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CLE FOR IN-HOUSE COUNSEL
NEW YORK I SEPTEMBER 2019

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Program Agenda

1 - 1:20 p.m.	**Registration & networking**
1:20 - 1:30 p.m.	**Welcome remarks and introduction** **Bob McCarthy**, Office Managing Partner
1:30 - 2:20 p.m.	**Uncovering Talent - A New Model of Inclusion in the Legal Workplace** **Panelists:** **Kristen Rodriguez**, Partner **Lia Dorsey**, US Director, Diversity & Inclusion
2:20 - 2:30 p.m.	**Break**
2:30 - 3:20p.m.	**Employer Liability Concerns: Emerging Sexual Harassment Trends** **Panelists:** **Dan Beale,** Partner **Christina Dumitrescu**, Associate
3:20 - 3:30 p.m.	**Break**
3:30 - 4:20 p.m.	**Cannabis in New York and New Jersey: Opportunities & Risk** **Panelists:** **Katie Ashton**, Partner **Eric Berlin**, Partner
4:20 - 4:30 p.m.	**Break**
4:30 - 5:20 p.m.	**Law and Wellness - The Interplay Between the Rules of Professional Conduct and the Reality of Attorney Mental Health Issues** **Panelists:** **Eddie Reich**, US General Counsel
5:20 - 8 p.m.	**Networking Reception**

Tab 2

Speaker Biographies

Kathryn Ashton | Partner | Chicago |+1 312 876 3157 | kathryn.ashton@dentons.com

Kathryn Ashton is the chair of the firm's US Health Care practice, leader of the firm's Global Health Care group and co-leader of the US Cannabis practice. She concentrates her practice in health care transactional matters with an emphasis on finance.

As co-leader of the US Cannabis practice, Kathryn focuses on advising investors and participants in the US and international cannabis industries, including Canadian companies seeking US cannabis market entry. She has extensive experience advising cannabis investor clients in performing due diligence reviews, investment risk assessments, regulatory reviews and investment transactions

Kathryn's cannabis experience also includes operational assistance, including state licensing assistance in multiple states over the past five years.

Dan Beale | Partner | Atlanta | +1 404 527 8489 | dan.beale@dentons.com

Dan Beale serves as the practice leader for the US Employment & Labor practice for Dentons. He represents employers in litigation and administrative charges and investigations in a broad range of employment disputes. In addition to formal litigation and administrative claims, Dan regularly provides guidance to employers regarding compliance with various federal, state and local employment laws. In this counseling role, Dan advises clients on employment policies, drafting of employment-related agreements and conducting internal investigations of employee complaints.

Eric Berlin | Partner | Chicago | +1 312 876 2515 | eric.berlin@dentons.com

Eric is one of the nation's leading cannabis law authorities, advocating full-time for clients in, or impacted by, the state-legal cannabis industries and tensions with federal law. With more than two decades of courtroom and jury trial experience in high-stakes matters, Eric is ideally suited to counsel companies in this fast-growing industry on how best to achieve their business objectives while avoiding the legal risks of operating in a rapidly evolving regulatory environment brimming with tension between federal and state law. Current clients include large publicly traded companies selling products or services into the cannabis industry, companies involved in financing the industry, vaporizer manufacturers, health care institutions, testing labs, cultivators, processors, and a company operating dispensaries in several states. Eric also counsels clients on risk management and litigation avoidance, and provides legal assistance in all types of commercial and corporate transactions.

Lia Dorsey | US Diversity & Inclusion Director | Washington, DC | +1 202 496 7262 | lia.dorsey@dentons.com

In her role as Director of Diversity and inclusion at a global law firm, Lia Dorsey collaborates with the Board, executive leadership, and other key partners to develop and implement the firm's diversity and inclusion strategic plan. Ms. Dorsey works across various departments to expand the firm's efforts in the recruitment, development, promotion and retention of diverse groups of attorneys.

Ms. Dorsey is also a thought leader in the movement to improve diversity and inclusion at law firms. She is the Vice President of the Board of Directors for the Association of Law Firm Diversity Professionals, and serves as co-chair of the Legal Marketing Association's Diversity and Inclusion Committee. She also speaks at conferences and seminars across the country, volunteers in the community, and supports several philanthropic organizations. Prior to her career in the legal industry, Ms. Dorsey was a top-producing sales executive.

Christina Dumitrescu | Associate | New York | +1 212 768 6937 | christina.dumitrescu@dentons.com

Christina is a member of Dentons' Litigation and Dispute Resolution groups in the New York office, where her practice focuses on labor and employment, commercial litigation, and international arbitration.

Christina's matters have involved such claims as theft of trade secrets, breach of contract and fiduciary duty, violation of noncompetition agreements and other restrictive covenants, discrimination and retaliation and securities law violations, as well as violations of ERISA, whistleblower provisions of the Sarbanes-Oxley and Dodd-Frank Acts, Defend Trade Secrets Act, and the Copyright Act, expropriation, violations of the fair and equitable treatment and full protection and security provisions under various bilateral investment treaties and Free Trade Agreements.

Eddie Reich | US General Counsel | New York | +1 212 768 6989 | edward.reich@dentons.com

Eddie Reich is a partner at Dentons and serves as its US general counsel. He is the Firm's principal lawyer, advising Firm management on a wide range of matters including ethics compliance, litigation, law firm governance and insurance issues. He has more than 10 years' experience in law firm risk management, having previously served as Dentons' deputy general counsel and as a chair of the Firm's legacy Lawyers' Professional Liability practice, which represents lawyers and law firms on a wide variety of legal and ethical issues.

Kristen Rodriguez | Partner | Washington, DC | +1 202 496 7188 | kristen.rodriguez@dentons.com

Kristen Rodriguez is a member of Dentons' Litigation and Dispute Resolution practice. She handles a variety of complex commercial and class action litigation, at both the trial court and appellate levels. Kristen leads discovery and briefing in large-scale litigation, and has provided counsel to clients in the areas of contract, tort, advertising, privacy and insurance matters.

Kristen also serves as the chairperson of Dentons' Latino Professional Network.

Tab 3

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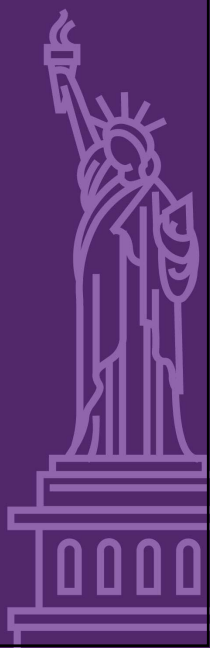
Uncovering Talent

A New Model of Inclusion in the Legal Workplace

Kristen Rodriguez, Partner

Lia Dorsey,
Director of Diversity and Inclusion



Overview

- Diversity and Inclusion
- What is Covering?
- Four Axes of Covering
- Survey Results - Everyone Covers at Work
  - **Appearance-based covering**
  - **Affiliation-based covering**
  - **Advocacy-based covering**
  - **Association-based covering**
- The Impact of Covering
- A Model to Uncover Talent in Legal Organizations

Diversity and Inclusion

- Diversity and Inclusion has become largely institutionalized, and many law firms and corporations have dedicated Diversity and Inclusion officers and departments.

- While many organizations tout their **Diversity**, which tends to focus on overall statistics (i.e., numerical representation), **Inclusion** has been more difficult to implement, particularly in law firms and legal departments.

Highest Performing Companies

Harvard Business Review — How and Where Diversity Drives Financial Performance

McKinsey&Company — More Evidence That Company Diversity Leads To Better Profits

What Happens When CEOs Take A Pledge To Improve Diversity And Inclusion?

"We just completed a two-year research study (Bersin by Deloitte 2015 High Impact Talent Management research) and the results are amazing: among more than 128 different practices we studied, **the talent practices which predict the highest performing companies are all focused on building an Inclusive Talent System**."

Challenges for Inclusion Programs

- Whereas an organization can improve its diversity simply through recruiting, inclusion depends on development, advancement and retention of those diverse individuals.
- Competing Interests and Human Tendencies:

  Assimilation (and the innate human desire to belong)

  vs.

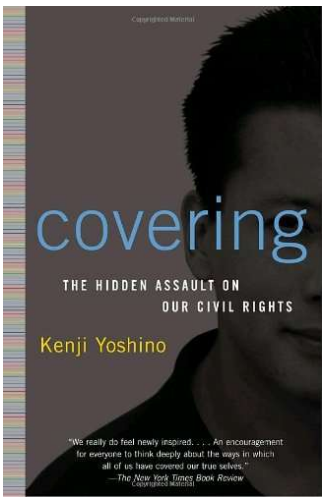
  Inclusion (and the innate human desire to be unique)

- Kenji Yoshino: “The ideal of inclusion has long been to allow individuals to bring their authentic selves to work. However, most inclusion efforts have not explicitly and rigorously addressed the pressure to conform that prevents individuals from realizing that ideal.”

Challenges for the Legal Profession

- Management issue
  - Diversity and inclusion have become important issues for legal departments and law firm management.
- Recruiting/retention issue
  - In vying for and keeping the very best attorneys, a professional culture of inclusion can provide an edge in a competitive talent market.
- Client issue
  - Corporate leadership and clients are increasingly aware of the importance of fostering diverse and inclusive teams and workplaces, and cultivating diverse teams of outside counsel.

What is Covering?



Covering is a strategy through which an individual downplays a *known* stigmatized identity to blend into the mainstream.

(Yoshino, 2006)

Analyzing "Covering" As A Means To Improving Inclusion To the Benefit of the Organization

- Kenji Yoshino hypothesizes that a model of inclusion that analyzes the pressure to conform might actually be beneficial to historically underrepresented groups.
- Because everyone has an authentic self, a culture of greater authenticity might benefit all individuals in the organization, including those who have traditionally been left out of the inclusion paradigm.
- To test this theory, Kenji's research draws on the concept of "covering."

Examples of Covering

What Is Covering?

- In 1963, sociologist Erving Goffman coined the term “covering” to describe how even individuals with known stigmatized identities made a “great effort to keep the stigma from looming large.” [4]
- “Covering” differs from the more familiar term “passing.”
- In 2006, Kenji Yoshino further developed the concept of “covering,” by elaborating on the four axes along which individuals can cover: [5]
  - **Appearance**
  - **Affiliation**
  - **Advocacy**
  - **Association**

[4] Erving Goffman Stigma: *Notes on the Management of Spoiled Identity* (New York: Simon & Schuster, 1963), 102
[5] Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2006).

The Four Axes of Covering Are Found in Legal Organizations (Law Firms and Legal Departments)

Appearance-based covering concerns how individuals alter their self-presentation — including grooming, attire, and mannerisms — to blend into the mainstream.

Affiliation-based covering concerns how individuals avoid behaviors widely associated with their identity, often to negate stereotypes about that identity.

Advocacy-based covering concerns how much individuals "stick up for" their group.

Association-based covering concerns how individuals avoid contact with other group members.

Examples of Covering from Case Law

- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
  - Plaintiff was the sole woman out of 88 nominees for partnership. She was not promoted, despite excellent record for generating business.
  - But she was also criticized for being too abrasive, "macho," told to "walk more femininely, talk more femininely, wear make-up and jewelry [and] have [her] hair styled," and to "take a course at charm school."
  - SCOTUS ruled in her favor under Title VII.
  - At PwC, aggressiveness, a desirable trait, was believed to be peculiar to males. If Hopkins lacked it, she would not be promoted; if she displayed it, it would not be acceptable.
  - Plurality opinion: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."

Examples of Covering from Case Law

- *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y 1981)
  - American Airlines had a policy of not allowing braided hair styles.
  - Plaintiff claimed the policy discriminated against black women.
  - Court upheld the defendant's policy because it applied equally to employees of all races and genders.

- *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992)
  - Male postal worker harassed because coworkers thought he was gay.
  - Plaintiff argued he was being punished for not acting "masculine enough."
  - Sixth Circuit rejected the argument.
  - "Dillon's supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a 'Catch 22.'"

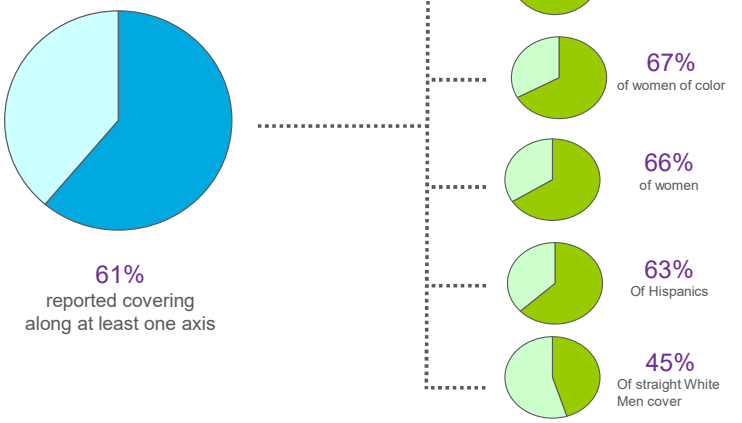
Examples of Covering from Case Law

- *Jespersen v. Harrah's Operating Co.,* 392 F.3d 1076 (9th Cir.2004).
  - Harrah's Casino required employees to participate in a grooming program to focus on improving their personal appearance.
  - Harrah's required women employees to wear makeup, including foundation, blush, mascara and lipstick. Male beverage servers were prohibited from wearing makeup.
  - But, makeup made Darlene Jesperson "feel sick, degraded, exposed, and violated." So she worked for over a decade without it.
  - When, as part of an overall image program, Harrah's enforced its makeup rules, Jesperson was fired, and she sued under Title VII.
  - Appellate court rejected discrimination claim, finding that she had been fired for appearance and behavior, not gender.

Studying The Effect of Covering

- **The Survey**: To measure the prevalence of covering within corporate cultures, a survey was distributed to employees in organizations spanning ten different industries.
- The 3,129 respondents included a mix of ages, genders, races/ethnicities, and orientations. The respondents also came from different levels of seniority within their organizations.
- The results may surprise you . . .

The Results: We Do Cover at Work



Covering at Work (continued)

Race/ethnicity-based covering (Black)	
Appearance	"I went through a period two years ago where I had a bad reaction to the chemical straightener I used in my hair and had to stop. It was so uncomfortable wearing my natural hair to work that I resorted to wearing weaves, which were very costly and did more damage to my hair. However, I felt that the weave was more acceptable than wearing my natural hair. I also hated that when I wore my natural hair it always seems to be the subject of conversation as if that single feature defined who I am as a person."
Affiliation	"[I] remov[e] myself from discussions involving mainstream news figures of the day (Susan Rice, Tiger Woods, Barack Obama)."
Advocacy	"I definitely avoid being too involved in events at work targeted to Blacks because too often when we speak up, we are seen as 'having an attitude' or having a chip on our shoulders. I even go to the point of making it very clear that I am from the Caribbean so that [I] am not associated with the negative stereotypes I hear about Blacks and sometimes to make the majority feel more comfortable around me."
Association	"I am very close to the two other African American attorneys here at the firm but I work very hard not to exclusively talk to them at firm events or to enter an event together."

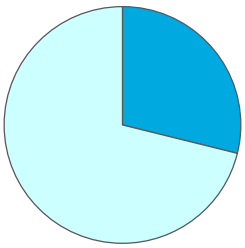
Covering at Work (continued)

- None of the Black respondents complained of exclusion from a particular work situation, so the issue is not formal inclusion. Those who covered perceived that they were expected to manage aspects of their identity.
- As one individual reported, covering “takes energy that I would rather give to my job.”
- Understanding group-based covering can aid an organization concerned about its inclusion efforts.
- Asking the right questions about the perceived pressure to conform can provide organizations with fresh insights about how to improve the organization’s inclusiveness.

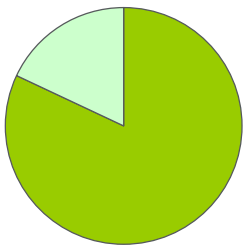
Covering at Work (continued)

Covering by Straight White Men	
Appearance	"I had a serious illness and hid it from most out of **fear of being ostracized**."
Affiliation	"I requested less time off for the birth of a child than was allowed under company policy because **I felt discouraged from doing so as a male**."
Advocacy	"When comments are made about **blue collar or working class** [individuals] and I don't correct those misrepresentations, I feel like I am not being proud of who I am and where I came from."
Association	"I [do] not **associate only with white males**."

Appearance-based covering



29%
of respondents said they engaged in appearance-based covering

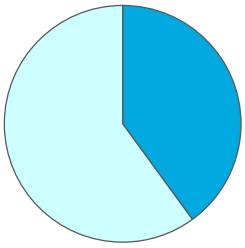


82%
of those who covered believed appearance-based covering was "somewhat" to "extremely" important to their long-term professional advancement

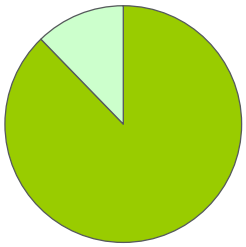
Appearance-based covering

Race/ethnicity (Asian)	"To overcome for Asian stereotype[s], I do my best to speak up, speak clearly, and carry myself in a confident manner."
Gender (female)	"[I] wear clothes to appear more masculine, model male behavior to break down barriers to success, go to places that men like to go to be part of my group at work, [and] downplay my interest in feminine things."
Sexual orientation	"I have thought to myself — 'I can't wear that to work; it's too gay.'"
Disability	"I don't use my cane if I can avoid it."
Military status	"[I do] not openly display my military status unless asked about it."
Socioeconomic background	"I also grew up very poor and for whatever reason felt that people would know that by looking at me. For years, I would make sure my clothes were name brand (even if they were bought at a discount) just so that I could feel like I belonged."

Affiliation-based covering



40%
of respondents said they engaged in affiliation-based covering.

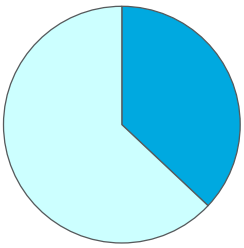


79%
believed affiliation-based covering was "somewhat" to "extremely" important to their long-term professional advancement.

Affiliation-based covering

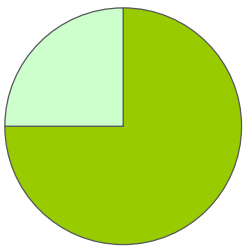
Race/ethnicity (Hispanic)	"I try to speak without my hands and lower my voice so as not to appear as 'too Hispanic.'"
Gender (female)	"I was coached to not mention family commitments (including daycare pickup, for which I leave half an hour early, but check in remotely at night) in conversations with executive management, because the individual frowns on flexible work arrangements."
Sexual orientation	"[I have] no pictures of my partner in the office, [and leave] off personal pronouns in discussion."
Age (younger)	"I am hesitant about taking time off during the day to attend doctors' appointments or taking extended PTO. I feel that being a younger practitioner, I have not earned that type of flexibility."
Age (older)	"I am worried that my age will block me from promotion since I am older than many people in my position so I have been careful not to mention my age or anything that might date me."
Socioeconomic background	"I didn't always volunteer the information that I grew up very poor and that I was the first to go to college. It seemed like I wouldn't be accepted because I always assumed everyone I worked with grew up middle or upper class."

Advocacy-based covering



37%
of respondents said they engaged in advocacy-based covering.

Advocacy-based covering

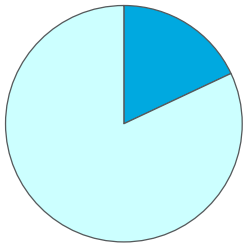


75%
believed advocacy-based covering was "somewhat" to "extremely" important to their long-term professional advancement.

Advocacy-based covering

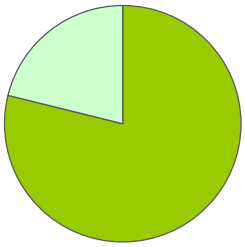
Race/ethnicity (Asian)	"Even though I am of Chinese descent, I would never correct people if they make jokes or comments about Asian stereotypes."
Gender	"I try not to make gender an issue at all. I never suggest it is an issue and do not bring up gender bias as a factor when considering applicants, etc., even if it might be present."
Sexual orientation	"I didn't feel I could protest when the person put in charge of diversity for our group was in fact an extremely vocal homophobe."
Citizenship	"Having a green card and not being a full citizen, I do not like to speak about anything political. The risk of hearing 'if you don't like it here, just leave' is always a fear."
Disability	"I would very much like to be an advocate for disability inclusion and improvements . . .. but I have been reluctant to, because I'm afraid it will have [a] negative impact on my career."
Political affiliation	"It is difficult during an election year to not offend anyone who may be a Republican or a Democrat. And as such, you tend to downplay your own beliefs."

Association-based covering



18%

of respondents said they engaged in association-based covering



79%

believed association-based covering was "somewhat" to "extremely" important to their long-term professional advancement.

Association-based covering

Race/ethnicity (Hispanic)	"In my office, the few Latinos employed are predominantly from the mail room. I try to avoid them especially when around some of my attorney cohorts. I fear that I will be unfairly judged and castigated by being given menial or low-level assignments."
Gender	"I am extremely sensitive to whether I am viewed as a sponsor of women versus a sponsor of people. I recognize that women need sponsors and that it is important for me to act as a sponsor to women, but I am also sensitive to whether my efforts in that regard will be perceived as 'favoritism.'"
Sexual orientation	"I never bring a +1 to work events. I also try to avoid mentoring or sponsoring only people of color or LGBT."
Mental health	"While I privately associate and support others with depression, I avoid doing so publicly. When asked why I am a member of the [disability-focused] BRG, I say it is because I believe in equality for all . . . and do not mention it is personal.
Physical health	"I don't associate with cancer groups, because I don't want to draw attention to my medical status, disability, or flexible arrangements. People tend to look at me like I'm dying when they find out I have cancer, they avoid giving me longer term or higher-profile projects. Mostly I think they do this to be nice, because they assume I can't handle it."
Teetotalism	"Years ago, I was a social drinker but that's not a part of my life any more. The lead manager in our group often invites all of us to join him in an after-work drink. I joined the group a couple of times and was ribbed loudly for not ordering an alcoholic beverage. Now when the invitation goes out to our team, I always give an excuse not to join them. I think some people have begun to think I'm standoffish."

Understanding The Impact of Covering

- Impact of covering is not trivial - for each axis, the percentage of respondents who stated that the practice of covering was "somewhat" to "extremely" detrimental to their sense of self was high

60% For appearance

68% for affiliation

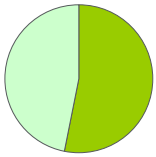
62% for advocacy

73% for association

- The Survey next asked individuals how perceived expectations or the pressure to cover affected their sense of opportunity within the organization and their commitment to their organizations.

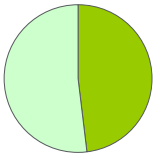
Leadership and Covering

53%
of respondents stated that their leaders (implicitly or expressly) expect employees to cover



Culture and Covering

48%
of respondents felt that their organization had a cultural expectation that employees should cover



In law firms and corporate law departments, these leadership-based and cultural expectations are more subtlety emphasized through conformity-emphasizing "professional attire," "act like a professional" and "don't rock the boat" messaging.

Reversing the Impact of Covering in the Legal Profession

- **Kenji Yoshino**: "The pressure to cover is distinct from discrimination under governing legal standards. Organizations should be interested in covering not because they are 'playing defense' against lawsuits, but because they are 'playing offense' to create a more inclusive culture over and above legal compliance.
  - Job satisfaction and retention - creating a more authentic workforce is an imperative for retaining legal talent within firms and law depts.
  - Productivity - a more authentic attorney, freed from internalized pressures to cover, spends more of his/her time focused on his/her work.
  - Recruitment - organizational reputations are more public and spread more quickly today than 15-20 years ago; inclusive workplaces attract better talent.
  - Promotion/leadership effectiveness - allowing more authenticity will aid the organization to uncover its most talented and productive attorneys, and groom them to lead the organization's future.

Authentic and Inclusive Leadership

"Another important point to consider is that highly skeptical lawyers are likely to follow leaders only if they are credible—and credibility requires not only good legal skills but also authenticity. Authentic leadership requires a level of openness, humility and vulnerability that is often uncomfortable for lawyers to display on the job. So lawyers who are not open to the process of growth and do not want to develop new skills are unlikely to be good candidates for leadership development, and they probably should not be targeted for leadership positions."[1]

"Women lawyers rightfully place a high value on authentic leadership. They struggle with authenticity because they frequently face situations where expectations of them as women and as leaders are in conflict. Rather than fretting over how to meet others' contradictory expectations or avoiding leadership altogether, women should expand their leadership skills, use styles that match objectives, and focus on their greater purpose as leaders."[2]

1 Women Leaders and the Dilemma of Authenticity, Ida Abbott, Management Solutions ® Issue 34
2 Bradley, Kathleen, LEADERSHIP DEVELOPMENT: Should Your Firm Invest In Growing Its Leaders?, Sept/Oct 2010,

A Model to Uncover Talent in Legal Organizations

Professor Yoshino proposes a model for Uncovering Talent to help organizations, law firms and legal departments, close the gap between values and practices. The model illustrates how such organizations (starting with, and led by, ***its leaders***) can begin to "uncover talent," and consists of four phases.

- Reflect - law firm and corporate law department leaders should engage in organizational self-reflection to identify covering within their own organizations.
- Diagnose - use surveys and tools to identify the breadth and depth of covering, and which groups it affects the most in the organization.
- Analyze - law firm and corporate law department leaders can compare the covering taking place within their organization to their corporate values and determine if what areas should be addressed.
- Initiate - law firm and corporate law department leaders should identify solutions and implement them.

Uncovering Talent in your Attorneys

- Seventeen percent of the Survey's respondents stated that they have “uncovered in a way that has led to success” both for them and for their organization.
  - One respondent stated, “The energy I put into trying to behave different[ly] than who I am drained my energy. Once I decided to bring my whole self to work, it was liberating and I became a lot more productive and successful.”
  - Another responded, “If you can’t be your ‘whole self’ at work, you’re not at your best. A company that allows people to be themselves and judges them only (on) the quality of work they do will be far ahead in the long run.”

Recommendations for integrating inclusion into the workforce

✓Reinforce the tone at the top

✓Offer personal and professional training seminars

✓Leverage the onboarding and integration processes

✓Start a formal mentorship or sponsorship program

✓Promote work-life balance

✓Conduct climate or pulse surveys

Tab 4

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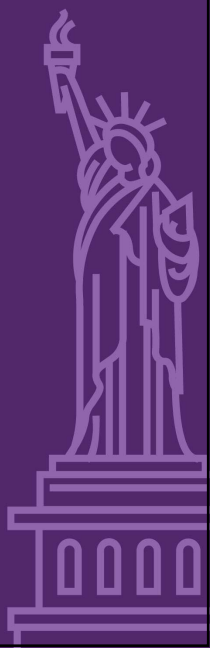
NEW YORK I SEPTEMBER 2019

Employer Liability Concerns: Emerging Sexual Harassment Trends

Dan Beale, Partner Christina Dumitrescu, Associate



Goals of the Presentation

- Overview of the #MeToo movement and its impact on the workplace.
- Review various state statutes prohibiting sexual harassment.
- Identify best practices for effective sexual harassment workplace trainings.

#MeToo

Origins of the "#MeToo" Movement

- Founder: Tarana Burke, activist and survivor of sexual assault;
- Founded: 2006.
- Began as an online community for women and girls, particularly women and girls of color, who had experienced sexual violence.
- Gained traction in October 2017, following a New York Times ("NYT") exposé of sexual harassment and assault allegations against film producer Harvey Weinstein.

The New York Times' Exposé on Harvey Weinstein

- The NYT investigation found previously undisclosed allegations against Mr. Weinstein stretching over nearly three decades.
- Actress Ashley Judd was one of the accusers interviewed by the NYT.
- That same day, Harvey Weinstein issued an apology published by the NYT.

Aftermath of the New York Times' Exposé

- On October 8, 2017, the Weinstein Company, a production company that Weinstein co-founded, terminated his employment.
- On October 10, 2017, the *New Yorker* magazine published an article adding detail to the NYT's initial report with allegations from 13 more women.
- That same day, the NYT published another article that included new accounts about Weinstein from actresses Angelina Jolie and Gwyneth Paltrow.
- On October 12, 2017, actress Rose McGowan posted on Twitter that Weinstein raped her.
- On December 6, 2017, a lawsuit seeking class-action status was filed against Weinstein, Miramax, the Weinstein Company and members of its board.
- On February 11, 2018, state prosecutors in New York filed a lawsuit against the Weinstein Company for failing to protect employees from Weinstein's alleged harassment and abuse.

#MeToo Reignites on Twitter

- Actress Alyssa Milano had been following the news stories on Harvey Weinstein.
- On October 15, 2017, she posted the following message on Twitter:

  "If you've been sexually harassed or assaulted, write 'me too' as a reply to this tweet."
- The tweet went viral as Twitter users and celebrities began to repost it, encouraging women who had survived sexual harassment or assault to do the same.
- On October 16, 2017, Milano posted on Twitter crediting "an earlier #MeToo movement" and attaching a link to the movement's website with a description written by Tarana Burke.
- Milano's tweet has since been reposted on Twitter over 20,000 times.
- As of October 24, 2017, Twitter confirmed over 1.7 million tweets were posted with the hashtag "#MeToo."

#MeToo Stories Make the Headlines

- October 18, 2017: Olympic gymnast McKayla Maroney posted on Twitter that she was sexually assaulted by former team doctor Lawrence G. Nassar.
- October 29, 2017: actor Anthony Rapp accused actor Kevin Spacey of making an unwanted sexual advance towards him.
- November 9, 2017: The Washington Post published an investigative piece about former Republican Senate candidate Roy Moore's alleged history of sexual abuse towards underage girls.
- November 29, 2017: the "Today" show opened with a revelation that co-host Matt Lauer had been fired after NBC received detailed allegations about the anchorman's sexual misconduct.

#MeToo Headlines Continue

- November 30, 2017: Russell Simmons resigned from his companies after writer Jenny Lumet accused him of sexual assault in the Hollywood Reporter.
- December 6, 2017: Time magazine named the "Silence Breakers" its 2017 Person of the Year, citing individuals like Tarana Burke.
- December 7, 2017: U.S. Senator from Minnesota Al Franken said he would resign from Congress amid allegations of sexual misconduct.
- Other public figures accused of sexual misconduct in the wake of #MeToo include:

Mario Batali	James Levine	Bill Cosby
Gary Goddard	Michael Ferro	Tom Brokaw
James Franco	William Strampel	Morgan Freeman
Quentin Tarantino	Stan Lee	Leslie Moonves

#MeToo Headlines Continue

- Since the #MeToo movement began, male victims of sexual harassment have also become more outspoken.
- Nimrod Reitman accused his former N.Y.U. graduate school adviser, Avital Ronell, of sexually harassing him. An 11-month Title IX investigation found Professor Ronell responsible for both physical and verbal sexual harassment, to the extent that her behavior was “sufficiently pervasive to alter the terms and conditions of Mr. Reitman’s learning environment.” The university suspended Professor Ronell for the coming year.
- Soon after the university made its final, confidential determination this spring, a group of scholars from around the world, including prominent feminists, sent a letter to N.Y.U. in defense of Professor Ronell, echoing many of the same past defenses of powerful men.
- The claims and the results from the investigation raise questions about how to respond when the alleged harasser is a woman and the victim is a male.

Epic Systems

Epic Systems Affirms the Enforceability of Arbitration Agreements with Class and Collective Action Waivers

- In May 2018, in a 5-4 decision, the Supreme Court upheld the enforceability of employment agreements that bar class actions by mandating individualized arbitration.

Case Law Following Epic Systems

- The National Labor Relations Board's ("NLRB") decision in *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (2019), decided on August 14, 2019, was the first to address the lawfulness of employer conduct surrounding mandatory arbitration agreements since the Supreme Court's decision in *Epic Systems*.
- The NLRB held that:
  - Under the National Labor Relations Act ("NLRA"), employers are not prohibited from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge;
  - Under the NLRA, employers are not prohibited from including mandatory arbitration agreements in response to employees who opt into a collective action under the Fair Labor Standards Act or state wage-and-hour laws.
  - In keeping with the NLRB's long-standing precedent, employers cannot take adverse action against employees for engaging in concerted activity by filing a class or collective action.

Epic Systems and the #MeToo Movement

- #MeToo has demonstrated that power in numbers and access to a public forum can drive employers, both public and private, to pay more attention to the problems of sexual assault and harassment.
- There is a concern that *Epic Systems* deprives employees of both power in numbers and access to a public forum.

Criticism of Epic Systems as a Threat to the #MeToo Movement

- On May 21, 2018, the Huffington Post published an article with the following headline:

  "The Supreme Court is Helping Companies Get Away with Sexual Harassment."

- The President and CEO of the National Women's Law Center, Fatima Goss Graves, said the decision eliminated a "powerful tool for women to fight discrimination at work."
- Prior to the decision, the Guardian warned that the outcome "could be disastrous" by making it easier for employers to retaliate against women who report harassment and assault.

Reconciling *Epic Systems* with the #MeToo Movement

- Some private-sector employers, like Uber, Lyft, and Microsoft, have carved out sexual harassment claims from their otherwise mandatory arbitration programs. Such a "carve out:"
  - Might help avoid public relations concerns.
  - ***But*** might also be seen as prioritizing claims of sexual harassment over other claims of discrimination, such as racial, age, and disability.

Pros and Cons of arbitration

Although the Supreme Court has issued a series of rulings over the past 25 years favoring the enforcement of arbitration agreements in the employment setting, the ruling in *Epic Systems* will extend many employers' ability to require that all employment disputes—including wage-and-hour litigation and discrimination claims—be handled through individual, private arbitration proceedings.

Employers should consider the following pros and cons when deciding whether to adopt a mandatory arbitration program for its workforce:

PROS

- Regardless of the strength or weakness of the underlying claims, class and collective actions are extremely expensive for an employer to litigate—resulting in a strong incentive to pay a substantial settlement even in weak cases. Individualized arbitration processes may weed out some frivolous claims.

Pros and Cons of arbitration (continued)

PROS (CONTINUED)

- Arbitration proceedings are private, and can also be confidential if specified in the agreement.
- Arbitration can involve somewhat less discovery and can move through the system more swiftly than court actions.
- Arbitration hearings can be scheduled more efficiently and are not dependent on the mandates of a judge's schedule.
- An experienced arbitrator may be less of a "wild card" than a jury.
- Arbitration decisions are generally final and not subject to appeal, except in extraordinary circumstances or unless broader appeal rights are provided in the arbitration program.

Pros and Cons of arbitration (continued)

CONS

- Courts have required that employment arbitration programs must satisfy certain due process protections, such as not requiring the employee to pay more in arbitration costs than the employee would have had to pay in filing fees were the employee to file the same action in a court. Thus, the employer ends up bearing a significant majority of the arbitrator's fees and administrative costs.
- Some employers with mandatory arbitration programs have experienced more claims than employers without such programs, perhaps due to the confidential nature of arbitration and the ease of filing claims without an attorney.
- While arbitration is generally considered a more cost-effective forum than court, that is not always the case, especially given that arbitrators can require the same amount of discovery, or even more, than is typically available in court.

Pros and Cons of arbitration (continued)

CONS (CONTINUED)

- Arbitrators are less likely to resolve a case early through a motion to dismiss or a motion for summary judgment, and thus a higher proportion of arbitration claims may be fully litigated through a hearing (the equivalent of a trial).
- There is a popular belief that arbitrators are more likely to "split the baby" in an award rather than fully dismiss a weak claim.
- Arbitration decisions cannot be easily appealed, unless an appeal right is built into the program, so an adverse decision is unlikely to be overturned.
- Requiring employees to sign mandatory arbitration agreements can be viewed as heavy-handed, negatively impacting employee morale and subjecting the employer to negative publicity.

Arbitration programs and recommendations

If an employer wishes to adopt a mandatory arbitration program (or review an existing program), the employer should:

- Ensure that the program meets the due process protections required by federal and state courts. These can include: (i) limiting the fees and/or costs that the employee must pay; (ii) confirming that the employee can recover the same types of damages that would be available in court; (iii) making sure that the terms of the program are understandable to the average employee; and (iv) providing for adequate consideration for the agreement.
- Think through the internal and external public relations implications of implementing a mandatory arbitration program.

Arbitration programs and recommendations (cont.)

- Plan a protocol for confirming the employee's agreement. An employer utilizing a digital or electronic signature must be able to present credible evidence that the signature was the act of the employee. Employers should therefore review their computer and intranet security measures with their IT department to ensure they comply with current technological and legal standards to establish that digital or electronic signatures are authentic and genuine. Employers who do not implement proper safeguards to authenticate their employees' signatures risk having their arbitration agreements invalidated.
- Prepare for the possibility of an increase in number of claims, although they will individually be smaller because they cannot be pursued on a class or collective basis.

Arbitration programs and recommendations (cont.)

- Employers should note that arbitration programs will not prevent enforcement actions by federal and state agencies, such as wage-hour audits by the Department of Labor or pattern-and-practice litigation by the U.S. Equal Employment Opportunity Commission. There may also be state law mechanisms allowing plaintiffs to circumvent mandatory arbitration programs, such as California's Private Attorneys General Act (PAGA).

Developments in State Legislation on Sexual Harassment

Developments in California

- In August 2019, SB 778 was approved by the Governor and chaptered by the Secretary of State.
- The bill covers new sexual harassment training requirements.
- By January 1, 2020, an employer having five or more employees shall provide at least two hours of classroom or other effective interactive training (*i.e.* e-learning) and education regarding sexual harassment to all supervisory employees and at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within six months of their assumption of a position. This training must be provided once every two years by a qualified trainer.
- What must information must a training include?
- Who is a qualified trainer?

Developments in Connecticut

- In June 2019, Substitute SB-3 (PA 19-16), known as the "Time's Up" bill, was signed into law.
- SB-3 makes substantial changes to the State's sexual harassment laws Majority of these provisions go into effect on October 1, 2019.
- Changes include:
  - All Connecticut employers must satisfy certain mandatory training requirements. Amount and timing of training depends on the employer's size. Failure to train will be considered a "discriminatory practice," subject to fines up to $1,000;
  - New posting requirements;
  - Expanded protections for employees reporting alleged sexual harassment;
  - Expanded time to file discrimination complaints;
  - Potential damages expanded.

Developments in Delaware

- In August 2018, HB 360 was signed into law.
- HB 360 provides greater protections related to sexual harassment under the Delaware Discrimination in Employment Act. The bill creates a new section in the DDEA devoted to sexual harassment. It went into effect on January 1, 2019.
- Changes include:
  - An employer of 4+ employees can be liable for sexual harassment of its employees, unpaid interns, job applicants, joint employees, or apprentices;
  - Definition of sexual harassment under HB 360 is the same as that under Title VII of the Civil Rights Act of 1964;
  - Provides standard for finding employer liable;
  - Mandatory notice to employees; and
  - Mandatory training.

Developments in Illinois

- In August 2017, SB 189 was signed into law.
- SB 189 removes the statutes of limitations on certain sexual abuse crimes. As amended, the statute states:
  - "When the victim is under 18 years of age at the time of the offense, a prosecution for criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, aggravated criminal sexual abuse, or felony criminal sexual abuse may be commenced at any time when corroborating physical evidence is available or an individual who is required to report an alleged or suspected commission of any of these offenses under the Abused and Neglected Child Reporting Act fails to do so."

Developments in Michigan

- In June 2018, two statutes extending the statute of limitations to bring claims were signed into law, giving victims of sexual misconduct more time to bring their claims.
- Act No. 182
  - For minor victims, an indictment may be filed up to the following dates, whichever is later:
    - The individual reaches age 28.
    - Within 15 years of the offense.
- Act No. 183
  - Minor victims of criminal sexual conduct can bring civil claims up to the following dates, whichever is later:
    - The individual reaches age 28.
    - Within 3 years of the date the individual discovers, or reasonably should have discovered, his or her injury and the causal relationship between the injury and the criminal sexual conduct.
  - Minor victims of criminal sexual conduct may commence actions to recover damages within 90 days after the effective date of the amendatory act if certain criteria are met.

Developments in Maryland

- In May 2018, Maryland passed the Disclosing Sexual Harassment in the Workplace Act of 2018.
- The act provides for the following:
  - Employment contract provisions that waive future rights or remedies to sexual harassment claims or retaliation for reporting sexual harassment are void.
  - Reporting requirement under which employers with 50 or more employees must create a survey with alleged sexual harassment settlement statistics. Statistics must be reported to the Maryland Commission on Civil Rights. The Maryland Commission on Civil Rights will post the aggregate number of settlements reported by employers on its website.

Developments in New York

- In April 2018, New York passed legislation that provides for the following:
  - No mandatory arbitration of sexual harassment claims unless a collective bargaining agreement provides otherwise.
  - Ban on non-disclosure agreements in sexual harassment settlements unless keeping the matter confidential is "at the complainant's preference."
  - Mandatory sexual harassment policy and training on an annual basis pursuant to Section 201-g of the N.Y. Labor Law.
  - Protections for non-employees who provide services to employers.

Developments in Tennessee

- In May 2018, HB 2613 was passed.
- The law restricts employers from executing sexual harassment related nondisclosure agreements as a condition of employment.
- If an employee is injured as the result of the provision, he or she will have rights and remedies available under the retaliatory discharge provision of the Tennessee Code.

Developments in Washington

- In March 2018, Washington enacted three separate laws related to sexual harassment:
- SB 5996 prohibits requiring employees, as a condition of employment, to sign nondisclosure agreements or similar documents that prevent them from speaking out about sexual harassment.
- SB 6068 makes any agreement that would limit, prevent, or punish disclosures related to sexual harassment or assault unenforceable.
- SB 6313 makes any provision of an employment contract that requires an employee to waive his or her right to pursue claims under antidiscrimination laws void and unenforceable.

Developments in New York City

- In May 2018, the Stop Sexual Harassment in NYC Act was signed into law.
- The act's provisions include:
  - An amendment to the New York City Human Rights Law (NYCHRL) to permit claims of gender-based harassment by all employees, regardless of employer size.
  - An expansion of the limitations period for gender-based claims under the NYCHRL from one year to three years.
  - A requirement that contractors include their sexual harassment practices, policies, and procedures as part of an existing report for particular contracts.
  - A requirement that employers conspicuously display an anti-sexual harassment rights and responsibility poster and circulate information sheets to new hires.
  - A requirement that employers with 15 or more employees must conduct annual anti-sexual harassment training.

Developments in Seattle

- In May 2018, the Seattle City Council passed Bill 119240.
- The bill extends the statute of limitations for sexual harassment claims that are investigated by the Office of Civil Rights by nearly 1 year, from 180 days to 1 year and 6 months.

Examples of Attempted Changes

- Michigan: In February, 2018, SB 877 was introduced. The bill would have amended the government immunity law to specify that a government agency is not immune from tort liability for the sexual misconduct of its members, officers, employees, or agents. This bill did not make it out of the Michigan House.

Developments in Federal Legislation on Sexual Harassment

Tax Cuts and Jobs Act (TCJA)

- The TCJA, signed into law on December 22, 2017, added a new section to Internal Revenue Service Code to discourage the use of nondisclosure agreements ("NDAs") as it relates to sexual harassment claims.
- Section 162(q):

  "No deduction shall be allowed under this chapter for - (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."

Tax Cuts and Jobs Act (TCJA)

- The TCJA applies to all settlement amounts paid after Dec. 22, 2017.
- May lead parties who negotiated settlements prior to Dec. 22, 2017 to incur tax liabilities they did not anticipate when they first entered into the agreement.
- Unanswered questions:
  - What does it mean to be "related to sexual harassment or sexual abuse"?
  - How does Section 162(q) apply to the settlement of cases that also involve other types of claims?

Tax Cuts and Jobs Act (TCJA)

- On February 28, 2019, the IRS posted an FAQ clarifying Section 162(q).
- A strict reading of 162(q) indicates that both the employer's **and** employee's attorney's fees related to the settlement of a sexual harassment claim subject to an NDA may not be deductible.
- The IRS, however, clarified that this rule only applies to employers and **not** employees.

Tax Cuts and Jobs Act (TCJA)

- Question:
  - Does section 162(q) preclude me from deducting my attorney's fees related to the settlement of my sexual harassment claim if the settlement is subject to a nondisclosure agreement?
- Answer:
  - No, recipients of settlements or payments related to sexual harassment or sexual abuse, whose settlement or payment is subject to a nondisclosure agreement, are not precluded by section 162(q) from deducting attorney's fees related to the settlement or payment, if otherwise deductible. See Publication 525, Taxable and Nontaxable Income, for additional information on when all or a portion of attorney's fees may be deductible.
- Publication 525 allows employees to deduct certain attorney's fees and court costs related to an unlawful discrimination lawsuit as adjustments to income, rather than as a miscellaneous itemized deduction.

What is Sexual Harassment?

Sexual Harassment

- Quid pro quo ("this for that") express or implied demands for sexual favors in exchange for favorable reviews, assignments, promotions, continued employment, or promises of continued employment.
- Hostile work environment.
- Example of a definition of "sexual harassment" used in a risk-pool sharing agreement:
  - “Sexual Harassment“ means any actual, attempted or alleged unwelcome sexual advances, requests for sexual favors or other unwelcome conduct of a sexual nature directed toward a person by another person, or persons acting in concert, which causes BODILY INJURY or PERSONAL INJURY, including but not limited to:
    a. Submission to or rejection of such conduct is made either explicitly or implicitly a condition of a person’s employment, or a basis for employment decisions affecting a person;
    b. Such condition has the purpose or effect of unreasonably interfering with a person’s work performance or creating an intimidating, hostile or offensive work environment.
    c. CLAIMS by third parties that a MEMBER has committed unwelcome acts of a sexual nature against them.

Examples of Prohibited Behavior

Sexual Harassment - Illegal Conduct

- touching or assaulting an individual's body, or staring in a sexual manner

Prohibited Behavior is typically defined in employee handbooks to include conduct that may not be illegal

- Threatening, intimidating, or hostile acts of a sexual nature
- Written or graphic sexual material that is placed on walls, bulletin boards, computer screens, or elsewhere
- Sexual stories, jokes, pranks
- In determining whether the conduct is illegal: Does such conduct have the effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive work environment?

Sexual Harassment Claims Statistics

Sexual Harassment Claims Statistics

- In FY 2018, there were 7,609 sexual harassment complaints filed with the Equal Employment Opportunity Commission (“EEOC“);
- 15.9% of those complaints were filed by men;
- The amount of money paid to resolve sexual harassment claims brought before the EEOC for FY 2017 was $56.6 million;
- 56.4% of charges filed resulted in a finding of “no reasonable cause;“
- 5.4% of charges filed resulted in a finding of “reasonable cause;"
- 8.7% of charges filed settled;
- 8.7% of charges filed were resolved through a withdrawal with benefits;
- 20.9% of charges filed were administratively closed;

What penalties might employers face for workplace sexual harassment?

- Payment of lost wages to the victim – These are the benefits and wages that the victim would have earned from the date when the harassment occurred to the date of the settlement or trial.
- Payment of future lost wages to the victim – These are payments to the victim of the wages and benefits that the victim would have earned if the sexual harassment had never happened.
- Compensatory damages – These are payments that the employer may be ordered to pay to the victim for the emotional pain and anguish that the victim has suffered.
- Punitive damages – These are payments that are above and beyond the economic and noneconomic losses that were suffered by the victim and are designed to punish and deter the employer.
- Legal fees and costs – These are payments to the victim for the court costs and attorneys' fees that the victim incurred as a result of the sexual harassment case.
- Job reinstatement or promotion – This is an order to reinstate the victim to his or her job or to give the victim a promotion.

Top Sexual Harassment Settlements/Verdicts

- 2016: *Gretchen Carlson v. Roger Ailes*: FOX agreed to pay **$20 million** to former broadcaster Gretchen Carlson to settle a sexual harassment lawsuit she filed against former FOX News CEO Roger Ailes.
- 2012: *Ani Chopourian v. Catholic Healthcare West*: A physician's assistant won what may be the largest-ever sexual harassment verdict for a single plaintiff.
  - Jury award: **$168 million**
- 2011: *Ashley Alford v. Aaron's Rents:* Former employee at Aaron's Rents said a manager made relentless sexual advances.
  - Jury award: **$95 million** (reduced by the court to $41.3 million because of caps on compensatory and punitive damages under Title VII).

Top Sexual Harassment Settlements/Verdicts

- 2011: *Carla Ingraham v. UBS*: Former senior client service associate said male broker she worked for made sexual advances and she was later fired one week after filing an amended charge of sexual discrimination.
  - Jury award: **$10.57 million**
- 2007: *Anucha Browne Sanders v. Madison Square Garden, et al.*: Former executive for the New York Knicks alleged she was fired after complaining that she'd been sexually harassed by Isiah Thomas, the Knicks' then head coach.
  - Jury award: **$11.6 million**
- 1999: *Linda Gilbert v. Daimler Chrysler:* First female millwright at a Chrysler plant claimed she endured cruel jokes and sexually explicit cartoons.
  - Jury award: **$21 million**

Sexual Harassment Training - Does It Work?

- Research on sexual harassment training programs is likely to grow given (1) the increase in states passing laws demanding sexual harassment training, and (2) the EEOC's ongoing Select Task Force on Harassment.
- Researchers have been able to provide information on:
  - Effective practices for sexual harassment training
  - Areas of focus for sexual harassment training
  - Two specific types of recommended sexual harassment training
  - Overarching culture changes required for effective sexual harassment prevention

Sexual Harassment Training - Effective Practices

- Training is a crucial and necessary component of ensuring anti-harassment in the workplace.
- However, certain methods of training appear to work better than others.
  - A one-size-fits-all approach to sexual harassment training is not effective.
  - The EEOC recommends that employers conduct sexual harassment training in an interactive, live environment. States that have passed laws on sexual harrassment training also require an interactive environment.
    - The trainers for a sexual harassment training should be engaging and interactive, to maintain the focus of attendees.
  - Sexual harassment training should also occur on a regular basis.
    - Once a year may not be enough to show the commitment that the company has to preventing sexual harassment.
  - A sexual harassment program should be routinely evaluated to ensure that it is effective.

Effective Sexual Harassment Training Areas of Focus

- The EEOC recommends that sexual harassment training include examples of troubling conduct that do and don't rise to the definition of sexual harassment.
- The EEOC also recommends utilizing real-life examples and scenarios that are specifically tailored to your workplace.
- Sexual harassment training should also inform employees about their rights, by explaining to employees the avenues that should be taken to report inappropriate conduct.
  - Sexual harassment training should detail the complaint procedure to be followed under such circumstances.

Sexual Harassment
Effective Training - Overarching Cultural Changes

- The EEOC indicates that sexual-harassment training should be a part of a "holistic culture of non-harassment."
  - It is important to shift the focus away from legal terms towards promoting an overall culture of civility within the workplace.
  - One study has found that sexual harassment training is ineffective when employees are cynical toward their larger work organization.
  - Training videos and lengthy programs will not suffice to solve this problem completely where the core issue often lies in employee attitudes and behaviors.

Sexual Harassment
Two Types of Training Found Effective by EEOC

- Two types of training found to be effective by the EEOC:
  - Bystander intervention training - training that empowers employees to intervene when harassment occurs.
    - This type of training also helps to create a sense of awareness and collective sense of responsibility within the workplace
  - Workplace civility training - training that focuses on promoting respect and civility throughout the workplace
    - This type of training will typically include exploring workplace norms, providing training on interpersonal skills and informing about the conflict-resolution process
    - This type of training is effective because it focuses on the positive -- what should be done, as opposed to the negative -- what should not be done

Sexual Harassment Avoidance Best Practices

What an employer should do:

- Have a clearly defined written anti-harassment policy.
- The policy should include a procedure by which employees can report any harassment and have procedures for investigating such complaints.
- Train all employees about the anti-harassment policy and the complaint procedure.
- Document the employees' receipt of the written policy and any training.
- Prompt Remedial Action.
- All these steps are important because, in certain cases, they allow an employer to raise an **affirmative defense** to vicarious liability for sexual harassment.

Sexual Harassment - Typical Language in an MOC

Language Commonly Found in a Memoranda of Coverage ("MOC"):

- *"**Sexual Abuse.** This MOC does not cover **DEFENSE COST** or **DAMAGES** for any **CLAIM** or **SUIT** arising directly or indirectly from any actual or alleged participation in any act of **SEXUAL ABUSE** of any person by any **MEMBER**, except for **CLAIMS** or **SUITS** alleging negligence on the part of a **MEMBER** other than the **MEMBER** personally accused of such **SEXUAL ABUSE** covered under [Other Sections].*
- ***Sexual Harassment**. This MOC does not cover **DEFENSE COST** or **DAMAGES** for any claim or suit arising directly or indirectly from any actual or alleged participation in any act of **SEXUAL HARASSMENT** of any person by any **MEMBER**, except for **CLAIMS** or **SUITS** alleging negligence on the part of a **MEMBER** other than the **MEMBER** accused of such **SEXUAL HARASSMENT** covered under [Other Sections].*
- *However, for purposes of **SEXUAL HARASSMENT**, **POOL** may provide a defense to a **MEMBER**, subject to a reservation of rights, until such time that it is established judicially or otherwise that the **MEMBER** committed or participated in **SEXUAL HARASSMENT**."*

- The provisions above clarify that the "bad actor" will not be covered by the MOC for the act of sexual abuse or sexual harassment, but that a Member entity (*e.g.* a school district) would be covered for negligence (*e.g.* negligent failure to terminate).

Tab 5

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NEW YORK I SEPTEMBER 2019

CANNABIS in NY/NJ: Opportunities & Risks

Eric Berlin, Partner Kathryn Ashton, Partner

Introduction

- **Co-Heads** of Dentons Cannabis Group
- **Eric Berlin**
  - 100% time spent on clients in or impacted by legal cannabis and hemp industries
  - Helped draft and pass Illinois and Ohio medical cannabis laws
- **Katie Ashton**
  - Head of Dentons Global Health Care Practice

Agenda

- Cannabis, hemp, and CBD
- States' legalization, including NY & NJ
- US federal laws on cannabis
- Hemp legalization & CBD
- Ancillary business opportunities & risks
- Impact on employers
- Conclusion and Q&A

What is Cannabis?

Hemp (not > .3% THC) **"Marijuana"**

+ Extracts from glands on flowers & leaves containing cannabinoids, terpenes and flavonoids

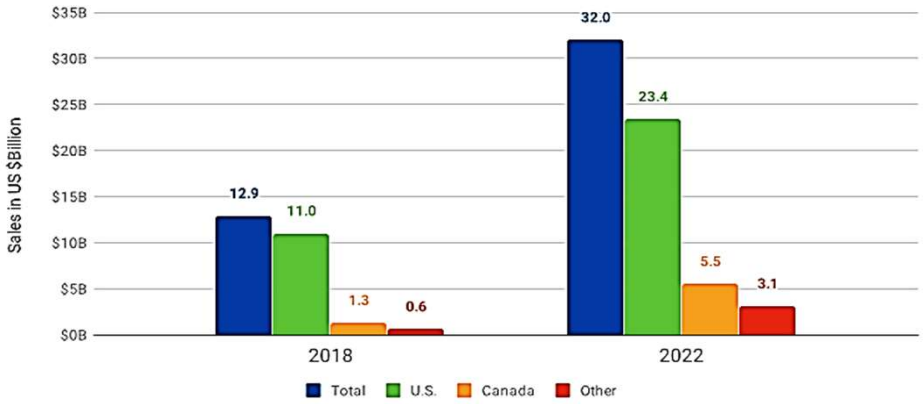
Medical Cannabis?

- Does cannabis have **medicinal properties**?
  - Effective as analgesic and for nausea
  - CBD for epilepsy
  - Some positive studies for Crohn's, Multiple Sclerosis, Alzheimer's, Parkinson's & diabetes
- Is cannabis **safe**?
  - DEA's chief ALJ: "one of the safest therapeutically active substances known"
  - In states with medical cannabis programs, each of the following has declined significantly:
    - opioid overdoses
    - Medicare prescriptions for conditions treated by cannabis
    - absences from work due to illness

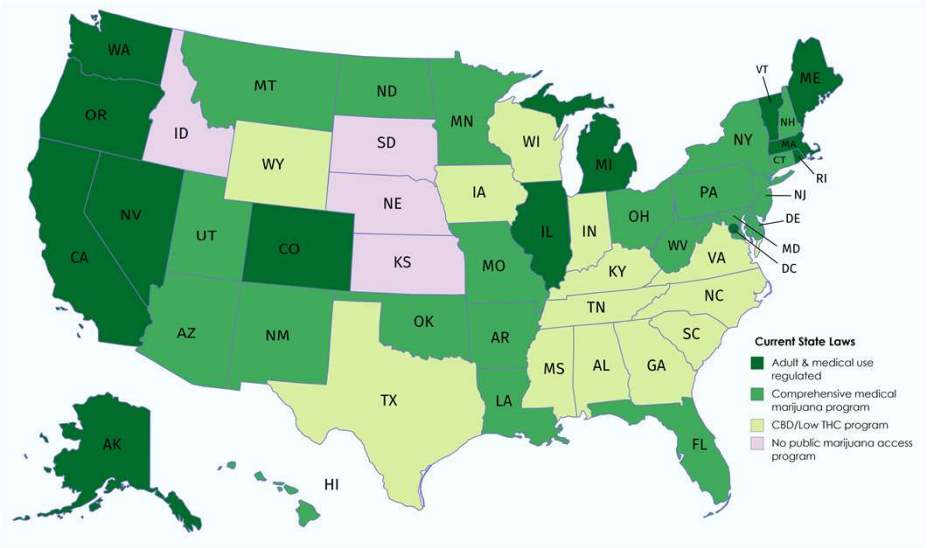
Cannabis Products

The Global & U.S. Markets

- Annual global cannabis market (inc. black market) = **$150 billion**
- **Legal** retail sales & projected: $13B (2018) to $32B (2022)



Current U.S. State Laws



No Two States The Same

- **Permit process**: open vs. competitive
- **Vertical integration**: required vs. prohibited
  cultivator →processor → distributor → testing lab → dispensary
- Different **advertising** standards
- **Home grow** permitted vs. not
- Different **forms** (smoking, vaping, oils, edibles), **limits**, etc.

Medical Cannabis in New York

- Legalized July 2014
- Only 10 registered organizations
- Permitted forms: metered liquid or oil, solid and semisolid preparations (e.g., capsules), metered ground plant preparations, and topical forms and transdermal patches
- Permitted advertising: must be “true and accurate”; claims regarding efficacy subject to prior Department approval
- Home grow **not** permitted
- Adult use? Failed to pass this year; likely in next 2 years

Medical Cannabis in New Jersey

- Legalized January 2010; Expanded in July 2019 through "Jake Honig Compassionate Use Medical Cannabis Act"
- Only 6 Alternative Treatment Centers currently, NJDOH seeking to add up to 24 add'l ATCs (including 4 vertically integrated permits) through Aug. 2019 RFA
- Permitted forms: dried, oral lozenges, topical formulations, oral formulations. Transdermal, sublingual and tincture forms permitted by new expansion bill
- Permitted advertising: No advertising of price, no items for sale or gifts that reference marijuana
- Home grow **not** permitted
- Adult use? Failed to pass this year; likely in next 2 years

U.S. Federal Law

- Cannabis = **Schedule I drug**, Controlled Substances Act
- **Illegal** to:
  - manufacture (grow), sell, or possess
  - advertise (print, internet, and communication facilities [*e.g.*, TV and radio])
  - sell paraphernalia (not authorized by state)
  - Control property on which cannabis trafficking knowingly occurs
- Conspiracy, Aiding & Abetting, AML, RICO

Federal Enforcement

- Feds **not enforcing** vs. state compliance businesses
- **History of non-enforcement**
  - Cole Memo
  - Rohrabacher (Joyce) protection for medical cannabis
  - Sessions rescission of Cole Memo
  - AG Barr pledged not to “go after” state law compliant companies

Implications of Federal Illegality

- Limited **banking**
  - Fin-CEN guidance
- **Tax** Code 280E
- Limited **IP** protection
- No federal **bankruptcy** protection
- **Interstate** commerce limitations

Possible Federal Reform

- **Pending Bills**
  - Many different aspects and kinds
  - FAIR Banking
  - STATES
  - Equity/Expungement
  - Insurance
- **Reform in 2019?**
  - Likely no Congressional action beyond possibly banking

Hemp

- Industrial hemp research programs under **2014 Farm Bill**
  - Morphed into research on commercialization of products with CBD
- **Epidiolex**
- **2018 Farm Bill** removed hemp and extracts of hemp from CSA
  - For hemp farmers and producers, expands banking options, expands IP protection, decreases tax liabilities, and makes crop insurance available
  - "Grandfathers" 2014 Farm Bill programs at least one year
  - Does not make sales of hemp or CBD nationally legal
    - States can ban, but must permit hemp/extracts/products to pass through state
    - Awaiting USDA regs

FDA on CBD

- **FDA** has claimed full jurisdiction
  - Illegal to add CBD to food, beverage or supplement
  - Illegal to make my health claim about CBD product
  - Plans to enforce only against the most “egregious, over-the-line claims”
- **Product choice** implications
- **Labeling** implications
- **Cease & desist letters** issued

Hemp/CBD in NY/NJ

- **New York**
  - Hemp cultivation and processing: can grow and process under the Industrial Hemp Agriculture Research Pilot Program.
  - CBD: Can be sold as health supplements; new processors cannot use CBD concentration higher than in original plant extract. (NYC enforcement)
- **New Jersey**
  - Hemp cultivation and processing: new law passed Aug 2019 (regulations in process)
  - CBD: allows CBD products to the maximum extent permitted by federal law

Chain of Development, Production and Sale

- **Cultivation**
  - Construction, HVAC, gardening, hydroponics
- **Products**
  - Extraction, infusion, ingredients, packaging, labeling, hardware
- **Retail/Dispensary**
  - POS software, all impacting other retailers
- **Commercialization Generally**
  - Real estate, accountants, lawyers, marketing, public relations, temp agencies, financial services

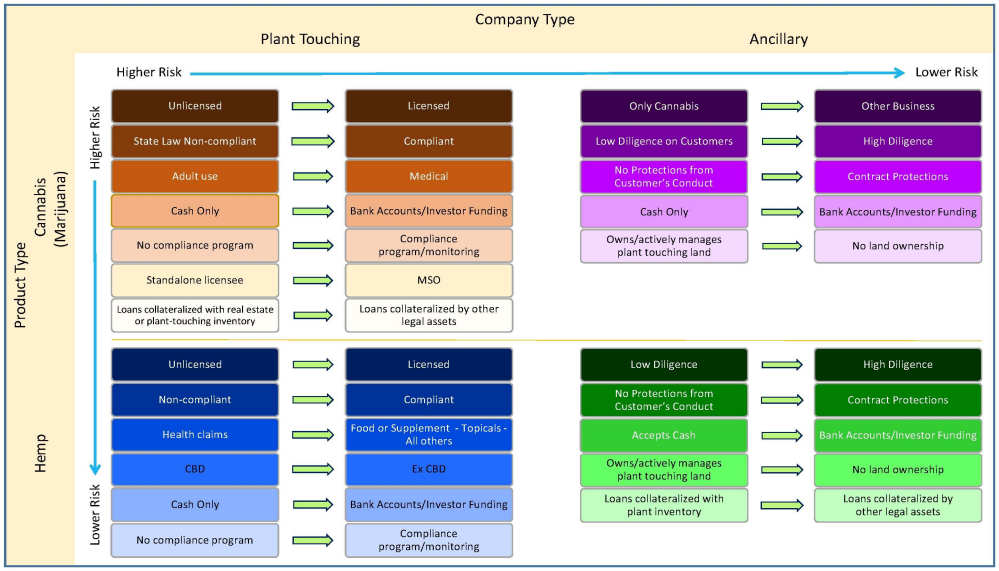
Ancillary Product/Service Suppliers

- Federal **vs.** state law
- **Risks** of aiding/abetting, conspiracy, money laundering
- **Low enforcement** risk
- **Banking** implications
- **Real estate**

Risks from Selling to Cannabis Companies

- Sale of products that could be considered paraphernalia
- Lease space to cannabis manufacturers/distributors
- Lack of diligence on customers' compliance with state law
- Lack of termination right if cannabis risk profile alters

Risks Matrix



Employer Rights & Limitations

- States have taken **varied approaches**
  - **NY**: No adverse actions solely based on status as medical marijuana patient; may still enforce a policy prohibiting employee from performing duties while impaired
  - **NJ**: No adverse actions solely based on status as medical marijuana patient
- No requirement for **health insurance** to cover
- Most: employers **may not discriminate**
  - No employee right to use cannabis at work
  - Workplace safety and federal law considerations
- Review existing drug policies; training to spot **impairment**

International Legalization

- **Uruguay** first country to legalize for adults
- **Canada** – Medical, and adult use added October 17, 2018
- **Medical legalization**: Mexico, Argentina, Columbia, Chile, Jamaica, Germany, Denmark, Greece, Italy, Catalonia, Croatia, Czech Republic, Macedonia, Poland, Turkey, Australia, Israel, South Africa, Thailand

Tab 6

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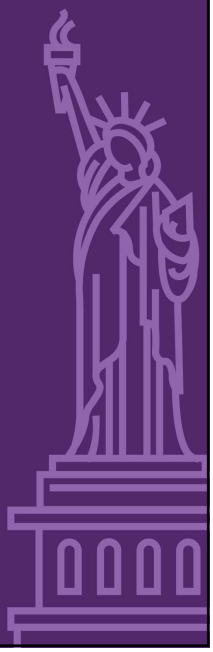
CLE FOR IN-HOUSE COUNSEL
NEW YORK I SEPTEMBER 2019

Interplay Between the Rules of Professional Conduct and the Reality of Attorney Mental Health Issues

Edward J. Reich, US General Counsel



Overview

- The legal profession collectively suffers from depression, suicide, and other mental health issues in significantly greater percentages than the general population
- US population continues to live longer, and lawyers are practicing well past age 65 in increasing numbers
- Substance abuse, mental health issues, and dementia can destabilize lawyer's lives; adversely affect their legal performance; and impair their ability to comply fully with their professional responsibility obligations

Alcohol and Drug Use

- In 2016 ABA Commission on Lawyer Assistance Programs, and Hazelden Betty Ford Foundation published a mental health study of nearly 13,000 practicing lawyers, based on self-reporting responses to diagnostic questions from well-established tests
- 21% of lawyers in the survey screened positive for “hazardous, harmful, and potentially alcohol-dependent drinking,” compared to 12% of professionals in the general population
- For lawyers who weekly used legal or illegal drugs affecting mood or behavior, 71% used stimulants; 51.3% used sedatives; 31% used marijuana, and 21.6% used opioids
- 22% of lawyers surveyed stated that their use of alcohol or drugs had been problematic at some point in their career

What Keeps Lawyers from Seeking Treatment for Alcohol and Drug Abuse?

- The ABA’s study found lawyers with substance abuse issues had common reasons why they did not seek treatment:
  - Denial
  - Perceived ability to “solve my own problem”
  - Not wanting others to find out they needed help
  - Concerns regarding privacy or confidentiality
  - Losing their law licenses
  - Did not know who to ask or how to pay for treatment

Mental Health Conditions

- Mental health conditions unrelated to substance abuse also are prevalent and can impair lawyers' performance:
  - Anxiety
  - Depression
  - Social Anxiety
- 28% of lawyers surveyed reported experiencing depression at some point in their careers, and nearly 12% have had suicidal thoughts

Consequences of Impaired Mental Health

- Professional
  - Malpractice
  - Loss of Clients
  - Loss of Reputation
  - State Bar Discipline
  - Withdrawal from the Profession
- Personal
  - Other Heath Troubles
  - Hospitalization
  - Suicide

Mental Health Issues That May Affect Senior Lawyers

- Growing numbers of lawyers over 65 are choosing to continue working, for a variety of reasons
- The ABA's Senior Lawyers Division has over 63,000 members
- Senior lawyers offer significant expertise and experience; however, as people age, everyone becomes more vulnerable to physical illness, dementia, and depression.
- Dementia and depression in older adults share some similar symptoms, and apparent mental impairment in senior lawyers can mask physical illness, substantive abuse, or treatable mental health conditions
-

Determining When a Lawyer Has Impaired Mental Health

- Lawyers are not medical health professionals, and it is not a law firm's role to diagnose substance abuse, mental health conditions or dementia; and both impaired lawyers and their co-workers tend to cover up problems
- On the other hand, significant behavior or work performance problems should always be addressed, and they may result from an underlying mental health impairment:
  - Repeatedly missed deadlines or late arrivals at meetings or hearings
  - Repeated failures to return calls
  - Persistent forgetfulness
  - Lapses in work performance
  - Significant changes in interpersonal behavior
  - Client or co-worker complaints

The Rules of Professional Conduct and Impaired Lawyers

- The Rules of Professional conduct apply equally to all lawyers, regardless of physical or mental health
  - ABA Formal Opinion 03-429 (2018) states, "mental impairment does not lessen a lawyer's obligation to provide clients with competent representation"
- If a lawyer becomes "material impaired" in his or her ability to represent the client, withdrawal from a matter or matters is mandatory under Rule 1.16(b)(2)
- Diminished performance by a mentally impaired lawyer can pose risk of Rule violation, client relationship issues, or financial or reputational loss

Rules 1.1 and 1.3: Competency and Diligence

- Rule 1.1, Competence
  - "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. . . ." Competence includes the mental, emotional and physical ability reasonably necessary" for performance of the legal service

- Rule 1.3, Diligence
  - "A lawyer shall not . . . Repeatedly, recklessly or with gross negligence fail to act with reasonable diligence . . . ." "Reasonable" diligence means the lawyer does not neglect or disregard, or unduly delay a legal matter . . . .""

Rules 1.4, 1.6, and 1.15: Communication, Confidentiality and Client Funds

- Rule 1.4, "Communication", requires a lawyer to notify a client, promptly, of information or circumstances material to a matter; to keep the client reasonably informed of developments, and to promptly comply with a client's requests for information
- Rule 1.6, "Confidential Information of a Client," states that a lawyer "shall not knowingly reveal or use confidential information . . . to the disadvantage of a client or for the advantage of a third person . . . ."
- Rule 1.15, Preserving Identity of Funds and Property of Others
  - Prohibits co-mingling and misappropriation of client funds; describes required trust account and bookkeeping procedures

How to Have the Conversation with an Impaired Lawyer

- Consult HR to ensure conversation and suggested action does not infringe on rights
- Be respectful and non-confrontational
- Be specific and direct about lawyer's performance or other conduct that causes concern
- Come prepared with specific suggestions for addressing the conduct of concern, including, if appropriate, contact information for the company's Employee Assistance Program, or the State Bar's Lawyer Assistance Program
- Listen carefully and patiently to what the lawyer has to say in response
- One conversation may not suffice to achieve a resolution acceptable to the company
- Consider involving family member

Lawyer Assistance Programs

- All 50 States and have Lawyer Assistance Programs that can help lawyers struggling with substance abuse issues, mental health concerns, burnout, stress, and other issues, through direct counseling or referrals to other sources of help
- Many Lawyer Assistance Programs are available to both lawyers and their families, and are entirely confidential, even from the State Bar
- New York
  - http://www.nysba.org/lap/
  - http://www.nylat.org/
  - https://www.nycbar.org/member-and-career-services/committees/lawyer-assistance-program-confidential-helpline
- Lawyer-volunteers who have overcome or successfully coped with their own mental health issues can be a significant asset to treatment

What the Rules Require of "Law Firms"

- "Law Firm" reporting obligation extend to private law firms, corporate legal departments, and lawyers in government entities and charitable organizations (Rule 1.0(h), (m))
- Both a "law firm," "a lawyer with management responsibility," and "a lawyer with direct supervisory authority over another lawyer" are required to "make reasonable efforts to ensure that all lawyers in the firm" conform to the Rules (Rule 5.1)
- Lawyers with partner-like managerial responsibility, and lawyers with direct supervisory authority over another lawyer, are responsible for Rule violations if they reasonably could have been prevented the violation, or mitigated its consequences, but failed to take reasonable remedial action"

Reporting Obligations

- Rule 8.3 requires lawyers to report violations of the Rules by another in limited circumstances:
  - The violation raises a "substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer
  - Rule 8.3's use of the word "substantial" refers to the seriousness of the violation and not the quantum of evidence, although a single violation may be "substantial"
- Comment 5 to Rule 8.3 makes an exception to the reporting obligation if the information about the misconduct or fitness is disclosed in the course of a "bona fide assistance program for lawyers"

The Emerging Concept of Attorney "Wellness"

- 2017's National Task Force on Lawyer Well-Being built on the data provided by the ABA's 2016 empirical study of lawyer mental health issues, recommending five central themes for "positive change" in the legal profession:
  - Identifying stakeholders and the role they can play in reducing the level of "toxicity" in the legal profession
  - Eliminating the stigma associated with seeking help
  - Emphasizing well-being as an indispensable party of lawyer competence
  - Education for lawyers on "well-being" issues
  - Taking incremental steps to address how law is practiced, to increase lawyer well-being

The ABA's Wellness Pledge for Law Firms and Legal Departments

- In September 2018 the ABA Working Group called for a pledge by legal employers to take seven steps to improve the health of lawyers, and nearly 100 law firms, legal departments and law schools have made the commitment to:
- Providing educational opportunities on wellness issues;
- De-emphasize alcohol at company events;
- Develop partnerships with lawyer assistance programs;
- Provide confidential access to mental health and addiction experts for all employees;
- Develop a written protocol and leave policy that covers assessment and treatment of substance use and mental health problems; and
- Promote help-seeking and self-care as a core value

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Thank you

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