

# The Real-World Implications of #MeToo

## Transforming the Legal Ecosystem (Part VII)

*A Roundtable Discussion of How Lawyers Can Mitigate Workplace Sexual Harassment*

*May 14, 2019*

WASHINGTON, DC: On May 14, 2019, The 3M Company hosted the seventh in the highly successful series “The Real-World Implications of #MeToo—Transforming the Legal Ecosystem” organized by FiscalNote, Her Justice, Thomson Reuters, and 3M. This was the first roundtable in Washington, DC and the largest roundtable to date, bringing together more than 50 senior executives and lawyers from more than 35 major corporations, law firms and policy and educational institutions. Many attendees traveled from out of state to participate in this exciting discussion.

Dave Curran, Senior Vice President & Chief Business Officer at FiscalNote, moderated the discussion. Joe Kennedy, a committed community organizer and advocate for women’s rights, and Alexa Minerva, Director of Strategic Initiatives and Thought Leadership at FiscalNote, played a vital role in organizing the event. Curran and Kennedy developed the series, in collaboration with Her Justice, with the purpose of facilitating a top-level exchange of ideas on how #MeToo issues affect the corporate environment and the unique role lawyers can play in addressing those issues.

Curran began the discussion by thanking the roundtable hosts—3M, Her Justice, FiscalNote and Meridian International Center—and thanked the guests from Dentons which hosted the roundtable in Denver last December and has actively participated in several of the other roundtables. Curran outlined the goals of the session: an open and honest discussion of issues of sexual assault, harassment and gender diversity in the context of the #MeToo movement—one of the most significant issues of our time—in order to develop practical takeaways for corporate and law firm leaders to effect positive change.

Curran began with the simple proposition: if you do the right thing, good things will happen. To Curran, this means companies and lawyers must go above and beyond mandatory legal protections to address meaningfully #MeToo issues because laws can be manipulated to cover up instances of sexual harassment and abuse. Curran stated that lawyers are at least partially to blame for these problems in the workplace, pointing to the prevalence of non-disclosure agreements and mandatory arbitration clauses in employment contracts that have the effect of silencing victims. Curran also observed that law firms should reassess the societal value proposition of their very lucrative investigations processes, especially in those situations where the facts are relatively straightforward. Are they genuinely “protecting the client” when they stretch out the process only, in the end, to

recommend settling a case because they can silence a victim? Is it ok to leave a really bad actor in place when it's possible that he/she might be a repeat offender, because they have the money and leverage to do so? There was an active discussion about how counsel needs to protect reputational risk and consider core ethics issues. Turning to some good news, Curran relayed that, since the start of this roundtable series, a number of firms and corporations have made pledges not to require employees to arbitrate workplace misconduct, and he challenged the roundtable attendees to end mandatory arbitration at their businesses.

**Takeaway:** Compliance with legal protections should be the floor, not the ceiling. End practices that silence victims, such as requiring employees to sign mandatory arbitration agreements that prevent them from bringing claims in court and force them to engage in costly and confidential arbitration proceedings.

Curran introduced Amy Barasch, Executive Director of Her Justice, a nonprofit organization that provides free legal services in family, matrimonial and immigration law to New York City women living in poverty.

Barasch provided an overview of Her Justice and how its work relates to the issues surrounding #MeToo. The women Her Justice serves all live in poverty and they represent the diversity of the New York City community, ethnically and racially. Nearly 40% do not speak English as their primary language and cannot navigate the legal system without an interpreter. Eighty percent of Her Justice clients have experienced domestic violence. Barasch explained that the synergy between the work of Her Justice and #MeToo is the abuse of power. Sex is merely a tool of control. Another similarity is the essential role lawyers can play to correct the balance of power. By recruiting and mentoring lawyers from over 90 major law firms and corporations to represent Her Justice clients, Her Justice shifts the power dynamic and achieves safety and economic security for its clients. For victims of domestic violence and victims of sexual harassment in the workplace, economic empowerment is key.

Curran then opened up the floor for attendees to discuss progress they had seen towards addressing the underlying issues at the root of sexual harassment and discrimination. Several attendees discussed sexual harassment training and whether it was effective. One attendee explained that her company had developed a very practical training on being respectful and generally “not being a creep.” She thought the policy was effective because the company had designed it and prototyped it, so it was tailored to the company’s needs and culture. Another attendee noted the importance of conducting in-person trainings led by corporate leadership. Several attendees agreed that canned videos and training materials developed by outside providers were not effective and did not result in employees taking the training very seriously. In some instances, outdated and corny training videos became the butt of jokes and had the opposite of the desired effect—employees viewed them as a sign that the company did not take sexual harassment and discrimination issues seriously either. One attorney took the position that having employees take the training and sign it was a means of keeping their employees accountable if they violated the firm’s policies. Another attendee said that the trainings were ineffective “check the box” requirements and not taken seriously.

Curran challenged the statement that training in general was not effective, suggesting instead that more interactive and scenario-based training (as opposed to canned training videos) were helpful tools. A crisis management consultant stated that honest training, customized to the company, that focuses on lessons-learned are effective.

In-house counsel from a large company explained that the tone from the top was essential to guarding against #MeToo issues. The company recently hired a new Chief Operating Officer who set-up a diversity and inclusiveness program that includes a series of quarterly “diversity dialogues” that are sent to executives. These are preferable to the traditional trainings on diversity issues. The dialogues are scenarios based on lessons learned and engage corporate leaders in discussions on how the scenarios should be handled.

**Takeaway:** Replace canned training videos with thoughtful, interactive scenario-based training customized to your company or firm.

Turning the floor over to Brittany Masalosalo, 3M’s International Affairs and Public Policy, Government Affairs COE, Curran thanked her for hosting the roundtable and asked her to share her experiences with the group. Masalosalo described herself as an ambassador for every demographic that she represents: African Americans, women, and mothers. Throughout her relatively short career, she has served in the Army and was on the national security team for Vice Presidents Joe Biden and Mike Pence. She was asked about Vice President Pence’s refusal to be alone with women and commented that it never affected her ability to do her job well, noting that Pence generally would not be alone with male colleagues either.

Curran asked female attendees what they would do if they needed to brief their male boss in a car on the way to a meeting and their boss insisted that a male colleague be in the car with them. Would they get in the car or refuse as an objection to the policy? An in-house attorney responded that she would get in the car because she would not want to sacrifice the professional opportunity, but would not be proud of it. She explained that young women are often perplexed about why their male boss invites one of their male colleagues to a meeting and question whether it’s because their boss doesn’t believe that she is competent or qualified enough to handle the project on her own. In reality, it’s about the boss’s discomfort with gender dynamics and is not a reflection on his female colleague’s abilities. Sharing a tip she learned from the last roundtable discussion, she stated that she now anticipates being interrupted and disrespected at meetings and rehearses her responses so that it doesn’t throw her off her game.

**Takeaway:** Anticipate potential #MeToo issues that you might face and rehearse responses in advance.

A corporate CEO asked how we increase conversation, and equip the next generation of workers to have difficult discussions, about these issues. Another participant queried how do we design a company culture so that the onus doesn’t fall on women to raise and resolve these issues? Answering the narrower question of how to address a man’s refusal to be alone with women, she proposed that he should make the policy gender neutral by not meeting alone with men or women.

Another attendee shared that recently her company had a situation where the wife of one of the male executives asked him not to be alone with other women. As a result, women colleagues now don't have the same access to this executive as their male colleagues. While the attendee respected men's concerns about potential false allegations and misperception, she highlighted that this policy advances discrimination against women. Transparency and having conversations about these issues and understanding reputational risk are important. These are global issues and it's important to have these conversations, not just with direct reports, but also with more junior people. Leadership and managers can be change agents by communicating common values. Actions matter more than words. It was suggested that corporate lawyers could facilitate these discussions and draft policies to address these concerns. An in-house counsel cautioned that lawyers will frequently take the most cautious, risk-adverse path.

A law firm partner contributed that scenario planning, a common crisis management tool, could help address these issues. She suggested making sure that everyone knows his/her role ahead of time in order to eliminate the concern and confusion that arises when a male colleague is unexpectedly invited to a meeting or on a trip for no apparent reason. For example, make clear that the male colleague is attending the meeting to take notes and learn from the more senior female colleague who will be leading the meeting.

**Takeaway:** Engage in transparent discussions about #MeToo issues and develop gender neutral policies.

Ally Coll, President and Co-Founder of the Purple Campaign, a nonprofit organization which trains and educates industry leaders, businesses, and employees about the problem of workplace sexual harassment and how best to address it, commented that public figures have a role to play to show that it is acceptable for men to travel with women colleagues. If men shy away from alone time with women, it will increase problems for women in the workplace. In her career, she has regularly traveled with men and it has provided her with great opportunities that she would not otherwise have had.

Another participant commented that the question is different when someone is a public figure. She described her experiences working for a female politician who treated men and women equally and a male politician who refused to be alone with female colleagues because he was concerned about how it would be perceived. As a result, female staffers were rarely brought on business travel. Another female participant noted that men face the real risk of false accusations if they are alone with women, opening them up to possible employment actions.

A senior corporate strategy advisor stated that he had a number of women on his staff while he was working in the federal government, including his chief of staff. He firmly believes that it is necessary to have closed door, confidential conversations with your chief of staff and that, by having a rule against meeting with women in private, women are effectively being shut out of these roles and not getting the same opportunities as their male counterparts. He emphasized that he did not want to normalize the "three people in a room" rule, even if it is gender neutral. It still sends the message that it's risky or inappropriate for male and female colleagues to be alone together. Curran agreed, stating that we need to be willing to take risks if we want to make progress.

**Takeaway:** We need to be willing to take risks if we want to make progress.

A male participant stressed the importance of creating a work culture where, if a male or female colleague is uncomfortable, there are transparent, straightforward avenues through which to raise these concerns. He added that it is possible to draw boundaries with colleagues of the opposite sex without interfering with career progression. For example, he was comfortable traveling with a female colleague, but he became uncomfortable when she asked him to go into her room to make sure it was secure. As a solution, he asked her to wait in the hallway while he was in her room.

A law firm partner explained that the “three people in a room” rule would not work at law firms because of the billable hour model; clients are not willing to pay for an extra non-essential third person. She expressed frustration that this meant many male attorneys default to staffing their cases with male colleagues.

A partner from another major law firm echoed that frustration and noted two things that her firm has done to address these issues. First, her firm increased its focus on improving reporting channels so that victims would be more likely to report issues. By interviewing women who had previously reported issues, the firm learned that, instead of reporting issues of misconduct, many women attempted to “self-cure” issues of sexual harassment or abuse by avoiding known predators and counseling other women to avoid them. To encourage women to report issues, the firm increased the number of people to whom employees could report claims (not just the head of human resources or a managing partner), including at least one woman in every office. Second, her firm implemented a policy requiring attorneys engaging in romantic relationships with colleagues to disclose those relationships. The goal is not to protect the firm from the victim but to protect the victim from the harasser.

To address the under-reporting issue, it was also suggested that companies could designate someone outside of human resources and the legal department as a “victim’s advocate.” This would hopefully increase reporting because many employees are weary of reporting issues to departments responsible for protecting the company and they fear the potential professional repercussions of reporting a claim. An in-house attorney at a large company explained that her company’s Chief Compliance Officer handles these issues, not the legal or human resources departments. Her company also has a strict non-retaliation policy and encourages witnesses—in addition to victims—of sexual harassment to report issues. The company’s goal is to make sure that women feel safe.

In-house counsel from another large company reported that her company recently did an anonymous survey on its reporting process which revealed that most employees want to report issues to their direct manager. As a result, the company is now training lower tiers of management in how to deal with these issues.

A law firm partner mentioned that upward feedback that includes cultural questions—how you feel about these issues within your team—is also an important part of the process. Every partner or team manager at her firm receives feedback during the review process as to how he or she is perceived by colleagues and the review includes suggestions of ways to address any negative perceptions. Hiring a coach to help a partner address these issues can yield improvement in behavior and attitudes as well.

Curran asked whether any of the law firms had issues with “rainmaking” partners and how the firm handled them. A law firm attorney stated that her firm had a past issue with a rainmaking partner which was handled by having a very awkward discussion with the partner. The partner did not realize that his behavior was offensive and sought to change it. The firm hired a coach for the partner to help him improve his behavior, which he has done and he is still with the firm. Curran asked what effect this had on the firm, the attorney replied that people were less afraid to have these difficult conversations because they’d seen the process work.

A managing director from an international nonprofit asked the group for advice on how and when to have conversations with male colleagues about these issues. Could these conversations be part of an annual performance review? Curran responded that J.P. Morgan Chase & Co. makes supporting diversity and inclusiveness part of its annual review process and ties performance in this area to bonuses and compensation.

A participant disagreed with including this in the review process, explaining that this backfired in the military because everyone was always given high marks for diversity and inclusiveness, including bad actors, who were later able to use the positive review as evidence of their innocence.

Another participant suggested occasional anonymous reviews which often provide real information and may validate rumors. She also suggested that, as we become more senior in our organizations, we have a responsibility to speak up more on these issues.

**Takeaway:** Encourage victims to report claims by increasing reporting channels and ensuring that employees have someone to report claims to whom they trust and with whom they feel comfortable speaking about these issues. Tie performance on diversity and inclusion issues to employees’ overall performance evaluation.

The discussion closed with Curran summarizing some of the takeaways from the discussion and thanking attendees for their thoughtful comments.

The series “The Real-World Implications of #MeToo—Transforming the Legal Ecosystem” will continue this fall.

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