  - "during the 1960s there was a reaction against this kind of sociology"

- opposition to political or social progress or reform.
- "the institution is under threat from the forces of reaction"
- synonyms: conservatism, ultra-conservatism, the right, the right wing, the extreme right; More

- PHYSICS
  - repulsion or resistance exerted in opposition to the impact or pressure of another body; a force equal and opposite to the force giving rise to it.
#MeToo Reactions

- Streamlining communications in the age of social media
  - The #MeToo movement has also forced many communications departments and GCs to collaborate, which is a valuable opportunity for legal teams to be proactive in structuring their internal systems to effectively respond and deal with situations if they arise, rather than being reactive after an incident occurs.
  - For example, with the prevalence of social media and digital sharing, as well as the 24-hour news cycle, it’s increasingly risky for organizations to hide or shy away from addressing these issues. As a result, many legal teams have made sure their companies have processes in place to respond to and investigate misconduct if it occurs.
#MeToo Reactions

- Beware of waiving the attorney-client privilege if consulting an outside PR firm
CO Rule 1.6 “Confidentiality of Information:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;
  - (5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;
  - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client.

- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
KS Rule 4-1.6 “Confidentiality of Information”

• (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

• (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  – (1) to prevent the client from committing a crime;
  – (2) to secure legal advice about the lawyer's compliance with these Rules;
  – (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  – . . .

• (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
#MeToo Reactions

- Sparked by a report that said Google gave former executive and the creator of Android software, Andy Rubin, a $90 million severance package after he was credibly accused of sexual harassment, tens of thousands of workers around the globe walked off the job in late 2018 to protest the tech giant’s workplace culture.
#MeToo Reactions

- Arbitration agreements
  - Google responded by announcing the company would do away with mandatory arbitration of sexual misconduct claims. Instead, it will give workers the option of challenging sexual misconduct in court or in arbitration.
  - Microsoft has also announced it will stop making workers arbitrate harassment claims.
#MeToo Reactions

- Google Overhauls Process for Handling Complaints Regarding Sexual Harassment:
  - (1) it will receive complaints through one dedicated site and include live support;
  - (2) it will “enhance” the process it uses to handle complaints, including allowing the individuals making complaints to be accompanied by a “support person” during interviews and related meetings; and
  - (3) it will offer “extra care and resources” to those that choose to come forward, including “extended counseling and career support.”
Google’s extra measures to ensure employees actually complete training:

- Google also announced that staffers would receive a “one-rating dock” in their performance reviews if they did not complete its mandatory sexual harassment training.
  - Remember Well-Known Resort? – According to the report, GC#2 told investigators that general counsel for Well-Known Resort at the time, claimed to have trained the CEO on the sexual harassment policy. But there are no records to corroborate the claim, according to the report.
  - Practice Point: In the age of #MeToo, it is not enough to do the right thing; you also have to be able to prove you did the right thing.
How Private Can You Keep Your Dirty Laundry?

- Nondisclosure and other similar agreements
Questions/Discussion