

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 5, 2018

RESOLUTION

1 RESOLVED, That the American Bar Association urges all employers, and specifically all
2 employers in the legal profession, to adopt and enforce policies and procedures that
3 prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender,
4 gender identity, sexual orientation, and the intersectionality of sex with race and/or
5 ethnicity. Such policies and procedures should include:
6

7 1. dissemination to all employees, management and directors of a clear statement
8 that harassment, including harassment based on sex, gender, gender identity, sexual
9 orientation, and the intersectionality of sex with race and/or ethnicity will not be tolerated;
10

11 2. confirmation that the policy applies to conduct by directors, officers, management
12 at all levels, supervisors, employees, and third parties, at or in connection with any work
13 related function or against anyone protected by this policy irrespective of where that
14 conduct occurs;
15

16 3. provision of alternative methods for reporting violations of the policy, including
17 methods which do not involve any accused party, and at least one anonymous reporting
18 method (such as a hotline);
19

20 4. communication upon commencement of employment of the process for reporting
21 to a governmental agency if the complainant desires independent review;
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23 5. investigation of all complaints in a prompt, competent, fair, thorough and objective
24 manner, with a report to complainant at closure of the process;
25

26 6. prohibition of retaliation against the complainant and/or witnesses;
27

28 7. implementation of corrective remedial actions as appropriate, and disciplinary
29 actions including, but not limited to termination, to prevent and correct unlawful
30 harassment or retaliation in the workplace;
31

32 8. communication regarding the existence, resolution, and any consideration paid for
33 the settlement of claims to the highest levels of the entity, such as reporting to the Board
34 of Directors or Executive Committee;
35

36 9. development of initiatives that foster effective training and other innovative
37 programs to address the problem of sexual harassment.

REPORT

The Problem of Sexual Harassment in the Legal Profession and Its Consequences

The legal profession has benefitted from an enormous increase in the number of women lawyers entering the profession over the past four decades. While the entry pipeline of women remains robust, at each advancing level of a lawyer's career we lose a disproportionate number of talented women lawyers.¹ Many of the reasons for the falloff can be traced to gender, and the fact that women lawyers continue to face many more hurdles than their male colleagues.² The loss of women lawyers from the legal profession has become a sufficiently pressing problem that it is now the focus of a special ABA Presidential Initiative, Achieving Long-Term Careers for Women in Law.

What causes the high rate of attrition of women from the legal profession even though there is a substantial pipeline of women law school graduates and associates? There are, of course, a number of factors. But one of the most pernicious hurdles to achieving a satisfying legal career is the unfortunate and continuing problem of sexual harassment.

The EEOC has issued authoritative guidelines on sexual harassment under Title VII³, imposing on employers "an affirmative duty" to prevent and eliminate sexual harassment, defined as:

. . . unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when any one of three criteria is met: (1) submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; (3) 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. 29 C.F.R. §1604.11(a).

¹ A Current Glance at Women in the Law, January 2017. American Bar Association Commission on Women in the Profession. https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf

² NAWL 2017 Annual Survey Report: The Retention and Promotion of Women in Law Firms. <http://www.nawl.org/page/2017>. One of the telling facts concerns the percentage of women equity partners, which is startlingly low compared to the pipeline of women law graduates. With a pipeline of close to 50% women law graduates and associates for more than two decades, women represent only 19% of equity partners in the nation's largest firms. *Id.* at 4, 6. Research by NALP shows that women comprise 29.4% of non-equity partners. NALP Bulletin, April 2017.

³ 42 U.S.C. § 2000e-2a, 29 C.F.R. § 1604.11.

We note that the EEOC interprets and enforces Title VII's prohibitions as forbidding any employment discrimination based on gender identity or sexual orientation. These protections apply regardless of any contrary state or local laws.⁴

Title VII also prohibits employers from retaliating against employees for reporting harassment (or other types of illegal discrimination) or for filing a charge, testifying, assisting, or participating in Title VII investigations, proceedings, or hearings.⁵ Workers who make good-faith reports of sexual harassment are protected from retaliation even if the behavior at issue is determined to not constitute illegal harassment.⁶

Sexual harassment is a too-frequent barrier to career success and satisfaction for women in general, with such damaging effects as decreased job satisfaction, lower organizational commitment, withdrawing from work, and reduced levels of physical and mental health.⁷ Early in a woman's career, sexual harassment may increase financial stress, largely by precipitating job change, and can significantly alter women's career attainment.⁸ Underreporting due to fear of retaliation and other inhibiting facts means that the actual number of such experiences is likely higher.⁹

⁴ https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

⁵ 42 U.S.C. § 2000e-3.

⁶ That said, retaliation cases (under Title VII and other statutes) accounted for 44.5% of the EEOC's charge inventory for 2015. National Partnership for Women & Families, "Women at Work: Looking Behind the Numbers Forty Years after Title VII of the Civil Rights Act of 1964" 12 (2004); see also *Sex Discrimination Cases Predominate in Recent Class Actions Filed by EEOC*, 71 U.S.L.W. 2158 (Sept. 10, 2002) (reporting that, of the 52 class action cases filed by the EEOC between October 1, 2001 and June 30, 2002, 25 of the cases included claims of retaliation). Retaliation carries especially great potential for harm because it deters victims from reporting harassment.

⁷ A Meta-Analysis of The Antecedents and Consequences of Workplace Sexual Harassment, Chelsea R. Willness, Piers Steel, And Kibeom Lee. *Journal of Personnel Psychology*, February 22, 2007. See also Deborah Edros Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 Acad. Mgmt Rev. 687, 702 (1997).

⁸ The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover among Female Lawyers, David N. Laband, Bernard F. Lentz, *ILR Review*, Volume: 51 issue: 4, pp. 594-607, July 1, 1998; The Economic and Career Effects of Sexual Harassment on Working Women Heather McLaughlin, Christopher Uggen, Amy Blackstone

Vol. 31 issue: 3, pp. 333-358. Article first published online: May 10, 2017; Issue published: June 1, 2017.

⁹ See Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST, Aug. 27, 2013, at http://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html (although 32% of respondents from a variety of professions reported being sexually harassed, 70% of those respondents never reported it); J. E. Gruber & M.D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis* (1995) (surveys across a number of industries indicate that fewer than 10% of women who experience sex-based harassment make any formal complaint).

Based on a broad range of research data and anecdotal accounts, the legal profession is not immune from sexual harassment and its deleterious impact.¹⁰ Many

¹⁰ See Chang and Chopra, "Where Are All the Women Lawyers?", FORUM, Sept./Oct. 2015 at pp.15-20 (reporting that 2005 survey of California lawyers found that 50% of women respondents reported sexual harassment).

<https://www.360advocacy.com/wp-content/uploads/2015/10/ChangChopraArticle-1.pdf>.

Results of the 2015 YLD Survey on Women in the Legal Profession, The Florida Bar, at 9 (17% of the respondents stated they had experienced harassment).

<https://www.floridabar.org/wp-content/uploads/2017/04/results-of-2015-survey.pdf>;

Report of The Florida Bar Special Committee on Gender Bias, May 26, 2017 at 1 (one out of every seven female lawyer respondents stated they had experienced harassment or bullying due to their gender within last three years, and only 23% of those who reported the incident to a supervisor stated that the complaint was resolved satisfactorily).

<https://www.floridabar.org/wp-content/uploads/2017/06/Special-Committee-on-Gender-Bias-Report-2017.pdf>.

See also Women Lawyers of Utah, *The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms* (Oct. 2010), http://ms-jd.org/files/wlu_report_final.pdf ("37% of women in firms responded that they experienced verbal or physical behavior that created an unpleasant or offensive work environment[, and] 27% of the 37% indicated that the situation became serious enough that they felt they were being harassed (approximately 10% of women in firms). The vast majority (86%) of those reporting harassment identified sex as the basis for the harassment."); ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 18-19 (2001) (citing survey results indicating that one-half to two-thirds of women lawyers experienced or observed sexual harassment); Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 894 (2005); Martha Neil, *Hidden Harassment: Law Firms and Disciplinary Authorities Look For Ways to Fight Sexual Misconduct*, 92-MAR A.B.A. J. 43 (2006); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 837 (2004) ("Female lawyers around the country report a significant incidence of gender-based discrimination and incivility against them by judges, court personnel, other lawyers, and clients."); Lorraine Dusky, *Still Unequal: The Shameful Truth About Women and Justice in America* 223-24 (1996) (half of female litigators, 43% of law firm lawyers reported harassment); Lynn S. Glasser, *Survey of Female Litigators: Discrimination by Clients Limits Opportunities*, in *The Woman Advocate: Excelling in the 90s* (Jean MacLean Snyder and Andra Barmash Greene, eds. 1995) 55 (55% of woman litigators reported harassment); Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 176-77 (1994) (citing surveys); Thom Weidlich & Charise K. Lawrence, "Sex and the Firms: A Progress Report," NAT'L L. J., Dec. 20, 1993, at 1. (51% of female lawyer respondents reported having experienced sexual harassment on the job); David N. Laband & Bernard F. Lentz, *Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594 (1998) (66% of women in law firms and 46% of women in corporate and public sector organizations reported harassment); Catherine E. Shanelaris & Henrietta Walsh Luneau, *Ten Year Gender Survey*, N.H. BUS. J. 56-78 (Mar. 1998) (one-half to two-thirds of female lawyers in New Hampshire reported sexual harassment); Richard C. Kearney & Holley Taylor Sellers, *Gender Bias in Court Personnel Administration*, 81 JUDICATURE 8 (1997) (49% of female court employees in Missouri reported instances of sexual advances to obtain job benefits; 35-40% of Rhode Island women experienced sexual comments, touching, or disrespectful interest; 27% of Mississippi women experienced unwanted verbal or physical harassment); Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity*, 32 IND. L. REV. 1167, 1172-73 (1999) (describing reported conduct reflecting gender bias and sex-based harassment by male attorneys and judges against female lawyers in the courtroom and the workplace); see also Joan Brockman, *Gender in the Legal Profession* 115-19 (2001) (34% of surveyed Canadian women lawyers reported sexual harassment by lawyers, 12% by judges, and 10% by clients). Of course, such surveys, based on self-reporting, do not necessarily indicate how much of the conduct labeled harassment would be sufficiently severe or pervasive to be legally actionable. See generally Margaret A. Crouch, *Thinking About Sexual Harassment: A Guide for the Perplexed* 102-07 (2001) (discussing problems with survey methodology);

female lawyers report experiencing sexual harassment at work.¹¹ The majority of women lawyers believe harassment is a problem in their workplace.¹² Harassment victims may be abandoned by fellow associates or partners, their billable time drops off, and they begin to fail at the firms where they had previously succeeded. There is a broad range of behaviors that constitute sexual harassment, and a frequent adjunct is bullying, exacerbated in the law firm setting where bullying may be tolerated as a normal function of the business, part of a competitive, bottom-line–driven, successful institutional landscape.¹³ Yet another issue is the challenge of crafting a remedy for women who have been sexually harassed.¹⁴

Commission on Women in the Profession, *Visible Invisibility: Women of Color in Law Firms* 10-11 (2006). Additionally, the website Above the Law compiles anecdotal evidence of workplace sex-based harassment from female lawyers and legal workers. See The Pink Ghetto Archives, found at abovethelaw.com/tag/the-pink-ghetto/. See also <https://www.law.com/americanlawyer/sites/americanlawyer/2017/12/20/behind-big-laws-wall-of-silence-on-sexual-misconduct/>.

¹¹ Rachel Oliver, *Are Gender Schemas Still Shaping Lives of Women Lawyers*, Ms. JD (June 6, 2015), <http://ms-jd.org/blog/article/are-gender-schemas-still-shaping-lives-of-women-lawyers>; *Sexual Harassment: What If It Happened at Your Firm?* FINDLAW <http://careers.findlaw.com/legal-career-assessment/sexual-harassment-what-if-it-happened-at-your-firm.html> (last visited Feb. 25, 2016).

¹² Martha Neil, *Hidden Harassment*, *supra* n. 20; Eyana J. Smith, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789, 800 (2004) (sexual discrimination also has had the devastating result of forcing women to leave the law completely); Joanna Grossman, *Sexual Harassment in Law Firms: Why It Still Exists, and Why Firms Haven't Taken Steps to Prevent It and to Decrease Their Own Liability*, FindLaw's Writ-Legal Commentary (Nov. 11, 2000), <http://writ.news.findlaw.com/grossman/20001110.html>.

A recent survey of male and female attorneys by The Center for WorkLife Law found that, over the course of a year, 82% of women (and 74% of men) reported experiencing sexist comments, stories or jokes at least once, 13% of women believed they had lost opportunities because they had rebuffed sexual advances from co-workers or superiors, 27% of women reported receiving unwanted romantic or sexual attention, or unwanted attempts to touch them, and 6% of women reported feeling threatened for not engaging in sexual behavior with a work colleague. Williams, Joan C., unpublished study conducted by The Center for WorkLife Law at UC Hastings College of the Law (2016). Note, of course, that women – like men – may not only be victims of harassment, but may engage in it themselves, although it is far less likely.

¹³ As described in the forthcoming American Bar Association Commission on Women manual, *Zero Tolerance: Modern Practices for Combating Sex-Based Harassment in the Legal Profession*: Bullying is often a precursor to more severe sex-based conduct. This problem is particularly acute in larger firm settings, where competition runs high and supervision may be more diluted. Culturally, bullying in the workplace may be tolerated as a normal function of the business, part of a competitive, bottom-line–driven, successful institutional landscape. This is particularly true in the demanding and high-paced law firm culture prevalent today, in which junior attorneys struggle to impress with billable hours that earn higher priority assignments, and senior attorneys jockey for authority, resources, and prestige. These environments often lead to aggressive and harassing behaviors, frequently targeted at women.

¹⁴ See, e.g., Wendi Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make It Stop*. New York Law Journal, March 4, 2016. In it, the authors explain that women are often asked to leave the workplace, not the perpetrator. Generally, it is women, not their perpetrators, who are asked to leave the workplace. They are left without references, with a hole in their resumes. In lock step it is hard to explain, why a 7th year associate leaves big law if they weren't passed up for partner. In addition, in most jurisdictions, lawyers have a duty to report where they worked and for how long --accurately without omission making messaging, and new employment particularly difficult.

Women of color face an even tougher situation, due to the duality of gender and race. As well documented by the EEOC among others, the combined impact of race, ethnicity, and gender leads to higher rates of sexual harassment.¹⁵ As described by the EEOC's Select Task Force on the Study of Harassment in the Workplace, intersectional harassment means that people can experience harassment on the basis of more than one identity group. Thus women of color may experience sexual harassment in multiple ways that may not be characterized as solely gender or race based.¹⁶ When someone is discriminated against because of two or more protected classes, whether individually or in combination, Title VII prohibits intersectional discrimination, as has been recognized by multiple federal courts.¹⁷

Even in the most respected areas of the legal profession, sexual harassment is a problem. Chief Justice Roberts made that very point in late 2017, when he observed that recent months "have illuminated the depth of the problem of sexual harassment in the workplace," and is requiring an evaluation on the issue of sexual harassment as it pertains to the federal judiciary.¹⁸

¹⁵ See, e.g. *Select Task Force on the Study of Harassment in the Workplace*, published by the U.S. EEOC, June 2016, at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. Regarding the impact of race and gender on harassment: "[w]hen the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience higher rates of harassment than white women. Moreover, when the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience harassment than men who are members of a racial minority group." *Id.* at 13-14. See also American Bar Association Commission on Women publications which include commentary on the intersectionality of race and gender on bias in the workplace, including *Visible Invisibility: Women of Color in Fortune 500 Legal Departments*; *Visible Invisibility: Women of Color in Law Firms*; and *From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms*.

¹⁶ *Id.*

¹⁷ See, e.g., *Jeffers v Thompson*, 264 F. Supp. 2d 314 (D.Md 2003); *Lam v Univ. Haw.*, 40 F.3d at 1562 ("[Asian women] may be targeted for discrimination 'even in the absence of discrimination against [Asian] men or white women.'") (quoting *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025,1032)). Courts also have addressed intersectional discrimination against African American women and against African American men. See, e.g., *Shazor v. Prof'l Transit Mgmt.*, 744 F.3d948,958 (6th Cir. 2014) ("If a female African American plaintiff . . . establishes a sufficient foundation of discrimination, a defendant cannot undermine her prima facie case by showing that [W]hite women and African American men received the same treatment."); *Jefferies*, 615 F.2d at 1032-34 ("we hold that when a Title VII plaintiff alleges that an employer discriminates against [B]lack females, the fact that [B]lack males and [W]hite females are not subject to discrimination is irrelevant"); *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 770-71 (E.D. Wis. 2010) (concluding that plaintiff established the first element of a prima facie case under Title VII by alleging that he was discriminated against based on a combination of race and gender, i.e., because he is an African American male).

¹⁸http://www.abajournal.com/news/article/chief_justice_roberts_says_judiciary_will_evaluate_its_handling_of_sexual_h/. See also <https://www.law.com/americanlawyer/sites/nationallawjournal/2017/12/21/nearly-700-law-clerks-tell-judiciary-to-reform-sexual-harassment-procedures/>, describing the request by close to 700 law clerks asking for reform of procedures for sexual harassment claims.

We know that the profession is suffering a tremendous talent drain when almost half of law school graduates and associates are women yet most of them do not reach senior levels of the profession. The gender gap at senior levels impacts law firm finances, client relationships, and the basics of recruiting and retaining the best talent in the profession. Law firms and other employers devote substantial resources to hiring and training their lawyers, and the attrition of senior women lawyers causes incalculable damage to their employers and clients who have developed strong relationships with the women lawyers who represent them.

Put bluntly, the profession needs the best and most diverse available talent. Eliminating the problem of sexual harassment takes on special urgency in this time of declining numbers of people entering the legal profession, the advent of technology and globalization, and changing models for the structure of legal employment. When women lawyers leave the profession, there is a reduced range of legal talent to offer clients, a narrower base for firms and businesses to develop client relationships, and a limited ability to recruit and retain skilled women lawyers at all levels.

The American Bar Association has a long history in speaking out against sexual harassment and discrimination. In February 1992, the House of Delegates adopted a Resolution recognizing that sexual harassment “is a serious problem in all types of workplace settings, including the legal profession; and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work environment.”¹⁹ Much has changed since then. Women now practice in every area of law. There are women lawyers in every type of job for which a law degree is required. But while progress has taken place along a number of dimensions, sexual harassment still persists in all practice settings. It is not enough simply to be aware of the problem. Individuals and legal employers need to know about and implement effective policies and practices that can help eliminate it.

Today, the American Bar Association is in a unique position to contribute meaningful solutions to the problem of sexual harassment through the proposed Resolution. Lawyers have a special perspective on what is needed to eliminate sexual harassment from the workplace. Lawyers are responsible for providing legal counsel and advice to both victims of harassment and employers. Lawyers understand as much as, if not more than, most employers that sexual harassment has an insidious impact on individual victims and on workplace culture, thereby affecting many employees even if they were not direct victims, and negatively affecting the employer who tolerates sexual harassment. Lawyers are most often responsible for developing preventive policies

¹⁹ The American Bar Association also adopted Resolution 109 in August 2016 amending Rule 8.4 and Comments 3, 4 and 5 to Rule 8.4 of the American Bar Association Rules of Professional Conduct to provide that it is professional misconduct for a lawyer to engage in conduct the lawyer knows or reasonably should know is harassment or discrimination.

and practices designed to prevent sexual harassment. It therefore becomes especially important for the ABA to speak out and provide much-needed guidance to legal employers on this important issue, which is the subject of so much public attention at this time.

The ABA Commission on Women in the Profession (“the Commission”) has been at the forefront in combating sexual harassment and bullying. The most recent example is the Commission’s forthcoming (March 2018) publication, *Zero Tolerance: Modern Practices for Combating Sex-Based Harassment in the Legal Profession* (“*Zero Tolerance*”).²⁰ Written and edited by a broad range of employment lawyers who deal with issues of sexual harassment in many different work settings, the book draws from the experiences of lawyers, judges, educators, investigators, mediators and legislators to set forth recommended policies and practices.

Key Components of the Resolution

The Resolution set forth components for enforcing policies and procedures prohibiting harassment and retaliation based on gender, gender identity, and sexual orientation.

For example, the resolution’s first bullet point, dissemination of the entity’s policy concerning sexual harassment, is a core principle. Individual employees cannot know that an employer does not tolerate sexual harassment unless the employer says so.²¹ Nor will employees be sure what to do if they experience or witness sexual harassment unless the employer tells them. Dissemination of an anti-harassment policy is an essential first step. It is not enough to assume that employees believe the organization will not tolerate sexual harassment, or that sexual harassment is illegal.

To develop a comprehensive and effective policy, the right people at the highest level should be involved in the discussion. In the law firm setting, that is typically the chair or managing Partner of the firm. If the employer has a head of human resources, a diversity officer, and/or employment lawyers, those persons also should be involved in the process of designing the policy. The key is to empower a group within the firm that has both the authority and the expertise to develop a policy that is consistent with the law and with the firm’s values and culture.

²⁰ *Zero Tolerance* follows other Commission publications addressing this problem, e.g., *Sex-Based Harassment: Workplace Policies for the Legal Profession* (“*Workplace Policies*”) (updated 2007).

²¹ https://www.americanbar.org/content/dam/aba/marketing/women/unfinished_agenda_4920029.authcheckdam.pdf.

To ensure that all employees understand the importance of the policy, it should be announced by the highest level of management. For example, the chair of a firm could hold a meeting in the firm's office along with someone from human resources, to announce the policy and to show the firm's commitment to assuring a work environment that is free from harassment of any kind.²²

Not only must the right people be involved in the discussion, but people at the highest levels must also take care to enforce the policy. The only way that personnel at all levels of a workplace, from the highest-level partner or manager to the most junior employee, will understand that an employer is serious about enforcing an anti-harassment policy if the highest level of management promulgates and enforces the policy. Communications from lower-level employees send a very different message: it is not important enough that the senior partners and managers care about or will enforce the policy.

Along the same lines, effective policies must apply to conduct at all levels, by management, supervisors, employees, and third parties, irrespective of where that conduct occurs. Sexual harassment by an employer may take place in settings that are not *in* the workplace, such as in a taxi or at a conference, firm retreat, or a meeting in a restaurant—all places where harassment can occur during the working life of lawyers.

Still another key factor is providing safe ways for victims to report violations of the policy. A recent survey concluded that the legal profession was one of the five fields with the highest reports of sexual harassment.²³ Even so, the majority of women who experience sexual harassment do not report it.²⁴ In another recent study, many of the women interviewed did not report harassment against themselves or others because of fear of retaliation by the harasser or organization.²⁵ Research has also found that sexual harassment can be trivialized by organizations or result in hostility and retaliation against the victim.²⁶ Safe methods of reporting can work to ensure reporting of complaints and to eliminate retaliation, both factors necessary to the functioning of a well-run policy against sexual harassment.

In the same vein, employees should be informed about how to report an incident to a government agency if the complainant desires independent review. It is also an essential follow-up to any complaint that there be an objective and thorough investigation. Multiple perspectives and areas of confidentiality need to be well managed for the alleged harasser and the complainant. A thorough, fact-based

²² Zero Tolerance, at [].

²³ *Id.*

²⁴ https://www.huffingtonpost.com/2015/02/19/1-in-3-women-sexually-harassed-work-cosmopolitan_n_6713814.htm.

²⁵ <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment>.

²⁶ *Id.*

investigation is fair to all parties, including the employer, and its importance should not be minimized.

Corrective actions are, of course, a part of any effective policy. Legal employers need to make clear that sexual harassment will have meaningful consequences. Such clarity in communication and in a sexual harassment policy not only benefits individual victims but also benefits the employer and the workplace culture the employer seeks to create and maintain.

One issue that merits further consideration is the extent to which employers should consider excluding sexual harassment claims from mandatory arbitration changes. There are multiple points of view on this subject and the Commission hopes to have further review and discussion. In the same vein, there has been discussion about sexual harassment training requirements for employees, managers, and upper level executives and directors, and the Commission hopes to have further review and discussion on that subject, as well.

Conclusion

Adoption of the Resolution would put the American Bar Association where it should be: in the forefront of preventing sexual harassment in the legal profession and acting as a prominent resource for guidance in preventing sexual harassment. Many women lawyers who experience sexual harassment feel alone and without resources to rely on. Many employers, including those who would like to eliminate sexual harassment from the legal profession, need a set of key principles with the imprimatur of accepted national guidance. This Resolution will meet that need.

The ABA is committed to advancing the rule of law and improving the administration of justice, as stressed in its mission of “Defending Liberty, Pursuing Justice.” This Resolution embodies the core of those goals, by affirming that merit, not gender, should be the basis for advancement and by setting the standards for all legal employers and all lawyers in order to eliminate sexual harassment from the profession.

There is no time to waste. A clear ABA Resolution setting forth policies and procedures to combat sexual harassment will assist the Association, its members, other affiliated organizations, and a broad range of employers to eliminate sexual harassment from the legal profession.

Respectfully submitted,

Stephanie Ann Scharf
Chair, American Bar Association Commission on Women in the Profession
February 2018

GENERAL INFORMATION FORM

Submitting Entity: Commission on Women in the Profession

Submitted By: Stephanie Scharf, Chair

1. Summary of Resolution(s). This Resolution urges all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity, and recommends a set of guidelines for policies and procedures.

2. Approval by Submitting Entity. The ABA Commission on Women in the Profession voted its approval on January 23, 2018, with some revisions submitted February 2, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? ABA Recommendation 117 was adopted by the House of Delegates in February 1992. That 26 year old recommendation recognized that sexual harassment was a problem in all types of workplace settings, including the legal profession, and recommended education of the profession about the scope and harm of sexual harassment in the workplace, called upon members of the legal profession to provide leadership and education in eradicating sexual harassment, and resolved that the American Bar Association should endeavor to ensure that its staff work in a professional atmosphere prohibiting sexual harassment. The proposed 2018 Resolution is necessary to update the ABA's much earlier policy statement against sexual harassment in the context of the continuing problem of sexual harassment in the workplace and the development of the law and employer policies and best practices since 1992.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? Sexual harassment in the workplace is of widespread concern to the legal profession and U.S. society as a whole. The ABA should be in the forefront in speaking on this issue. The timely issuance of official ABA policy is essential to allow ABA leadership to play an active role in the movement to combat the sexual harassment in the legal profession and in the workplace

6. Status of Legislation. The Resolution is in furtherance of existing federal and state legislation, including Title VII as enforced by courts and the Equal Employment Opportunity Commission. A number of states also have passed legislation on the subject of the Resolution.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Commission on Women in the Profession plans to create and implement a number of legal education programs and publications regarding sexual harassment. The Commission plans to coordinate its efforts with other entities within the ABA with an interest in this topic. The Resolution will allow the ABA President to participate in the national debate by citing official ABA policy.

8. Cost to the Association. (Both direct and indirect costs) There is not expected to be a cost to the Association. CLE programs and publications and other outreach are not expected to be paid for by the Association and instead by those participating/purchasing materials.

9. Disclosure of Interest. (If applicable) N/A.

10. Referrals. The resolution has been circulated to the following ABA entities:
Section of Litigation
Section of Business Law
Section of Civil Rights and Social Justice

11. Contact Name and Address Information. (Prior to the meeting). Please include name, address, telephone number and e-mail address) Stephanie Scharf, Scharf Banks Marmor LLC, 333 W. Wacker Dr., Ste. 450, Chicago, IL 60606; Phone: 312.662.6999; E-mail: sscharf@scharfbanks.com.

12. Contact Name and Address Information. (On-site at the Meeting)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity, and recommends a set of guidelines for policies and procedures.

2. Summary of the Issue that the Resolution Addresses.

The legal profession must take a leadership role in eliminating sexual harassment in the workplace and its deleterious impact on victims, employers, and the profession at large. The American Bar Association is in a unique position to contribute meaningful solutions to the problem of sexual harassment through the proposed Resolution. Lawyers have a special perspective on how to eliminate sexual harassment from the workplace. Lawyers are responsible for providing legal counsel and advice to both victims of harassment and employers. Lawyers understand as much as, if not more than, most employers that tolerating sexual harassment has an insidious impact on individual victims and on workplace culture, affecting many employees even if they were not direct victims and negatively affecting the employer. Lawyers are most often responsible for developing preventive policies and practices designed to prevent sexual harassment. It therefore is especially important for the ABA to speak out and provide much-needed guidance to legal employers on this important issue, which is the subject of intense public attention at this time. The Resolution sets forth well-founded components for enforcing policies and procedures prohibiting harassment and retaliation based on sex (including gender, gender identity, and sexual orientation) and the intersection of sex and other protected classes.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Adoption of the Resolution would put the American Bar Association in the forefront of preventing sexual harassment in the legal profession and acting as a prominent resource for guidance in preventing sexual harassment in the workplace and provide a set of key principles which has the imprimatur of accepted national guidance.

By setting forth policies and procedures to combat sexual harassment, the Resolution will assist the Association, its members, other affiliated organizations, and a broad range of employers to eliminate sexual harassment from the legal profession and the workplace in general.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified. To date, none have been identified.