Behind Big Law's Wall of Silence on Sexual Misconduct

As the #MeToo movement spreads from the entertainment sector to politics and the courts, will big law firms face their own reckoning?

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This story is the first part in a series examining the problem of sexual harassment and misconduct in the legal industry.

As allegations of sexual harassment continue to roil Hollywood, the federal courts and the news media in the wake of the Harvey Weinstein scandal, other industries are awaiting their seemingly inevitable turn in the spotlight.

Law firms, which already have a less-than-stellar track record of supporting women, are no different.

In interviews, legal industry insiders with experience at multiple law firms said the nature of law firm partnerships can make inappropriate behavior harder to avert or address, especially when firms don't do enough to police relationships in the workplace.

Unlike corporations, law firms are owned by their partners. That can fuel a power imbalance in male-dominated partnerships, exacerbating gender bias and allowing misconduct to go unchecked or kept permanently under wraps.

One area where these problems converge is in relationships between partners and associates or staff. When firms lack policies governing romantic workplace relationships or don't enforce them, those failures can invite claims of sexual harassment, longtime industry observers said.

Woman after woman interviewed for this story said they had to ignore or shrug off unwanted comments and conduct at their firms out of concern that speaking out could harm their careers. Many feared what one law firm marketer described as "the freeze out," where a woman wouldn't lose her job, but coveted assignments would disappear, leaving her isolated and viewed as a problem for her firm.

Others described an "old boys' club" atmosphere at many firms, likening it to the way women are treated in the television show "Mad Men."

In a survey conducted for this story of every Am Law 100 firm, only 13 firms acknowledged having policies setting guidelines for relationships between partners, associates and staff.

The firms that did cite policies—Cozen O'Connor; Drinker Biddle & Reath; Duane Morris; Fox Rothschild; Goodwin Procter; Greenberg Traurig; Kirkland & Ellis; Locke Lord; Mintz, Levin, Cohn, Ferris, Glovsky and Popeo; Morgan, Lewis & Bockius; Orrick, Herrington & Sutcliffe; Shearman & Sterling; and White & Case—all confirmed that they had policies that governed relationships between employees and partners.

Three other firms—Akin Gump Strauss Hauer & Feld; Fenwick & West; and Jenner & Block—said they did not have such a policy. The remaining 84 firms polled either did not respond to multiple requests for comment or declined to discuss their approaches.

Policy Landscape

From no-dating policies among employees to nonfraternization protocols that bar personal relationships between supervisors and subordinates, companies across the country have adopted a range of workplace rules designed to limit their liability.

Most of those provisions were put in place starting in the early 1990s, following the U.S. Supreme Court's 1986 ruling in Meritor Savings Bank, FSB v. Vinson, a case that redefined sexual harassment in the workplace.

Over time, however, complete bans on intracompany dating became less common, with companies opting more for nonfraternization policies that attempt to govern relationships between supervisors and subordinates, said Cozen labor and employment partner Julie Trester.

Most law firms that confirmed having a personnel policy for this story did not offer details, although some did describe how their policies govern supervisor-subordinate relationships within a firm.

An Orrick spokesman said the firm generally discourages romantic relationships in the workplace. When they do occur, its policy requires that one or both parties inform the firm to ensure the two individuals are not working together in a reporting or supervisory capacity.

Mintz Levin, which a year ago this month settled a former associate's long-running gender discrimination suit, has a policy that covers consensual intimate relationships involving individuals in a direct reporting situation, a firm spokesman said.

That policy governs relationships where one individual directly or indirectly supervises the other "such that the person in the superior role controls or can influence the assigning of work, reviewing, approving, auditing or otherwise participating in his or her performance evaluation, promotions or demotions, compensation, disciplinary action or termination," according to Mintz Levin.

If two such individuals develop a sexual or romantic relationship without required approval, the firm's spokesman confirmed that one or both could be forced to leave Mintz Levin.

Recognizing the Risks

One problem with romantic relationships in the workplace is the potential for favoritism, something known to labor and employment experts as paramour preference sexual harassment, said Cozen's Trester. If a workplace culture allows a subordinate involved in a relationship to receive benefits that other employees do not, courts have found that this can create a hostile work environment.

Trester noted that law firms and companies might face the most risk when a consensual romantic relationship between a supervisor and subordinate turns sour.

"If the subordinate person changes his or her mind, they may be in a position where they're going to be harassed or they're going to claim that they are being harassed by the individual with whom they've had the relationship," Trester said.

The Cozen partner, who helps lead her firm's Women's Initiative, added that, in her own practice, most charges of sexual harassment arise from unwelcome contact outside a relationship. Trester noted that it is not uncommon for sexual harassment claims to emanate from a workplace relationship that ends with at least one party feeling aggrieved.

More than a half-dozen women contacted for this story—including consultants, marketers and public relations professionals with decades of experience in Big Law, each of whom has worked at multiple firms in different areas of the country—said they doubted most firms had any policies governing personal workplace relationships between partners and staff and associates. However, some sources suggested many firms do have policies but fail to publicize or enforce them.

Most said it was important for firms to have actionable policies, noting that doing so could reduce the risk of problem relationships in the workplace.

Others said they thought having a formal policy was beside the point. Instead, they said it was the culture and structure of the firms that often give rise to unwanted conduct. Nearly all of the women said that relationships between partners and associates and staff were pervasive at law firms, sometimes leading to allegations of sexual harassment.

Power Imbalances

Many law firm insiders described a workplace environment rife with relationships between partners, associates and staff.

Speaking on condition of anonymity, out of fear that their careers would be jeopardized if they spoke openly about specific firms and individuals, several women contacted for this story were

able to cite what they characterized as inappropriate relationships at their current or former firms.

Jonathan Kurens, a former practicing lawyer at Arent Fox and Epstein Becker & Green, advises law firms as a senior vice president at global insurance broker and risk adviser Marsh Inc., specializing in employment practices liability and management liability. “I think [dating in law firms] happens more times than people think but less times than all the time,” Kurens said.

Kurens estimated that the vast majority of Am Law 200 firms do have some form of policy addressing subordinate-supervisor relationships. But even where there is a policy, several women cited the “fuzzy” nature of law firm’s hierarchy as being used to justify workplace relationships.

For instance, a male partner who has a relationship with a marketing assistant might claim he is not a supervisor, because the assistant reports to a firm’s chief marketing officer, even though technically as a partner he is an owner of the firm.

“Most firms in the Am Law 200 have challenges that come up in this area, whether it’s claims of inappropriate behavior related to relationships between people in the firm or other types of employment-related matters,” said Kent Zimmermann, a legal industry consultant at the Zeughauser Group. “I think leaders of most [law firms] try to balance between protecting the institution with doing the right thing.”

The structure of most law firms—with control often consolidated in an equity partnership tier and far less power in the ranks below—makes them particularly susceptible to fallout from workplace relationships, said Zimmermann, who has worked as a general counsel and CEO.

“You have a group of equity partners in every firm that are all owners of the firm and then you have a group of the attorneys [and others] who are not owners of the firm,” Zimmermann said. “The equity partner may be able to influence whether or not that associate becomes a partner, what assignments that associate gets and may be able to influence his or her career trajectory [and] whether the associate can even remain at the firm over time.”

That means that in any personal relationship between an equity partner and an associate or staff member there is a mismatch in authority that could leave both individuals involved, as well as their firm, vulnerable.

“If the culture is permissive of allowing people to date who have any imbalance of power between them in the firm, and if the people in those relationships who have less power thrive at the firm, even if they’re highly-qualified on the merits, I think you leave yourself as a firm open to having others who aren’t in those relationships say, ‘Well, what does it take to get ahead around here?” Zimmermann added.

And when misconduct does occur in the office, the more-powerful individual may be insulated from any significant punishment. Zimmermann and others noted that partners with big books of business can have outsized influence and power, especially at firms with "eat what you kill" compensation systems.

Changing the Culture

Some women executives in Big Law contacted for this story said that female partners, often a minority in most firms' equity tier and already fighting other battles over their advancement, can feel powerless to change the culture at their firms because they are beholden to the same compensation systems or depend on male partners for certain assignments.

And along with a lack of diversity in leadership at most firms—the overwhelming majority of which are led by white men—the women said partners may be given the benefit of the doubt or forgiven for workplace misconduct.

"A partner will always be protected before anyone else is believed," said a chief marketing officer at one Am Law 100 firm, describing a lack of assistance from human resources departments in curbing inappropriate behavior.

Most of the women interviewed expressed little faith in the human resources departments at law firms, calling them "worthless" and often more interested in protecting partners and the firms themselves than advocating for whistleblowers.

"I think that talent development and some traditional [human resources] functions are areas where many firms have room for improvement," Zimmermann said. Unlike traditional companies, law firms are organizationally "flat" or devoid of middle management—something that Zimmermann said doesn't help them combat these challenges.

'Now What Do We Do?'

Given the current climate of sexual harassment allegations involving powerful men, law firms need to be especially careful to build barriers against misconduct, said Barnes & Thornburg labor and employment partner David Ritter, whose practice group at the firm has sponsored client-focused seminars on how to reduce sexual harassment in the workplace.

Ritter disagreed with the notion that sexual harassment is an issue that particularly plagues Big Law. "[There are] no data points to say that this is a problem at law firms to a greater or lesser extent than it is a problem or issue elsewhere in the private sector," he said.

But that doesn't mean firms should be complacent. Ritter described a hypothetical partner "who has a book of $5 million, and now this partner has engaged in inappropriate activity, [like] he's dating his secretary [or] an associate." If the partner is a man, Ritter said he might claim to

be “in a consensual sexual affair” with a woman, but then she denies it. “Now what do we do?” Ritter asked.

Law firms should ensure that they have policies in place to protect the firm and its employees, Ritter said. But just having something on paper is not enough.

“You need to enforce them, you have to take them seriously, you have to talk to your folks about them, and it has to be the culture,” Ritter added. “You’ve got to walk the talk.”

And if firms don’t follow through on such protocols, they are putting themselves at risk.

“The courts have always said that lawyers know the law and should be able to enforce and maintain the law,” added Kurens, the risk adviser from Marsh.

Even in cases of simple negligence, Kurens said that courts have held that there is a higher standard of duty for lawyers and law firms in sexual harassment cases arising from soured relationships.

“If you don’t have a policy [and] you allow things to happen, you have not taken steps to protect the employees and prevent something from happening,” Kurens said. “That’s really taking a risk—because you have put nothing in place to protect someone.”

Whether it’s a law firm or a corporate client, Kurens noted that an employer has a duty to protect its employees from harm, especially within the workplace. And potential liability doesn’t extend to law firms that don’t have nonfraternization policies.

Rather, Kurens said that, in certain situations, a firm could be liable if it knows that a supervisor is dating a subordinate and the relationship leads to trouble.

“When someone abuses their power, that’s when it’s a problem,” he said. “And if you have a policy and don’t enforce it, it’s even worse for the firm.”

Law firms have been much slower to address issues of harassment than the corporate clients they serve, said venture capitalist and social policy researcher Freada Kapor Klein of Klein Associates.

She said firms tend to focus narrowly on mitigating the risks from specific claims, rather than confronting the reasons gender bias and harassment take hold. “What we’re seeing in #MeToo is the utter and abject failure [of] traditional approaches,” she said.

Klein said she believes Big Law’s time in the spotlight will eventually arrive, with women coming forward to accuse law firm rainmakers and in-house general counsel of misconduct.

Others aren’t so sure.

Law firms are keenly private. And in a highly competitive industry, employees know that a scandal—or a public lawsuit—could have a huge impact on their careers. Nearly all the women interviewed for this story said they were waiting for Big Law to have its “Weinstein moment.” But they doubted one would ever come to light.