

The Real-World Implications of **#MeToo** Transforming the Legal Ecosystem (Part VI)

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

March 21, 2019

SAN FRANCISCO— On March 21, 2019, Uber Technologies, Inc. hosted the sixth in the highly successful series “The Real-World Implications of #MeToo—Transforming the Legal Ecosystem” organized by FiscalNote, Her Justice, Thomson Reuters, and Uber. This was the first roundtable on the West Coast and the largest roundtable to date, bringing together more than 40 senior executives, outside counsel, and in-house counsel from over 30 major corporations and law firms based in the Bay area and elsewhere. As buzz about the first five roundtable series has spread, attendees from across the country traveled to San Francisco to participate in this very important 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, participated and 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 effect the corporate environment and the unique role lawyers can play in addressing those issues.

Uber’s General Counsel, Tony West, opened by zooming in on how the #MeToo movement has raised more cultural awareness than ever about the pervasive reality of sexual assault and misconduct in our society, and It has shown us that every industry and community is touched by these issues. It has also revealed the need to confront sexual assault and misconduct in a way that hasn’t been done before.

He also shared his belief that Uber can make a difference by doing things differently than companies have in the past and committing to transparency, hence why the company is publishing a transparency report this year, that would include sexual assaults that took place on the platform. West added that it was a tough decision to make, as even talking about the issue of sexual violence can seem risky - which helps explain why companies have stayed silent for so long. But if companies are willing to court risk in the name of disruption and innovation, then they can embrace risk in the

name of creating more fairness, safety and justice in our cities. He also added that this project is an industry first, and sorely needed given that data on safety and sexual assaults is generally sparse, inconsistent and mostly unavailable across industry.

After West's opening remarks, Dave Curran, the roundtable moderator, 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 then introduced Amy Barasch, Executive Director of Her Justice, a nonprofit 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 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 commonality 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 NYC 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. 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 nodded, agreeing 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.

Take-away: Develop thoughtful anti-harassment and anti-discrimination materials tailored to your company and conduct in-person trainings so that employees understand that the company takes these issues seriously.

Another attendee thought that in addition to self-reporting issues of harassment and discrimination, employees should feel comfortable coming to the aid of others evidencing these issues and help them stand-up to aggressors. One attendee spoke about the importance of being an influencer within your organization or community. She described how she helped to pass and implement legislation in California requiring corporations to have a certain number of women on their boards.

While agreeing about the importance of requiring corporations to have women on their boards, another participant stated that what is legal is the floor, not the ceiling, and companies need to do more than what they are merely legally required to do. Participants around the room agreed that it was important to do what's right, not just what's legal. Playing devil's advocate, Curran pointed out that there is sometimes a tension between doing more than what's legal and protecting your company or your client's best interest. By way of example, Curran raised that some attorneys silence victims through non-disclosure agreements in the name of protecting the company. One possible solution raised by a participant is for private sector companies to copy Title 9 protections and procedures that provide public sector employees who are victims of harassment or discrimination with a designated victims' advocate to whom claims can be reported.

Unlike in-house counsel or Human Resources, whose duty is to the company, the role of the victim's advocate is to protect the interests of the employee. Though federal law prohibits companies from retaliating against employees reporting certain types of harassment and discrimination, many victims choose not to report claims to HR or in-house counsel because of a fear of repercussions, particularly where the aggressor is in a position of power. Engaging a victim's advocate may alleviate some of these fears and level the playing field between victims and powerful aggressors.

Take-away: Consider hiring a victim's advocate or designating someone within your company (outside of HR or the Legal Department) as a victim's advocate to encourage employees to report claims and level the playing field.

Another solution raised by a General Counsel was to make taking care of their employees the company's number one value. One way his company did this was through a zero tolerance policy for inappropriate behavior, stating that all reported incidents of harassment or discrimination at his company had resulted in the aggressor being terminated. Curran questioned whether enforcement was the solution to #MeToo issues. Stressing the need for prevention in addition to enforcement, the participant replied that his company was developing trainings and policies aimed at entirely eliminating incidents of harassment and discrimination within the workplace. Other participants chimed in to agree that enforcement was not a cure and were eager to hear about the company's new prevention policies.

Take-away: Enforcement is not a cure; it is important to have meaningful policies and procedures that prevent harassment and discrimination.

While applauding the goal of eliminating harassment and discrimination from the workplace, Curran questioned whether zero reported incidents of harassment or discrimination was a good thing; or whether it meant that victims were simply failing to report. Participants agreed that zero incidents might not be possible, but pushed back, stating that, through adequate training, active monitoring, and buy-in from the top, it is possible to reduce significantly—if not eliminate—misconduct.

Several attendees agreed that the tone from the top, and corporate leadership leading by example, are key to decreasing incidents of harassment and discrimination. One participant noted that, not only did the tone need to come from the top, but management needed to be in touch with its employees. The participant cited a study that found that 70% of executives believe that their companies have respectful cultures, while only 20% of employees believe this. Responding to this study, a Chief Marketing Officer observed that lip-service from management about its values and policies is insufficient. Companies must embody their values and hire, fire, and promote based on these values, starting at the top.

Take-away: It's important that the respectful tone at the top permeate the firm culture and is reinforced at all levels.

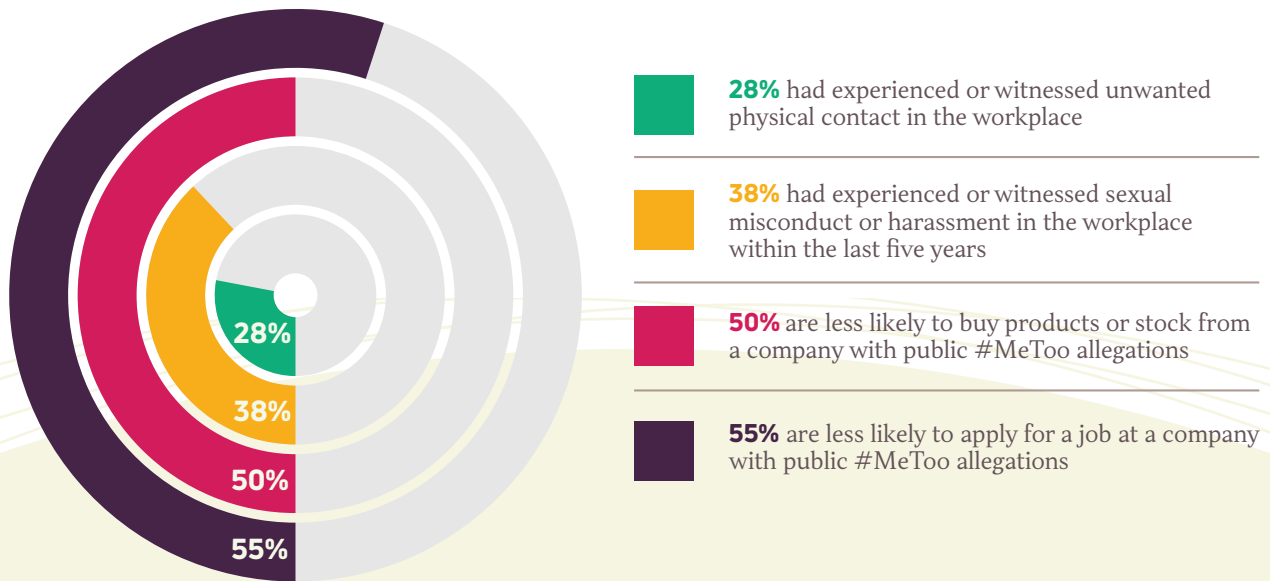
The discussion then turned to corporate culture, specifically the “bro” culture, and what could be done to change it. Efforts to implement quotas for women and diverse candidates were cast aside as helpful, but still tokenism. Several participants discussed the importance of men in leadership positions understanding and advocating for women and minorities. One participant described a program where senior men in the company were assigned to mentor more junior women. The program’s benefits were two-fold: women were given exposure and opportunity and men gained an appreciation for some of the issues women experienced in the workplace of which they may not have been aware. Agreeing that this was an effective strategy, another participant highlighted a Manbassador program at UC Berkeley Business School. The Manbassador program invites men to become a Manbassador by signing a pledge and agreeing to a code of conduct to stand against gender inequity.

Take-away: Men play an important role in the #MeToo movement and should be actively engaged in your company's efforts to promote diversity and inclusiveness.

A participant who worked at a tech start-up observed that, in the start-up world, it's often difficult to build a respectful and healthy corporate culture while in hyper-growth mode because of pressure from investors and shareholders to deliver shareholder value. Disagreeing, another participant who worked for a tech start-up explained that it was possible—and essential— to develop a healthy corporate culture while growing a company. He explained that the failure to develop a positive culture would ultimately undermine the company, harming shareholders and investors and talked about the importance of company's being intentional in developing a culture and taking the time to develop a personal and real code of ethics instead of copying and pasting from one taken off the internet.

Understanding that delivering value to shareholders is a critical objective for all public companies, Curran asked Elizabeth Alexander of FTI Consulting to share statistics demonstrating the impact of #MeToo issues on companies' bottom lines.

The results of a 2018 survey of 5,000 women professionals in the legal, finance, technology, energy and healthcare sectors, conducted eight months after the beginning of the #MeToo movement, **showed that:**



Therefore, preventing #MeToo incidents from occurring is important to a corporation's financial well-being. The full survey results are available at https://gender.ftcommunications.com/pdf/MeToo_at_Work-research.pdf.

Take-away: *Developing a respectful corporate culture and preventing #MeToo issues are essential to a company's success and bottom line.*

Curran explained that lawyers lack training and business analytics and need to hone these skills in order to communicate more effectively to corporate boards the importance of robust training, codes of conduct and zero tolerances policies through visualizations and statistics that are more digestible. Another participant spoke about how data could help test and verify whether companies were sincerely implementing diversity and inclusiveness policies.

Take-away: *Outside counsel should suggest using analytics to bring peer-to-peer pressure on corporate leadership to improve corporate cultures and implement best practices.*

Giving the perspective from “big law,” one law firm partner spoke about the importance of mindfulness, resilience and emotional intelligence to developing a respectful and inclusive culture. Another partner talked about the role of law firm clients in encouraging diversity, stating “every time you pick a law firm, you are giving a voice to someone, so make the right decision and impact change.” Dave Curran commented that a well-known law firm that unsuccessfully pitched to his company presented a team of 34 lawyers, only one of whom was female, which surprised him and led him to choose a different firm. Going a step further, another participant suggested that, if you don’t select a firm because of its lack of diversity and inclusiveness, you should tell the firm that’s the reason it was not selected in order to drive home the importance of this issue to their bottom line.

Take-away: In-house counsel can encourage diversity and inclusiveness by working with firms that demonstrate these values.

As the discussion neared a close, participants reflected on West’s statements about embracing risk to create more fairness, safety and justice. One participant explained that sometimes you need to be uncomfortable and make people uncomfortable to effect change. As a minority, he counts the number of diverse people in a room and voices concern when there is a lack of diversity, even though it’s sometimes awkward to do. Agreeing, a law firm partner stressed the importance of calling out bad behavior and standing up for yourself. She stated that she likes to think in advance about what negative/discriminatory comments might be made to her, then she practices her responses. One response she gives when someone says something she finds inappropriate is “I don’t like that” because it’s short, simple and to the point.

Echoing this sentiment, another participant said that, on one occasion she paused a negotiation with opposing counsel and had her team step outside the room so that she could explain to them that a comment made by opposing counsel to her had been offensive. Her team had not initially realized that the comment was offensive, but appreciated and supported her after she explained. Even though her natural inclination was to say nothing, she recognized that inappropriate comments stemming from implicit or unconscious bias need to be vocalized in order to be resolved. Another participant noted that “it takes guts” to tackle issues of unconscious bias because calling out behavior people may not realize is inappropriate is uncomfortable, but essential to resolving these issues. There is a process by which uncomfortableness can be converted into energy and become a driver for change.

Take-away: Address inappropriate conduct and statements, understanding that, while it’s uncomfortable to do so, it’s necessary to effect change.

Before closing the session, Curran asked participants for any final practical solutions to resolve #MeToo issues. One participant spoke about the “Rooney Rule,” which requires a company to consider at least one diverse candidate for every position and the “Double Rooney Rule,” which requires a company to consider at least two diverse candidates for every position. She stated that the Rooney Rule does not make a very significant impact on diversity, however the Double Rooney Rule results in an approximately 30% increase in minority hiring.

Take-away: Require that at least two diverse candidates are considered for each position in order to increase substantially diversity in the workplace.

Another participant emphasized the importance of having a DE&I policy: diversity, equity, and inclusion, recognizing that merely having a threshold number of women and minorities (“table stakes”) is not equivalent to ensuring that minorities and women are given power and opportunity within the company.

Another participant observed that some companies, like J.P. Morgan Chase, promote diversity and inclusion by making it part of executive performance evaluations and tying performance bonuses to how successful an employee is with respect to promoting, developing and meeting diversity and inclusion criteria. Tying back to earlier comments about the importance of companies “living” their values, participants agreed that making diversity and inclusiveness part of an employee’s responsibilities was an effective way to enshrine the importance of diversity and inclusiveness in the corporate culture.

Take-away: Companies can improve diversity and inclusion by evaluating and compensating their employees against their efforts to support the company’s diversity and inclusiveness policies.

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

The series “The Real-World Implications of #MeToo–Transforming the Legal Ecosystem” will continue with Part VII in Washington, D.C. May 14th hosted by 3M, Corporation. For information regarding our next discussion please contact Alexa Minerva (alexa.minerva@fiscalnote.com) or Joe Kennedy (jkennedy@herjustice.org).