

Los Angeles Lawyer

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TOM KELLER

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Sexual Harassment, *Professionally Speaking*

Besides possible sanctions under the Rules of Professional Conduct, various state and local laws provide redress for a victim of sexual harassment while engaging in legal practice

Attorneys brush elbows with their opposing counsel in a variety of legal settings. These encounters can create opportunities for unwelcome sexual advances and sexual harassment.¹ The harassment may occur during a deposition, at an arbitration hearing, at a settlement conference, or at a trial in a courtroom, where it is least expected. For example, the following scenario may occur: a female attorney is sitting at counsel's table in a courtroom, preparing to start a jury trial, and the opposing counsel parks his hand on the female attorney's lap, right below her skirt line. It happens under counsel's table, for 10 long seconds, away from all eyes. The female attorney removes the hand and wonders if this was a ploy to unnerve her, to demean her, to thrill the opponent—or all of the above. The opposing counsel has just made an unwelcome sexual advance. What are the ethical and potential disciplinary ramifications of an attorney's sexual harassment of his opposing counsel?

Twenty-four states in the United States follow the American Bar Association's Model Rules of Professional Conduct.² Under Model Rule 8.4, "[i]t is professional misconduct for a lawyer to...(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of...sex...in conduct related to the practice of law." Comment 4 of the ABA Rule states:

Conduct related to the practice of law includes representing clients; interacting with witnesses,

coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

California, however, is not an ABA Model Rule jurisdiction.³ Rule 8.4.1 of California's Rules of Professional Conduct, effective November 1, 2018, states:

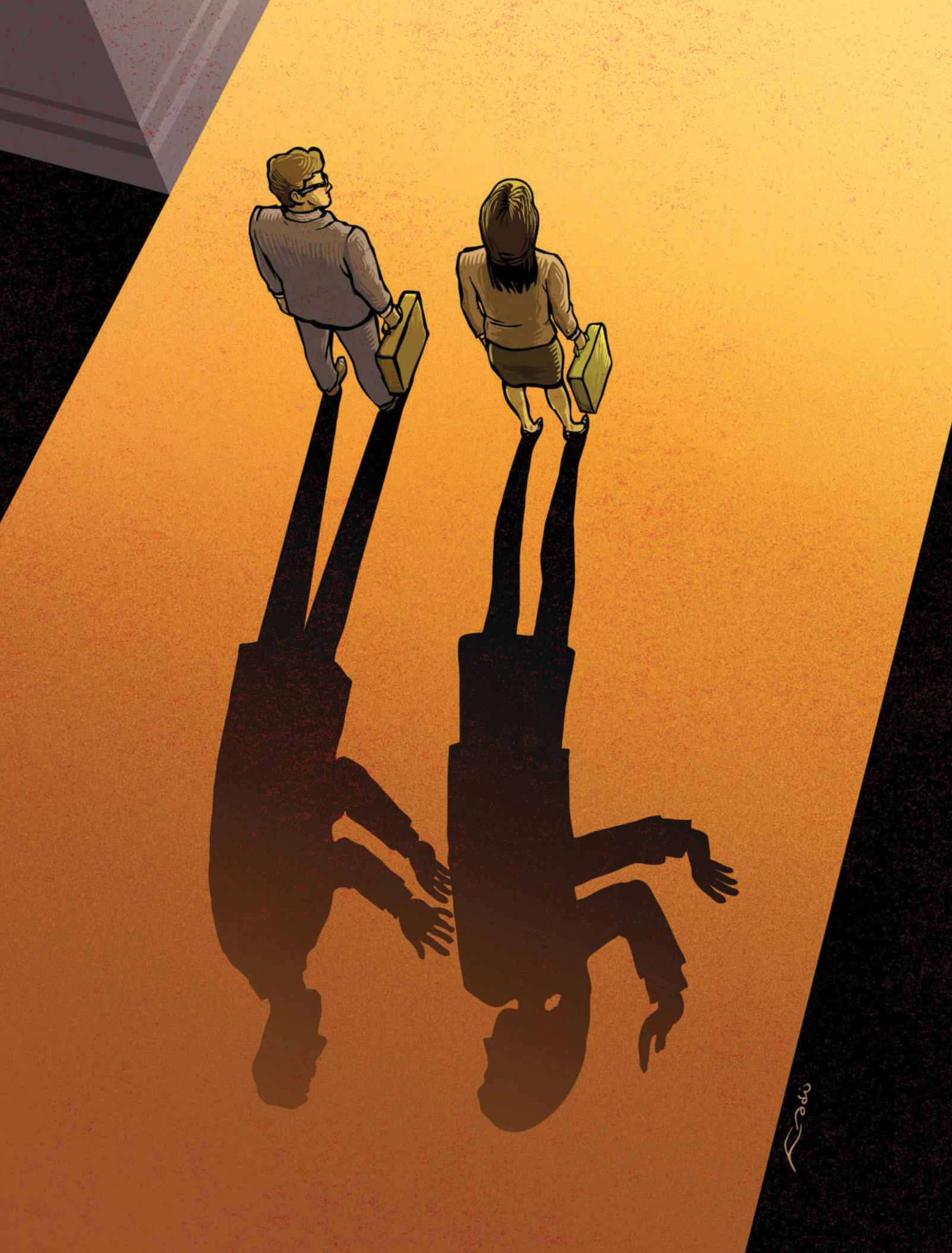
(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not: (1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic...(b) In relation to a law firm's operations, a lawyer shall not: (1) on the basis of any protected characteristic...(ii) unlawfully harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract.

Under Rule 8.4.1(c), sex and gender are "protected characteristics."

The phrase "in representing a client" in Rule 8.4.1(a) differs in wording from ABA's Rule 8.4, which uses the broader phrase "in conduct related to the practice of law." California's Commission Drafting Team for Rule 8.4.1 was cognizant of this difference and chose not to extend the rule's prohibitions to "bar association, business or social activities in connection with the practice of

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HADI FARAHANI



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law.”⁴ The scope of the phrase is important in that the context of an attorney’s legal engagement can affect the rule’s application. For instance, in the right context, an attorney can argue that he or she had not begun client representation, thus falling outside the ambit of the rule. Alternatively, an attorney can argue that the alleged harassment occurred during an event that was unrelated to client representation, e.g. during an MCLE seminar or a law school round table.

Although the State Bar of California has not conducted a formal survey into the scope, type, and extent of sexual harassment in the practice of law, it is a well-known fact that it affects many in social legal settings. In an article published in *The Gavel*, former Orange County Trial Lawyers’ Association President Geraldine Ly courageously recounted her own experiences with the types of behavior that underlie Rule 8.4.1.⁵ Some of these experiences occurred at legal networking and charitable black-tie events. Ly’s article demonstrates the importance of adopting ABA’s Rule 8.4 in its entirety without carving an exception for “bar association, business or social activities in connection with the practice of law.”

Assuming the above-described touching occurred after November 1, 2018, while the attorney was actually representing a client in the courtroom, then Rule 8.4.1(a) would prohibit the attorney from unlawfully harassing all “persons,” including his opposing counsel. Not all harassment is unlawful, however. According to the Equal Employment Opportunity Commission (EEOC), “[h]arassment becomes unlawful where: 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”⁶

Comment [2] of Rule 8.4.1 states: “The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer.” At least one court in California has suggested that Rule 8.4.1 applies to the sexual harassment of a judicial officer. In *Martinez v. O’Hara*, an attorney filed a notice of appeal in which he referred to the female judicial officer’s ruling as “succubistic.”⁷ The court defined succubus “as a demon assuming female form which has sexual intercourse with men in their sleep.”⁸ In a footnote, the court in *Martinez* stated: “Had rule 8.4.1 been in effect at the time the notice of appeal was filed, [the attorney’s]...reference to the judicial officer’s ruling as ‘succubistic’ would have constituted a violation of that rule as well as misconduct under section 6068 of the Business and Professions Code.”⁹ In this opinion, the all-male panel of justices of the Fourth Appellate District, Division Three, in Santa Ana, Orange County, stated: “We publish this portion of the opinion to make the point that gender bias by an attorney appearing before us will not be tolerated, period.” The court reported the grandiloquent attorney to the California State Bar for manifesting gender bias.¹⁰

In the initial scenario described, the opposing counsel’s one-time touching of his opponent’s thigh, in most likelihood, would not be considered “unlawful,” as it would not be “severe or pervasive.” It is unknown yet whether a series of persistent non-serious acts, addressed to multiple different individuals, would collectively demonstrate pervasiveness and unlawfulness for disciplinary purposes.

The ABA model rule is indeed broader than California’s version, in that it prohibits harassment on the basis of sex in conduct related to the practice of law in general and not just in representing a client or in the operation of a law firm. California attorneys, however, cannot avail themselves of the ABA model rule. Thus, it is hoped that Rule 8.4.1 will be interpreted broadly

to cover more interactions and settings to foster “confidence in the legal profession and our legal system.”¹¹

Other Possible Violations

Did opposing counsel commit an act of moral turpitude? California Business and Professions Code Section 6106 states: “The commission of any act involving moral turpitude...whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.” In the attorney discipline context, the term “moral turpitude” includes “particular crimes that are extremely repugnant to accepted moral standards such as ... serious sexual offenses.”¹² Examples include, among others, the attempt to commit a lewd or lascivious act on a child¹³ and knowing possession or control of child pornography.¹⁴ Although the act of touching a female opponent’s thigh is unprofessional and unacceptable, it does not—by itself—rise to the level of a serious sexual offense. As such, this conduct would most probably not be considered an act of moral turpitude.

Did opposing counsel violate California Business and Professions Code Section 6068 by failing to support California law? Section 6068 states: “It is the duty of an attorney...(a) to support the Constitution and laws of the United States and of this state.” With regard to state law, claims of civil battery and a violation of the Unruh Civil Rights Act seem the most pertinent to the scenario at hand.

California’s decisional law on civil battery¹⁵ is encapsulated in Judicial Council of California Civil Jury Instructions.¹⁶ To prevail on a battery claim, one would have to show: 1) that the defendant touched him with the intent¹⁷ to harm or offend him, 2) that he did not consent to the touching, 3) that he was harmed or offended by the defendant’s conduct, and 4) a reasonable person in his situation would have been offended¹⁸ by the touching.

Arguably, the opposing counsel committed battery when he touched his opponent with the intent to deliberately park his hand for around 10 seconds on her lap. This touching would be highly inappropriate, disrespectful to any officer of the court, and invasive of her private space. In the aftermath of the #MeToo movement, society would probably consider this type of touching to be offensive. Assuming there was no consent to the touching and counsel was indeed offended by her opponent’s conduct, the remaining elements for a battery cause of action would be met. Hence, opposing counsel seems to have violated California decisional law by committing battery on the person of his opponent.

Again, arguably, opposing counsel also may have come very close to violating California Civil Code Section 51.9 of the Unruh Civil Rights Act.¹⁹ This section prohibits sexual harassment when a “business, service or professional relationship exists” between the plaintiff and the defendant. Under Section 51.9(a) (1)(B), this relationship can exist between a plaintiff and a lawyer. This section also covers relationships between a plaintiff and an elected official or lobbyist. Senate Bill 224, which amended the statute, effective January 1, 2019, expanded the statute’s reach to individuals who may not be employers but hold themselves “out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a 3rd party.”

The statute does not use the term “client” but instead uses the term “plaintiff.” There are no reported decisions under this statute on whether a relationship between two opposing attorneys falls within its purview. Assuming the statute covers the business or professional relationship between two opposing attorneys, and the opposing counsel’s physical conduct was of a sexual

MCLE Test No. 292

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at <http://www.lacba.org/mcleselftests>.

1. California is an American Bar Association (ABA) Model Rule jurisdiction.
True.
False.
2. Rule 8.4.1 of California Rules of Professional Conduct, on harassment, is broader in scope than Rule 8.4 of ABA's Model Rules of Professional Conduct on harassment.
True.
False.
3. The prohibitions of California's Rule 8.4.1 on harassment do not extend to bar association, business, or social activities in connection with the practice of law.
True.
False.
4. Under Canon 3B(6) of the California Code of Judicial Ethics, a state court judge has a duty to require lawyers in proceedings before him or her to refrain from harassment against counsel based upon sex.
True.
False.
5. Under Canon 3B(6) a state court judge can require a lawyer in proceedings before him or her to refrain from sexual harassment in bar association, business, or social activities in connection with the practice of law.
True.
False.
6. According to the Equal Employment Opportunity Commission, all harassment is unlawful.
True.
False.
7. California Rule 8.4.1 and ABA Model Rule 8.4 do not use the term "sexual harassment" but instead use the term "harassment on the basis of sex."
True.
False.
8. Under the right circumstances, an attorney can be found liable for sexual harassment under Civil Code Section 51.9 of the Unruh Civil Rights Act.
True.
False.
9. To prevail under Civil Code Section 51.9, the plaintiff must show "pervasive or severe" conduct by the defendant.
True.
False.
10. Currently, upon admission to the State Bar, California attorneys take an oath to strive to conduct themselves with dignity, courtesy, and integrity.
True.
False.
11. The attorney oath on dignity, courtesy, and integrity does not extend to bar association, business, or social activities in connection with the practice of law.
True.
False.
12. All current members of the State Bar of California are bound by the oath of dignity, courtesy, and integrity.
True.
False.
13. Disbarment or actual suspension is appropriate for disobedience or violation of the attorney's oath.
True.
False.
14. A local bar association cannot impose a duty of civility and professionalism on a member who took his or her oath before 2014.
True.
False.
15. It is not professional misconduct for a harassed attorney to notify a harassing opponent that he or she would report the opponent to the State Bar for sexual harassment, unless the harassing attorney accepted his or her client's settlement offer.
True.
False.
16. A state court judge can report an attorney to the State Bar for manifesting gender bias.
True.
False.
17. A judge's duties under Canon 3B(6), prohibiting harassment by an attorney, do not extend to transactional attorneys who are negotiating the formation of a contract, outside of litigation, in a case not before a judge.
True.
False.
18. California Rules of Professional Conduct impose a duty on an attorney to report to the State Bar what he or she believes to be unethical conduct by another member of the State Bar.
True.
False.
19. Under California Rules of Professional Conduct, a harassed attorney should always inform his or her client of acts of sexual harassment by the opposing counsel.
True.
False.
20. Under California Rules of Professional Conduct, a harassed attorney may withdraw from representing a client if the harassed attorney's mental condition, as a result of the sexual harassment, renders it difficult for the harassed attorney to carry out the representation effectively.
True.
False.

MCLE Answer Sheet #292



SEXUAL HARASSMENT, PROFESSIONALLY SPEAKING

Name _____

Law Firm/Organization _____

Address _____

City _____

State/Zip _____

E-mail _____

Phone _____

State Bar # _____

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2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the \$25 testing fee (\$35 for non-LACBA members) to:
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Attn: Los Angeles Lawyer Test
P.O. Box 55020
Los Angeles, CA 90055**
Make checks payable to: Los Angeles County Bar Association.
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5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

- | | | |
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| 1. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2. | <input type="checkbox"/> True | <input type="checkbox"/> False |
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nature²⁰ that was unwelcome, and this conduct caused emotional distress, the plaintiff must still show that her opponent's conduct was "pervasive or severe." This she may not be able to demonstrate. For example, in *Hughes v. Pair*,²¹ the court explained that to be pervasive, the sexually harassing conduct must consist of more than a "few isolated incidents." *Hughes* involved claims against the trustee regarding the trust of the plaintiff's minor son. When the plaintiff requested that the trust approve certain payments, the trustee made various inappropriate comments to her on a phone call. For example, he called her "sweetie," and "honey," told her she was beautiful, and suggested that if she would be "nice" to him he would approve the trust payment she requested. Later, the same day, the plaintiff saw the defendant at a museum event, and she alleged that he told her "I'll get you on your knees eventually. I'm going to f _ k you one way or another." Relying on employment precedent, the court held that all the alleged statements were neither pervasive nor severe.

Thus, since counsel was only subjected to one brief incident of unwanted touching in the courtroom by her opponent, no matter how unpleasant it was, it would be difficult for her to argue that her opposing counsel violated Section 51.9. The element of pervasiveness or severity cannot be established.

Did opposing counsel violate his attorney oath? California Business and Professions Code Section 6067 states: "Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability...." Rule 9.7 of the California Rules of Court, titled "Oath required when admitted to practice law," and enacted in 2014, states: "In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: 'As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.'"²² Moreover, Standard 2.8 of the Standards for Attorney Sanctions for Professional Misconduct, titled Violation of Oath or Duties of an Attorney, states: "(a) Disbarment or actual suspension is appropriate for disobedience or violation of...the attorney's oath"

Sexual harassment is an undignified, discourteous, and dishonorable act, because it violates a human's right to be free of discrimination. Therefore, such harassment is evidence of disobedience to the tenets of the attorney's oath, with implied disciplinary ramifications. Whereas isolated incidents may not warrant severe discipline, a pattern of continuous reported misconduct may. Whatever the punishment, it must fit the crime. As noted by legal scholars, fashioned penalties must be "stern, fair, fit the offense, and [be] uniform where they ought to be."²³

Did opposing counsel violate any local bar association rules? In July 2007, the State Bar Board of Trustees adopted the "California Attorney Guidelines of Civility and Professionalism" as "a model set of guidelines for members, voluntary bar associations and courts to use and implement in a way that is effective for the local legal community."

Many bar associations, including the Los Angeles County Bar Association (LACBA)²⁴ and the Orange County Bar Association,²⁵ have in fact adopted these guidelines and impose their own standards of civility and professionalism on their members. LACBA, for instance, requires that its members conduct themselves in a professional and civil manner, striving to conduct themselves at all times "with dignity, courtesy, and integrity." LACBA maintains:

[T]he right to investigate any alleged violation of this Code of Civility, and in its sole and absolute discretion (i) deter-

mine whether any violation of this Code has occurred, and (ii) take action, through the Executive Committee of its Board of Trustees, as it deems necessary to enforce this Code, including but not limited to (a) removal from any and all leadership positions at LACBA, including boards, sections and committees, and/or (b) termination of all membership status and rights in or related to LACBA.²⁶

By engaging in sexual harassment, an attorney may be violating the code of conduct of a bar association to which he or she belongs, prompting a complaint to that association. In fact, in her #MeToo article, Ly encouraged "that hotlines within...[legal] organizations be established so that inappropriate behavior can be reported and actions be taken."²⁷ A report of sexual harassment, which is presumably an uncivil and unprofessional act, to the association's executive committee may trigger an investigation of the alleged violation and jeopardize the member's standing and membership in that bar association.

Complaints to the State Bar

Rule 3.10 (formerly Rule 5-100) of the California Rules of Professional Conduct, titled "Threatening Criminal, Administrative, or Disciplinary Charges," states in relevant part:

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. (b) As used in paragraph (a) of this rule, the term 'administrative charges' means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action....

The advisory Formal Opinion 1991-124 of the State Bar of California Standing Committee on Professional Responsibility and Conduct provides valuable guidance on this issue. In this opinion, the Standing Committee opined: "A statement that 'all available legal remedies will be pursued' unless satisfactory settlement is promptly forthcoming is not, in itself, ethically improper."²⁸

To threaten the opposing counsel, that he would be reported to the State Bar, unless he settled the case or offered some type of concession, would be unethical. On the other hand, a statement to the opposing counsel, as soon as possible, advising him that all available legal remedies would be pursued, be it now or if he repeated his odious conduct, may not be unethical. In addressing his or her opponent's offensive conduct, the harassed attorney must also be mindful of his or her own oath to act with dignity, courtesy, and integrity at all times.

Is there an ethical duty to report the opposing counsel's misconduct to the State Bar? In a formal opinion, LACBA has stated:

There is no California Rule of Professional Conduct presently requiring an attorney to report what he or she believes to be unethical conduct, under risk that failure to report might itself lead to disciplinary action. The Committee believes that it would be inappropriate to find such a duty in the absence of any express requirement in the Rules of Professional Conduct. Accordingly, it is the view of the Committee that while there is no ethical duty to report what a lawyer believes to be unprivileged, unethical conduct on the part of another lawyer, an attorney can and should consider the seriousness of the offense and its potential impact upon the public and the profession, and may, consistent with the ethical obligations of the

California Rules of Professional Responsibility, report such conduct to the appropriate disciplinary authorities for consideration.²⁹

In a formal opinion, the Bar Association of San Francisco Opinion 1977-1 has stated: “The California Rules of Professional Conduct impose no duty upon California attorneys to report a known impropriety of another attorney to the appropriate agencies. However, moral and ethical consideration aside from the Rules would seem to dictate that such an obligation may be proper.”³⁰

Ethically, thus, an attorney is not obligated to report the incident to the State Bar. Moral considerations, however, may dictate otherwise. If enough reports and complaints, albeit minor in nature, find their way to the State Bar, a pattern of improprieties may be established, thus justifying a reproof³¹ or other sanctions against the harassing attorney.

Ethical Duty to Client

Rule 1.4 (formerly Rule 3-500) of California Professional Rules of Conduct, titled Communication with Clients, states: “(a) A lawyer shall...(3) keep the client reasonably informed about significant developments relating to the representation....” Was the opposing counsel’s misconduct a “significant development” that the female attorney had to communicate to her clients? The idea of reporting this incident to her clients may not only be demeaning but horrifying. Will the clients think that their female attorney is somehow at a disadvantage? If opposing counsel’s conduct did not have a significant impact on the attorney’s performance, reporting the incident to the client would not appear to be necessary.

Is there an ethical duty to withdraw from representing the client? Rule 1.16 (formerly Rule 3-700) of California Rules of Professional Conduct, titled “Declining or Terminating Representation,” states: “(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if...(3) the lawyer’s mental or physical condition renders it unreasonably difficult to carry out the representation effectively.” Under 1.16(b), “a lawyer may withdraw from representing a client if...(8) the lawyer’s mental or physical condition renders it difficult for the lawyer to carry out the representation effectively.”

As stated by the State Bar, “[t]here is little authority specifying the differences between...when incapacity renders it “un-

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reasonably” difficult, as opposed to just “difficult,” to continue representation.”³² In *Nehad v. Mukasey*, the court stated that an attorney facing a personal situation (wife’s illness) that made it difficult for him to vigorously pursue his client’s objective had to give notice to the client that he had to withdraw.³³ In *Slavkin v. State Bar*, withdrawal was mandated because alcohol and drug abuse caused the attorney to miss deadlines and fail to attend to client matters.³⁴

Withdrawal would depend on the circumstances of each situation. If the opposing counsel’s sexual harassment has not made it difficult for an attorney to effectively represent his or her clients, withdrawal should not be an issue.

Judicial Ethical Duties

California Code of Judicial Ethics, Canon 3B(6) states: “A judge shall require lawyers in proceedings before the judge to refrain from...(b) sexual harassment against parties, witnesses, counsel, or others...” This Canon appears better aligned with the ABA’s broad Model Rule 8.4 because it covers all “proceedings before the judge” and not single aspects of an attorney’s practice of law under California’s version, i.e., in representing, terminating or refusing client rep-

resentation or in relation to a law firm’s operations. Furthermore, Canon 3B(4) in Chapter 2 of the Code of Conduct for United States Judges (amended March 12, 2019) states: “A judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment”

If the trial judge does not learn of opposing counsel’s sexual harassment, he or she would have no opportunity to address the issue. Under California’s Code of Judicial Ethics, requiring lawyers to refrain from sexual harassment is mandatory. How this would be brought to the judge’s attention during the proceedings, and how the judge would address the issue are yet to be seen. At present, *Martinez v. O’Hara* is the only published decision referencing Canon 3B(6). Under California Code of Judicial Ethics, Canon 3D(2), “[w]henver a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.” The attorney in *Martinez* was reported to the State Bar. Suffice it to say that silence and inaction by a judge, in the

face of a sexual harassment complaint by an officer of the court, would be unacceptable and unethical.

The legal field has not been immune to sexual harassment. The harasser can be a male or a female, with more legal experience, older, and often more powerful. As Anne-Marie Slaughter, noted attorney, scholar, and Princeton University professor, once stated: “Sexual harassment is rooted in power imbalances.”³⁵ I know this to be true, as I was that young female attorney in the Central Civil West Courthouse, Los Angeles Superior Court, in 1993, when my opposing counsel, a prominent attorney 25 years my senior, rolled his chair towards me and parked his hand on my thigh, under counsel’s table. Fortunately, recent amendments to the California Rules of Professional Conduct have attempted to change the landscape of sexual harassment. Although a step in the positive direction, California’s Rule 8.4.1 is restricted in scope and still leaves many unprotected from unscrupulous attorneys in various legal settings. Nonetheless, knowing the legal and ethical implications of an opposing counsel’s misconduct will enable the harassed attorney to assess and analyze the situation from multiple angles, speak up, act, and ensure that dignity,





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courtesy, and honor remain the cornerstones of the practice of law. ■

¹ According to the U.S. Employment Opportunity Commission (EEOC), “harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.” Sexual Harassment, EEOC, https://www.eeoc.gov/laws/types/sexual_harassment.cfm.

² Model Rules of Professional Conduct, Am. Bar Ass’n, available at https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/chart_of_state_rules_of_professional_conduct_nondiscrimination_provisions.pdf (last viewed Aug. 23, 2019).

³ Consult the State Bar’s Ethics Hotline, State Bar of Cal., <http://www.calbar.ca.gov/About-Us/News-Events/California-Bar-Journal/Articles/consult-the-state-bars-ethics-hotline> (last viewed Aug. 23, 2019).

⁴ “Proposed paragraph (a) applies to conduct ‘in representing a client’ rather than using the language of the ABA’s new Rule 3.8(g) [sic] ‘conduct related to the ‘practice of law’ because, consistent with current California rule 2-400, we have retained separate section (b) addressing conduct ‘in the management or operation of a law firm’ rather than trying to have a single provision apply to all conduct, and rather than extending the rule’s prohibitions (as does the ABA’s new Rule 3.8(g) [sic] to bar association, business or social activities in connection with the practice of law.” COMMISSION REPORT AND RECOMMENDATION: RULE 8.4.1 [2-400] 18, available at [https://www.calbar.ca.gov/portals/0/documents/rules/rcc2014/final_rules/rcc2-8.4.1_\[2-400\]-all.pdf](https://www.calbar.ca.gov/portals/0/documents/rules/rcc2014/final_rules/rcc2-8.4.1_[2-400]-all.pdf) (last viewed Aug. 23, 2019). (All references of 3.8(g) should read “8.4(g).”)

⁵ Geraldine Ly, *#MeToo, Yes, it Happens Even to Tough Women Lawyers*, THE GAVEL, at 4, 44 (Mar. 2018) [hereinafter Ly].

⁶ Harassment, EEOC, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited July 13, 2019).

⁷ Martinez v. O’Hara, 32 Cal. App. 5th 853, 855 (2019).

⁸ *Id.* at 858 n.9.

⁹ *Id.*

¹⁰ Cal. Code of Judicial Ethics, Canon 3B(6) states: “A judge shall require lawyers in proceedings before the judge to refrain from...manifesting, by words or conduct, bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation....”

¹¹ ABA MODEL RULE 8.4.1, cmt. 1.

¹² In re Lesansky, 25 Cal. 4th 11, 15 (2001).

¹³ *Id.* at 15.

¹⁴ In re Grant, 58 Cal. App. 4th 469, 476 (2014).

¹⁵ So v. Shin, 212 Cal. App. 4th 652 (2013).

¹⁶ CACI No. 1300 (2017).

¹⁷ “Intent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does.” Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892, 917 (1995).

¹⁸ The usages of decent society determine what is offensive. Barouh v. Haberman, 26 Cal. App. 4th 40, 46 n.5 (1994).

¹⁹ (a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements:

(1) There is a business, service, or professional relationship between the plaintiff and defendant or the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. Such a rela-

tionship may exist between a plaintiff and a person, including, but not limited to, any of the following persons:...(B) Attorney, holder of a master’s degree in social work, real estate agent, real estate appraiser, investor, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer....(I) A relationship that is substantially similar to any of the above.

(2) The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.

(3) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2).

CIV. CODE §51.9.

²⁰ Let’s assume the touching of the leg, under the table, is of sexual nature. This is in contrast to a hand-shake or a high-five that are socially acceptable forms of contact.

²¹ Hughes v. Pair, 46 Cal. 4th 1035, 1048 (2009).

²² CAL. R. OF COURT, R. 9.7.

²³ Kapelus v. State Bar of Cal., 44 Cal. 3d 179, 195 (1987).

²⁴ Los Angeles County Bar Ass’n Code of Civility Guidelines, available at <https://www.lacba.org/docs/default-source/lacba-overall/code-of-civility-guidelines.pdf> (last viewed Aug. 26, 2019) [hereinafter LACBA Civility Guidelines].

²⁵ Orange County Bar Ass’n Civility Guidelines, available at http://www.ocbar.org/Portals/0/pdf/news/2017/civility_guidelines.pdf (last viewed Aug. 26, 2019).

²⁶ LACBA Civility Guidelines, *supra* note 23.

²⁷ Ly, *supra* note 5, at 44.

²⁸ State Bar of Cal. Standing Comm. on Prof’l Responsibility and Conduct, Advisory Op. No. 1991-124.

²⁹ Los Angeles County Bar Ass’n, Prof’l Responsibility & Ethics Comm., Formal Op. No. 440 at 144. available at <https://archive.org/details/LACBAEO/page/n399>.

³⁰ Bar Ass’n of San Francisco Legal Ethics Op. No. 1977-1, available at https://www.sfbar.org/ethics/opinion_1977-1.aspx.

³¹ See “Public reproof” and “Private reproof,” Attorney Discipline Definitions, <http://www.calbar.ca.gov/Portals/0/documents/members/DisciplineKey.html>. When an attorney is found culpable of professional misconduct, but no period of suspension is imposed. If private a reproof is imposed before formal charges are filed, the discipline is part of the attorney’s record but is not made available to the public unless as part of evidence in a subsequent discipline case. If the private reproof is imposed after formal charges are filed, the reproof is reported on the State Bar’s website and is disclosed to the public upon request. The attorney may be required to pass the Multistate Professional Responsibility Examination (MPRE) and/or comply with conditions similar to probation.

³² Suzanne Burke Spencer, *Do I have to? Determining whether withdrawal is mandatory*, MCLE Self Study, State Bar of Cal. (June 2016), https://apps.calbar.ca.gov/mcle/selfstudy/mcle_home.aspx?testID=110.

³³ Nehad v. Mukasey, 535 F. 3d 962, 970 (9th Cir. 2008).

³⁴ Slavkin v. State Bar, 49 Cal. 3d 894 (1989).

³⁵ Anne-Marie Slaughter, *Sexual Harassment is Rooted in Power Imbalances*, FINANCIAL TIMES (Oct. 26, 2017), available at <https://www.ft.com/content/1d624ee0-b8af-11e7-bff8-f9946607a6ba>.



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