

SPECIAL REPORT

# medical office manager™

## **Stopping Sexual Harassment in the Medical Workplace**

**5 Common Sexual Harassment Policy Blind Spots & How to Fix Them**



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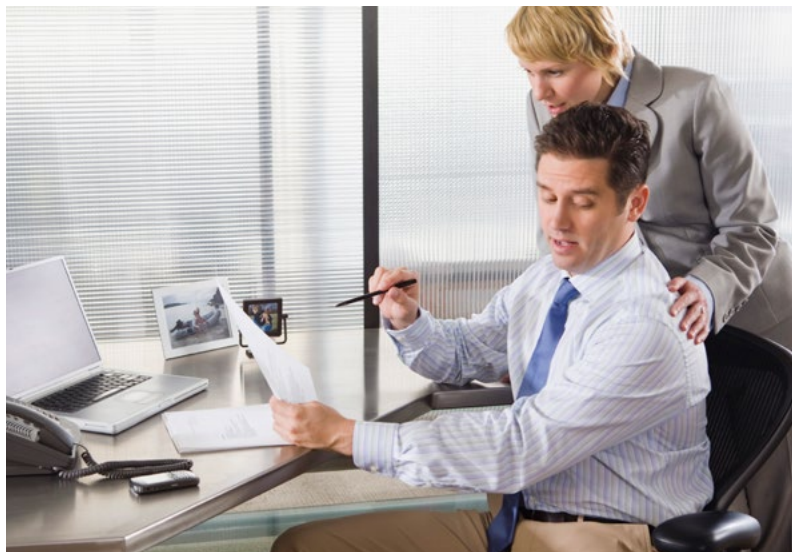
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## 5 Common Sexual Harassment Policy Blind Spots & How to Fix Them

The old-school sexual harassment policy, circa 2000, has become obsolete and needs to be revised to comport with modern times, technology, wisdom and understanding about how sexual harassment occurs.

Recent months have witnessed the morphing of workplace sexual harassment prevention from legal requirement to moral imperative. And while the current fervor is a bit unnerving for employers, to the extent it shatters complacency, it's a positive and even necessary development. Sexual harassment has evolved dramatically in the past two decades—in terms of not just conduct but our understanding of it. As a result, the traditional sexual harassment policy, of circa 2000, has become out of date and badly in need of revision. So reviewing your medical office's current sexual harassment policy is not only a justifiable use of time but an imperative. Here are five common blind spots to look for in your review.

### 1. BANNING SEXUAL HARASSMENT "IN THE WORKPLACE"

**Blind Spot:** Typical policies ban sexual harassment "in the workplace." The problem is that sexual harassment occurs not just within the four corners of the physical workplace but also offsite—in vehicles, during business trips and even at home. Moreover, the employer's duty to prevent sexual harassment may follow

employees wherever they go in the course of their job duties, especially when they are in the company of co-workers. *Examples:*

- California court refuses to dismiss sexual harassment claim of employee/actor who was allegedly drugged and gang raped at home of co-worker/casting director;
- Male salesman's inappropriate sexual remarks to female co-worker at bar was sexual harassment even though it occurred away from work site;
- Failure to take action in response to employee's complaints about co-worker's harassing phone calls makes employer liable for creating hostile work environment even though calls were made from (and to) home after work hours.

**How to Fix It:** Ban sexual harassment not just "in the workplace" or "the medical office" but *all* work-related settings, including offsite activities such as:

- Client and customer visits and service calls;
- Business travel;
- Conferences, training sessions and seminars;
- Company or client-sponsored social functions;
- Any other offsite work assignments.

### 2. BANNING SEXUAL HARASSMENT "BY CO-WORKERS, SUPERVISORS AND MANAGERS"

**Blind Spot:** As with setting, sexual harassment is personnel-agnostic. Employees can suffer it at the hands of not just individuals who work for the same organization but third parties like customers, clients and even outside service personnel.

**Example:** During a service visit, a photocopy technician smacks an employee on the butt with a rolled up newspaper as she bends over to pick up a fallen ink cartridge. The victim's employer is found liable for sexual harassment even though the technician is an employee of the service company and not the organization.

**How to Fix It:** Your commitment to protect medical office employees from sexual harassment should extend to harassment from third parties that employees may encounter in the course of their job at least to the extent you have a reasonable degree of control over those parties, e.g., customers, clients, vendors and contract personnel. While it may be admirable in principle, seeking to extend this commitment to all third parties is neither reasonable nor realistic.

### 3. OMISSION OF CYBER HARASSMENT & REVENGE PORN

**Blind Spot:** Old-school sexual harassment policies don't deal with what is rapidly becoming the face of sexual harassment in the 21st century: cyber bullying and revenge porn. The latter refers to vindictive and nonconsensual online posting of nude or sexually explicit photos, videos and other depictions of ex-lovers in an attempt to embarrass, humiliate and ruin lives. And it frequently happens in the workplace. Although the law is still evolving, the early cases indicate that it's only a matter of time before the employer's sexual harassment duties are extended to cyber bullying and revenge porn.

**How to Fix It:** Make sure your policy defines sexual harassment to include cyber bullying and stalking, non-consensual taking or posting of sexual activity and other forms of sexual abuse against co-workers via social media and other digital fora.

Old-school sexual harassment policies don't deal with what is rapidly becoming the face of sexual harassment in the 21st century: cyber bullying and revenge porn.

### 4. OMISSION OF OTHER FORMS OF SEXUAL MISCONDUCT

**Blind Spot:** While sexual harassment is the most common, it's not the only form of workplace sexual misconduct. And while using the term "sexual harassment" to refer to the whole enchilada may be clear enough for everyday parlance, it won't work in the context of an HR policy.

**How to Fix It:** Ban not just "sexual harassment" but all forms of sexual misconduct that employees may suffer in the course of their work, including:

- Non-consensual sexual contact or attempts to commit it (just be sure to include a clear definition of "consent");
- Dating violence or abuse, i.e., use of fear, degradation, humiliation and/or abuse against a dating partner to gain power and control in the relationship;
- Domestic violence;
- Stalking and cyber stalking;
- Sexually-based communication, i.e., in-person, phone, social media, electronic messages and other communications of a sexual nature that are unwelcome to the employee recipient;
- Invasion of an employee's sexual privacy;
- Exceeding the limits of consent, e.g., Bob lets a friend hide in the closet so he can watch Bob have consensual sex with his co-worker;



- Knowingly transmitting a sexual infection or disease to another person;
- Non-consensual sexual exposure.

## 5. LACK OF ACCOUNTABILITY FOR BAD FAITH ACCUSATIONS

**Blind Spot:** While most sexual harassment complaints are made in good faith, there's always the risk of employees' of abusing the system by making accusations they know to be baseless. Most sexual harassment policies aren't equipped to deal with these abuses.

- *Pattern 1:* The policy doesn't hold employees accountable for such abuses; or
- *Pattern 2:* The policy holds employees accountable for "false" accusations.

The first policy doesn't go far enough; and the second policy goes too far. Punishing employees for making "false" sexual harassment complaints exposes you to liability risks for retaliation if the employee made the accusation in good faith and sincerely believed he/she was harassed.

**How to Fix It:** Reserve the right to punish not false but bad faith complaints. Specify that you won't consider a complaint to be in bad faith merely because the evidence doesn't ultimately support the accusation and that bad faith requires a finding that the complaining employee acted maliciously either knowing that the accusation was false or recklessly without regard to whether the accusation was true.



## Tool: Model Sexual Harassment Policy

The sexual harassment policy has been a fixture of the HR manual for decades. And that's the problem. While lack of toleration for sexual harassment is decades-old, the conduct and our understanding of how to deal with it has evolved significantly in recent years. In the current environment, reviewing your current sexual harassment policy is not only a justifiable use of time but an imperative. Here's a Model Sexual Harassment Policy template you can use to conduct your review.

### MEDICAL OFFICE SEXUAL HARASSMENT POLICY

#### 1. MEDICAL OFFICE COMMITMENT & PRINCIPLES

XYZ Medical Office (Medical Office) is fully committed to providing employees a work environment that is positive, respectful and safe, one that recognizes, respects and embraces the individual dignity, worth and rights of all our employees regardless of gender. We will not tolerate sexual harassment in any form and we are committed to taking all complaints of such conduct seriously and responding as quickly as possible and holding individuals found to have engaged in such conduct fully accountable regardless of position.

#### 2. PURPOSE

The purpose of this Policy is twofold:

- a. To establish clear ground rules regarding sexual harassment and other forms of sexual misconduct so that all employees understand what is and is not acceptable and can thus behave accordingly; and
- b. To describe the procedures that XYZ Medical Office follows for receiving, investigating and responding to complaints of sexual harassment, including imposition of discipline for those found guilty of offenses.

#### 3. DEFINITION OF SEXUAL HARASSMENT

For the purposes of this Policy, sexual harassment in the workplace refers to a course of offensive, humiliating or intimidating comment or behavior based on sex or gender (typically

but not exclusively by one employee—which may include a supervisor or manager) against another, that the person engaging in the behavior knows or ought reasonably to know is unwelcome. Sexual harassment negatively affects the work environment and can lead to negative work-related consequences for the victim. Sexual harassment may consist of a single incident of unwelcome behavior or multiple incidents over time. Sexual harassment is also form of discrimination that is prohibited under both federal and state discrimination laws.

#### 3.1. What Constitutes Sexual Harassment

Sexual harassment includes, but is not limited to:

##### Physical Harassment. *Examples:*

- Leering or inappropriate staring;
- Invasion of personal space;
- Unwelcome and unnecessary physical contact (touching, grabbing, hugging, kissing, etc.);
- Sexual assault and violence.

##### Verbal Harassment. *Examples:*

- Making offensive comments or engaging in behavior towards a person based on their gender, gender identity, gender expression and/or sexual orientation;
- Making sex-related comments about a person's physical appearance or actions;
- Making comments or engaging in behavior because of a belief that someone does not conform to gender-role stereotypes;

- Making offensive comments about members of a specific gender or sexual orientation;
- Using vulgar, sexual or gender-related humor or derogatory language (such as slurs, jokes or innuendo);
- Asking unwelcome questions or engaging in unwelcome conversation about sexual activities;
- Spreading sexual rumors (including online).

**Hostile Work Environment Harassment.** *Examples:*

- Displaying or distributing pornographic or other sexual images, objects, jokes or sayings (including online);
- Making vulgar gestures.

**Threats and Demands.** *Examples:*

- Asking for sexual favors in exchange for workplace benefits;
- Repeatedly asking someone for dates or sexual favors even after they have said no;
- Threatening someone (e.g., with violence, termination or denial of other workplace benefits) if they refuse to comply with sexual advances;
- Making an employee dress or behave in a sexualized or gender-specific way;
- Threats of retaliation or reprisal if the victim makes a complaint under this Policy or exercises his/her recourse under employment discrimination or other laws.

### 3.2. Where Sexual Harassment Can Take Place

For the purposes of this Policy, the workplace or work environment refers to all workplace-related activities, including:

- Activities on Medical Office premises;
- Work assignments outside of Medical Office premises ;
- Work-related conferences, training sessions, or seminars;

- Work-related travel;
- Work-related social functions that Medical Office or its clients or associates sponsor or organize.

The above scope of activities in which sexual harassment can occur includes the job application and interview process, volunteer work and internships with Medical Office, and activities or events that take place outside regular business hours or locations but are linked to and may impact the workplace environment.

This Policy applies to all permanent and temporary employees at all levels, to those with whom Medical Office conducts business, and at all sites where Medical Office business activities take place.

### 3.3. Potential Victims of Sexual Harassment

Both women and men may engage in and experience sexual harassment in the workplace, but women are generally more vulnerable to it because they often hold jobs with lower pay, authority and status than men. That being said, even women in positions of authority can experience sexual harassment. Treating and portraying an employee, especially a woman, in a sexual way can undermine their status and image in the eyes of their co-workers.

In addition, sexual harassment can be perpetrated by women targeting men and by men or women targeting members of their own sex or gender. The offense is defined not by the gender of the victim and victimizer but the sexual nature of the conduct.

### 3.4. What Does NOT Constitute Sexual Harassment

The definition of sexual harassment and the Medical Office Sexual Harassment Policy are not intended to inhibit interactions based on mutual consent between employees, such as consensual conversation about sex in the

workplace, or suggestive imagery, like a poster, that does not offend anyone. However, if you are offended by comments or imagery in the workplace even when no one else is, this does not mean that your concern is invalid. You should express your objections to those involved and file a complaint if the issue is not resolved.

## 4. OTHER FORMS OF PROHIBITED SEXUAL MISCONDUCT

### 4.1. Sexual Offenses Other than Harassment

Medical Office is committed to preventing and protecting employees against not just sexual harassment but a wide range of behaviors and conduct of a sexual nature that is nonconsensual or has the purpose or effect of threatening, intimidating or coercing. As with harassment, both men and women may be perpetrators as well as victims of sexual misconduct.

### 4.2. Definition of Consent

For the purposes of this Policy, consent means conscious, informed, fully voluntary agreement to, or permission for, an act. In determining whether consent has been given, the following principles will apply:

- Although consent may be implied verbally or nonverbally, it should never be assumed;
- Silence, inaction or absence of express denial of consent do not necessarily imply consent;
- Consent is valid only if it is given voluntarily without threat, force or duress;
- Consent is valid only if it is given by a person with adequate capacity—valid consent cannot be provided by a person who is asleep, drunk, high, physically or mentally incapacitated or otherwise judgment-impaired;
- Consent is not valid if it is provided by a person under the legal age of consent;
- Consent is limited in scope—consenting to

one form of sexual activity is not implied consent to another form of sexual activity;

- Consent can be taken back at any time.

### 4.3. Forms of Prohibited Sexual Misconduct

Forms of sexual misconduct banned by this Policy include, but are not limited to:

**a. Non-Consensual Sexual Contact (or Attempts to Commit It)**, i.e., any intentional sexual touching, however slight, with any object by a person upon a person without consent and/or by force, including (without limitation):

- Contact with the breasts, buttocks, groin or genitals;
- Making another person touch the abuser, victim or a third party with or on any of those body parts; and/or
- Any other intentional bodily contact in a sexual manner not involving contact with/of/by breasts, buttocks, groin, genitals, mouth or other orifice.

**b. Non-Consensual Sexual Intercourse**

**(or Attempts to Commit It)**, i.e., any sexual intercourse, however slight, with any object by a person upon a person without consent and/or by force, including (without limitation):

- Vaginal penetration by a penis, object, tongue or finger;
- Anal penetration by a penis, object, tongue, or finger, and/or
- Oral copulation (mouth-to-genital contact or genital-to-mouth contact).

**c. Dating Violence**, i.e., a pattern of assaultive and controlling behaviors by a person against a dating partner in an attempt to use fear, degradation, humiliation and/or abuse to gain or maintain power and control in the relationship.

**d. Domestic Violence**, i.e., use of physical, sexual or emotional abuse or threats to control a current or former spouse or other intimate partner, e.g.,



a person with whom the abuser is living or has lived with in the past.

**e. Stalking**, i.e., a pattern of repeated and unwanted attention, harassment, contact or other course of conduct directed at a specific person which would cause a reasonable person to become alarmed or fear harm or injury, including physical, emotional or psychological harm.

**f. Cyber-Stalking**, i.e., use of electronic media such as the internet, social networks, blogs, cell phones, texts or other similar devices or forms of contact to pursue, harass or make unwelcome contact with another person.

**g. Sexual Exploitation**, i.e., taking sexual advantage of another person for the advantage or benefit of the person committing the exploitation or a third person to the extent such behavior does not constitute sexual harassment or one of the other forms of sexual misconduct banned by this Policy. Examples:

- Invasion of sexual privacy;
- Prostituting another person;
- Photographing, video-or audio-taping sexual activity without consent;
- Exceeding the boundaries of consent, e.g., letting a friend hide in the closet so he can watch you have consensual sex with your partner;
- Voyeurism;
- Knowingly transmitting a sexually transmitted infection, disease or HIV to another person;
- Non-consensual exposure of genitals; and
- Sexually-based stalking.

**h. Sexually-Based Communication**, i.e., speaking to, or directing any kind of communication, words or images of a sexual nature at another person which is not welcomed by the receiving party, which may include interactions in person, by phone, social media, electronic messages and photos and written words or images such as graffiti.

## 5. ROLES & RESPONSIBILITIES

### 5.1. Duty of Management

Medical Office management is committed to:

- Treating all co-workers, seniors, subordinates, colleagues and others with whom they interact with professionalism, dignity and respect in adherence to this Policy;
- Providing satisfactory resources to deal with sexual harassment complaints;
- Taking complaints seriously and responding quickly; and
- Fostering a healthy environment where employees feel comfortable about raising complaints and are kept informed about and involved with actions taken in response.

### 5.2. Duty of Supervisors

Supervisors will:

- Treat all co-workers, seniors, subordinates, colleagues and others with whom they interact with professionalism, dignity and respect in adherence to this Policy;
- Ensure that all employees, including those in positions of responsibility, are made aware of sexual harassment policies as soon as they are introduced, as well as through training, orientation material and education on human rights issues; and
- Continually monitor the work environment to make sure it is free from sexually harassing behavior.

### 5.3. Duty of Workers

Workers will:

- Treat all co-workers, seniors, subordinates, colleagues and others with whom they interact with professionalism, dignity and respect in adherence to this Policy;
- Immediately notify a supervisor or manager if they experience or witness incidents of sexual harassment or other violations of this Policy.

## 6. REPORTING SEXUAL HARASSMENT & MISCONDUCT

### 6.1. Procedures

Medical Office wants to ensure all its employees feel safe, comfortable and encouraged to report any incident of sexual harassment or misconduct they have observed or experienced. Please file a complaint about any incident to your manager [*contact name and info*] or HR advisor [*contact name and info*]. If it is not appropriate to file a complaint with these individuals because they are involved in the incident, the employee should report the incident to any other manager of their choice.

Complaints need not be in writing but should include as much detail as possible, including the name(s) of the individual(s) involved and a description of the incident(s), including actions and/or comments made, place(s), date(s) and time(s).

The possibility of informal resolution may be explored and reached with the consent of all parties. If no informal resolution is sufficient, a formal and thorough investigation of the incident and surrounding circumstances will be undertaken, involving interviews with the complainant, the respondent, and any other individuals who may be able to provide information on the situation.

If the process within the workplace does not address or resolve the issue to your satisfaction, you can report it to the [*state*] Equal Employment Opportunity office [*contact info*].

Threats, attempts or actual incidents of physical or sexual assault are all criminal offenses and can be reported to your local police service.

### 6.2. Assurance of Non-Retaliation

Employees are reminded that Medical Office is committed to providing you a workplace free of sexual harassment and misconduct in accordance with OHS, human rights and other laws and this Policy. Making you feel free to come forward and report incidents or concerns of sexual harassment is an important part of our commitment. Accordingly, we wish to assure you that you won't be fired, demoted, reassigned, disciplined or subject to any other punishment or adverse treatment from Medical Office or its managers, supervisors and other representatives in retaliation for reporting sexual harassment or misconduct in good faith.

### 6.3. Bad Faith Complaints

To protect the innocent, Medical Office reserves the right to discipline any employee who knowingly and in bad faith files a false complaint or makes misrepresentations of sexual harassment or misconduct up to and including termination. For purposes of this Policy, a complaint is not considered bad faith merely because the evidence does not ultimately support the allegation. Bad faith requires an investigation finding that the employee who accused another person of sexual harassment or misconduct acted maliciously knowing the accusation was false or recklessly without regard to whether the accusation was true.

## 7. INVESTIGATION

Acts of sexual harassment or misconduct will not be tolerated and will be responded to with appropriate disciplinary action, up to and including termination, based on a thorough investigation of the incident and the surrounding circumstances. Such disciplinary action may include immediate termination, even if the person committing the act has committed no prior offenses or engaged in previous acts of sexual harassment or misconduct.

## 9. CONTRACTORS & SUBCONTRACTORS

To protect employees from risks of sexual harassment or misconduct by third parties they contact at work, Medical Office will ensure that any contractors and subcontractors hired to perform work at its medical office sites are notified of and required to ensure their workers comply with the terms of this Policy and are held accountable for any violations they commit.

## Employment Law Update: The Weinstein Edition

By [Mike O'Brien](#)

Your news feed, like mine, has exploded with references to someone named Harvey Weinstein for the past few months. What's up? Weinstein is a well-known American film producer and former film studio executive. He and his brother co-founded Miramax, which produced several popular independent films. Several women who have worked with/for Weinstein have accused him of various forms of sexual misconduct, ranging from rape to requests for sexual favors to inappropriate comments. Many of the allegations involve workplace-related behaviors and, because of his success, wealth, and power in the entertainment industry, many felt obligated to comply with or at least not complain about his alleged misbehaviors.

The recent news is reminiscent of other past high profile discussions of the same general topic...Donald Trump grabbing you-know-what, Bill Clinton not having sex with "that woman," the dangers of accepting mixed drinks from Bill Cosby, and the whole Clarence Thomas/Anita Hill Supreme Court confirmation battle of the 1990s.

Now, as in the past, the headline news is providing another teaching moment when employers can talk to employees about inappropriate behavior and harassment on the job. Maybe you should seize this opportunity to have this important discussion with your employees? Why? Keep reading.

### THE HASHTAGS #METOO AND #IHAVE

These hashtags also are appearing all over my news feeds. The #metoo hashtags are a collection of very disturbing stories from women who say they have suffered sexual harassment at work or various forms of sexual predation. The #Ihave hashtags are some stories from men admitting to sexual misbehavior and apologizing for it. There even are #metoo stories from male

victims. Accordingly, this is an issue that likely is on the minds (and on the social media) of your employees right now. Your employees are talking about these very issues right now. There may never be a better time for you to talk with them too. You have their attention.

### WHAT THE LAW SAYS

We should all know this by now, right? Federal and Utah state law prohibit discrimination and harassment based on race, color, religion, age (40 and over), sex, gender, sexual orientation, gender identity, pregnancy, disability, national origin, ethnic background, genetic information (including of a family member), military service,

#### What is Sexual Harassment?

It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

—U.S. Equal Employment Opportunity Commission



When an employer is aware of possibly-unlawful conduct, it has a legal duty to investigate and promptly remedy and problems. An employer can be held financially responsible for violations of these laws.

and/or citizenship. Harassment is unwelcome or unsolicited verbal, physical or sexual conduct which interferes with an employee's job performance or which creates an intimidating, hostile work environment. Examples of possible harassment include:

- questions or comments that unnecessarily infringe on personal privacy, or offensive, sexist, off-color or sexual remarks, jokes, slurs, or propositions or comments that disparage a person or group on the basis of characteristics protected by law;
- derogatory or suggestive posters, cartoons, photographs, calendars, graffiti, drawings, other material, or gestures;
- inappropriate touching, hitting, pushing, or other aggressive physical contact or threats to take such action, and
- unsolicited sexual advances, requests, or demands, explicit or implicit, for sexual favors.

When an employer is aware of possibly-unlawful conduct, it has a legal duty to investigate and promptly remedy and problems. An employer can be held financially responsible for violations of these laws.

## THERE ARE MANY FACES TO THE PROBLEM

By the way, this is not just woman vs. man stuff, although many claims are framed that

way. Today, claims of workplace harassment are filed with federal (Equal Employment Opportunity Commission- EEOC) and state agencies (Utah Labor Commission Antidiscrimination and Labor Division- UALD) by men against women, by women against men, by women against women, and by men against men.

## EEOC REPORT QUESTIONS EMPLOYER ANTI-HARASSMENT EFFORTS

The EEOC also recently issued a report suggesting that employers should consider taking a different approach to preventing harassment in the workplace. The report, resulting from an EEOC task force study over 2015-16, notes that despite ongoing employer efforts, harassment claims remain a major problem in today's workplaces. Thus, the report says employers should "reboot" their prevention efforts. The report calls for a renewed commitment from management to provide a respectful workplace without harassment, development of better policies regarding reporting and investigation, and an investment in effective training. The report says the best training focuses on preventing harassment rather than limiting liability, and suggests that live, plain-language and interactive training is best. You can read an executive summary of the report [here](#) and read the full report [here](#).

## WHAT SHOULD AN EMPLOYER DO?

To prevent harassment and discrimination and minimize legal risk, I tell my employer clients to focus on five basic goals:

1. Have clear policies regarding professional workplace behavior with effective mechanisms that encourage employees to raise issues and complaints;
2. Conduct employee/supervisor training, focus on establishing a workplace of civility,

- respect, and effective communication, and remember that supervisors must set a good example;
3. Try to head off possible problems pro-actively by investigating complaints and enforcing policies; deal with the “aftermath” to minimize the risk of retaliation claims;
  4. Be consistent in decision-making and carefully document the same;
  5. Focus on job relatedness—that is qualifications, demonstrated job performance, skills, etc., in decision-making, not on factors such as sex, race, etc.

## CONCLUSION

Harvey Weinstein made movies, but the misbehaviors he is accused of also are real life problems in most workplaces today. As employers, we all get the chance to write the positive ending to this particular story, so get to it.

## Facts About Sexual Harassment

Sexual harassment is a form of sex discrimination that violates [Title VII of the Civil Rights Act of 1964](#). Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.

- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination

on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

—U.S. Equal Employment Opportunity Commission

## 8 traps to avoid when investigating a sexual harassment complaint

### DON'T RUSH TO JUDGMENT—IN EITHER DIRECTION

Back in the bad old days when employers didn't take sexual harassment seriously, harassment complaints were ignored or swept under the rug. To the extent they were investigated at all, the tendency was to downplay the complaint as exaggeration, fabrication or oversensitivity on the part of the victim.

The good news: Today's employers "get it." All but the most Stone Age of them understand the implications of sexual harassment complaints and the liability and embarrassment they can bring to the firm.

The bad news: Employers are still rushing to judgment, only now they're going in the opposite direction. The modern tendency is to assume that employee sexual harassment accusations are true and swiftly discipline the accused to control the damage. Such hasty decisions not only fail to contain the problem but actually make it worse.

And that brings us to the moral of this story: Your liability for sexual harassment is based not only on your policies and attitudes but on how you investigate complaints. To conduct a reasonable investigation the inquiry must be not just thorough but fair and account for the rights of both accuser and accused.

As a practice manager, you'll probably play a key role in the investigation. So it's critical to be aware of the mistakes that can mar your sexual harassment investigation and make your practice liable—regardless of whether the accusation is actually true. We've looked at court cases and rulings by arbitrators and

tribunals including the federal Equal Employment Opportunity Commission and identified eight things you need to be on the lookout for.

### MISTAKE 1: WAITING TOO LONG

You must investigate promptly. Over time, memories fade, witnesses leave the firm and physical evidence disappears. In addition to compromising the evidence, delaying an investigation undermines its effectiveness and puts additional strain on the accuser, accused and other parties involved.

➤ **Firm loses:** Court rules that an employer's investigation of sexual harassment was unfair because of "excessive" and "unreasonable" delay—the complaint was made in October and not investigated until April.

➤ **Firm wins:** Court praises employer for starting investigation within a day of receiving the first allegation of sexual harassment from a summer employee who claimed a supervisor made unwanted sexual comments.

**Practice tip:** Keep in mind that while speed is important it isn't the paramount concern. Fairness is. Rushing an investigation is just as bad as foot dragging. So, for example, it was unfair for an employer not to give the accused enough time to respond to allegations in a rush to complete the investigation before the Christmas holiday.

### MISTAKE 2: USING INVESTIGATOR WHO ISN'T OBJECTIVE

The person carrying out the investigation must be completely impartial and not related to or in any other special relationship with either the accuser or accused. That's why managers shouldn't investigate subordinates and vice-versa. Individuals also shouldn't investigate if

One common mistake practices make is talking only to the alleged victim. You can't have a fair investigation unless you also give the accused an opportunity to give his/her side of the story.

they have a history of conflict with the accused or the accuser. Nor should the investigators have a personal or professional stake in the outcome, such as partners determined to use the investigation to cover up wrongdoing in their departments.

Of course, it's not always easy to find objective and impartial investigators, especially in small practices where everyone knows and may be affected by the outcome of the investigation. And persons who are objective might not be qualified to do a thorough and competent investigation. As a result, you may have to have somebody from outside your practice do the investigation.

### MISTAKE 3: NOT GETTING BOTH SIDES OF STORY

One common mistake practices make is talking only to the alleged victim. You can't have a fair investigation unless you also give the accused an opportunity to give his/her side of the story.

You must also give the accused the facts they need to know about the allegations, including dates and specific details, to respond effectively.

- **Firm loses:** Arbitrator rules that employee accused of sexual harassment was wrongfully fired because the investigation was unfair. The biggest flaw: The firm waited three months before telling the employee what he was accused of.

- **Firm wins:** Arbitrator upholds firing for harassment because the investigation was fair and the accused employee got a six-page detailed summary of the allegations, including identities of the co-workers who made them and the witnesses who supported them.

### MISTAKE 4: NOT INTERVIEWING THIRD PARTIES

It's important to interview not only the accuser and accused but others who may have relevant information about the situation—especially in the all too common he said/she said situations.

- **Firm loses:** Arbitrator says investigation is flawed because the firm didn't talk to the two individuals the accused cited as witnesses who would support his side of the story.
- **Firm wins:** Court says investigation that included interviews of 40 employees is thorough and fair. The investigator started by interviewing the accuser and then interviewed other employees that the accuser mentioned in her story. Those interviews, in turn, led to interviews of additional employees and uncovered a total of five other alleged victims of sexual harassment by the same supervisor, all of whom were then interviewed. The investigator also interviewed the accused four times and gave him an opportunity to respond to the allegations on each occasion.
- **Firm wins:** Court rules that investigation in which 45 people were interviewed disclosing seven incidents of sexual harassment against seven victims was thorough and fair.

**Practice tip:** Document the results of interviews and when appropriate get written statements from third party witnesses.

### MISTAKE 5: ASKING LEADING QUESTIONS

It's not just how many interviews you do but how you do them. One common interview mistake



to avoid is to lead witnesses—that is, phrase questions to set up the witness to respond in a certain way.

*Example:* Jane accuses the billing manager, Mike, of making inappropriate remarks about her tight clothes not only to her but to her colleague, Megan. So the investigator decides to interview Megan to see if she can confirm the story.

- **Bad interview question:** “Did Mike ever say anything to you about Jane’s tight clothes?”
- **Good interview question:** “Did you ever hear Mike make any inappropriate comments about you or any of your colleagues?”

## MISTAKE 6: INTERVIEWING WITNESSES IN EACH OTHER’S PRESENCE

Interviewing the accuser in front of the accused can intimidate the accuser, and vice-versa. Even third party witnesses can be influenced by the presence or statements of others. Result: The testimony becomes less credible as evidence.

- **Firm loses:** Court slams investigators for failing to warn two witnesses not to confer when putting their complaints of sexual harassment in writing and allowing them to give their accounts together in the same room at the same time.

**Practice tip:** Be on the lookout for and take steps to minimize the risk of witness collaboration and intimidation. Witnesses should be interviewed separately and not in the presence of other witnesses.

## MISTAKE 7: NOT FOLLOWING YOUR PRACTICE’S OWN PROCEDURES

A surefire way to taint an investigation is to deviate from your practice’s investigation procedures. Although you can be flexible if the occasion demands it, make sure you have a solid justification any time you depart from normal policy and procedure.

## Procedure for investigating sexual harassment complaints

### A. Policy

Complaints of discrimination or sexual harassment are taken seriously and will be dealt with promptly, thoroughly, impartially and equitably. Where discrimination is found to have occurred, the Practice will act to stop the discrimination or sexual harassment, to prevent its recurrence, to remedy its effects, if any, and to discipline those responsible.

### B. Receipt of complaint

After receiving any employee’s complaint of an incident of alleged discrimination or sexual harassment, the manager who receives the complaint will immediately contact the Practice Human Resources (HR) Manager.

### C. Investigation

After receiving a complaint incident of alleged discrimination or sexual harassment, the HR Manager will initiate an investigation to gather information about the incident. If the HR Manager is unable to initiate an investigation, because of a conflict or for any other reason, the Practice shall designate another individual to act as investigator for the matter.

Reports will be investigated promptly, thoroughly, impartially and fairly in accordance with the circumstances. In all cases, the employee accused in the complaint will be provided with information as to the nature of the complaint.

The employee filing the complaint and the employee who is accused in the complaint will have equal rights to be interviewed, identify witnesses and provide documentation pertaining to the complaint. The standard for evaluating complaints shall be a preponderance of the evidence.

### D. Recommendation

At the completion of the investigation, a recommendation will be made to the appropriate management official regarding the resolution of the matter. The recommendation is advisory only.

After the recommendation has been made, a determination will be made by management regarding the resolution of the matter. If warranted, disciplinary action up to and including involuntary termination will be taken.

➤ **Firm wins:** Court finds it reasonable for employer to depart from its procedure of having supervisors conduct internal and “discreet” investigations of sexual harassment allegations by instead handing the matter over to the police. That’s because the accused was the owner’s brother and calling in the police was necessary to avoid any appearance of bias.

## MISTAKE 8: NOT DOCUMENTING INVESTIGATION

As lawyers like to say, if it isn’t documented, it never happened. It’s critically important to thoroughly document each step of your investigation so you can retrace your steps and prove that the investigation was thorough and fair.

➤ **Firm loses:** Court rules employer didn’t make detailed notes of witness interviews he conducted. He just made a general synopsis of what each witness said. This wasn’t adequate for determining what the witnesses actually said in the interview, said the court.

➤ **Firm wins:** Court says investigation is properly conducted, citing detailed notes of interviews and written statements taken from all of the key witnesses.

## CONCLUSION

Sooner or later, one of your employees is bound to complain about being sexually harassed by a co-worker. Such complaints are emotionally disturbing and expose your practice to serious legal risks. But as the practice manager, you need to understand that how you respond to the complaint has just as much impact on your liability as whether the complaint is actually true. The best way to protect your practice is to:

➤ Recognize that overreacting to a sexual harassment complaint is just as dangerous as ignoring it;

Ensure that the investigation process accounts for the rights of not just the alleged victim but the accuser.

- Help management resist the temptation to “put out the fire” and rush to judgment;
- Remind the decision makers that being accused doesn’t make an employee guilty of sexual harassment;
- Have somebody objective and qualified thoroughly and fairly investigate if the accusation is true; and
- Ensure that the investigation process accounts for the rights of not just the alleged victim but the accuser.

## Sexual harassment investigation DOs & DON'Ts

- ✓ **DO** select an impartial and objective investigator or investigative team
- ✓ **DO** let the accused answer allegations
- ✓ **DO** give the accused detailed information he needs to answer the allegations
- ✓ **DO** interview all relevant witnesses, including those the accused asks you to interview
- ✓ **DO** interview witnesses thoroughly
- ✓ **DO** thoroughly document each step of the investigation
- ✗ **DON'T** assume a person is guilty just because he or she has been accused
- ✗ **DON'T** unnecessarily delay the investigation
- ✗ **DON'T** put a speedy investigation ahead of a fair one
- ✗ **DON'T** interview witnesses in the presence of other witnesses
- ✗ **DON'T** deviate from company investigation policy and procedures without justification

## Checklist of steps to take when conducting an investigation

When an employee makes a sexual harassment complaint, you have an obligation to conduct a thorough and timely investigation. In many circumstances, the filing of a complaint sets in motion several legal and regulatory requirements for a business.

This checklist will help you conduct a timely and thorough investigation so that you can determine a proper and appropriate response. Use this checklist to gather the necessary information you need to obtain a clear picture of what happened.

✓	Step	Action	Considerations
	Notification is made / Allegation made by one person	Investigation should begin within 72 hours	Is this a concern or a formal complaint? A concern gives the complaining party some cover while a formal complaint is formal and out in the open.
	Investigation: pre steps—get organized and set time aside to conduct a timely and thorough investigation.	Look at and consider the files on each of the parties	Ask yourself, "is it in their character to do what is alleged?"
	Interview the alleged victim first	Ask the <i>who, what, when, where</i> and <i>why</i> questions. Determine if this is a concern or complaint? Ask for names of potential witnesses (actual or character).	Look for specifics and consider "is this plausible?"
	Interview the alleged perpetrator next.	Tell them that a concern or complaint has been raised and ask for their response and their side of the story. Ask for names of potential witnesses (actual or character).	Look for specifics and consider "is this plausible?"
	Interview all the witnesses from both sides.	Ask them if they knew about the micro incident? Ask them if they think it is in the person's character to do what is alleged?	
	Assemble the findings.		
	Draw a conclusion.	There are three possible conclusions: 1. The findings substantiate (prove) the allegation to be true; 2. The findings fail to substantiate or overturn the allegation (suggest allegation is false); 3. The findings cannot substantiate or overturn the allegation—the findings are inconclusive.	
	Make a decision regarding next steps.	There are two possible steps: 1. Close the case because the allegation was overturned. 2. Assign a punishment (warning or termination) because the allegation was substantiated.	

## Why do some get away with sexual harassment?

By [Lynne Curry](#)

Harvey Weinstein. Matt Lauer. Bill Cosby. Roger Ailes. Bill O'Reilly. Uber executives. And maybe someone you know. How can these men not "get it?" How do they get away with sexually harassing those who work for them? And if you're a practice administrator or HR officer, how do you protect your company, and your and your company's reputation?

First, these men didn't have to "get it." They faced no consequences. Here's why:

### THE CEO/"STAR" EXEMPTION

More than 30 women accused the 65-year old Weinstein of harassment. His sexual misconduct, including rape allegations, constituted an open secret, publicly joked about during the 2013 Oscars. Dozens of Weinstein's employees, including top executives, knew personally or anecdotally of Weinstein's conduct.

Who, however, could take on Weinstein, who owned his own company? One accuser described the balance of power as "me: 0, Harvey Weinstein: 10." Further, Weinstein enforced a code of silence, requiring that employees sign contracts that they would not criticize the company or its leaders in a way that could harm his reputation.

Similarly, Bill Cosby allegedly is a serial abuser who sexually assaulted women across many years and cities. When a woman protested or sued, he and his attorneys lashed out against her with denials and defamation lawsuits. Said several of the more than 50 women who accused the world famous and beloved Cosby as long ago as 1969, "Who would believe me?"

And which of Ailes' more than 20 accusers could survive the career-crushing consequences for taking on Fox News' chief executive officer or its star, Bill O'Reilly?

Who, after all, can stand for the woman—or man—protesting a senior executive's harassment? Not the HR officer several power rungs lower than the executive.

### NO MONETARY CONSEQUENCES

Fox News paid the women who accused Roger Ailes and Bill O'Reilly millions of dollars, even as they paid Ailes and O'Reilly millions in compensation. Weinstein's company settled eight lawsuits to protect him. Did harassment cost Ailes, O'Reilly or Weinstein? Not until the end.

### COVER UP

Four months after an Uber engineer alleged that Uber's human-resources team systematically ignored sexual harassment complaints, external attorneys investigated 215 separate sexual harassment, bullying, retaliation and bias cases. The result—the company fired 20 employees, issued "final warnings" to another seven and gave 31 others remedial training.

When Fox and Friends anchor Gretchen Carlson complained to her supervisor about her co-host, Ailes called her a "man hater" and demoted her. Although many at Fox knew Ailes frequently made inappropriate sexually-laden remarks, Fox's culture of fear prevented others from coming forward.

Who, after all, can stand for the woman—or man—protesting a senior executive's harassment? Not the HR officer several power rungs lower than the executive.



## RATIONALIZATION

Those accused appear to shed their victim's discomfort and accusations like a snake sheds its skin. Weinstein reportedly told the women he harassed "this is how it's done in Hollywood." He told others his interactions had been consensual. When he finally asked Hollywood stars to protest his firing, he rationalized that he'd grown up in the Sixties. In a televised interview he offered the excuse that "everyone makes mistakes."

Similarly, board members and investors rationalize harassers' actions, citing the bottom-line results senior executives accused of harassment bring to their companies. Weinstein's 2015 contract offered a "cure" for sexual misconduct, specifying the damages he needed to pay for the first, second, third and subsequent incidents, as long as he reimbursed his company for settlements or judgments.

## WHAT BRINGS THEM DOWN?

Comedian Hannibal Buress kindled the media firestorm that brought down Bill Cosby when a clip of his jokes went viral, leading dozens of victims to publicly accuse Cosby of assault.

Former Uber engineer Susan Fowler's 2,910 word blog post detailing sexism and harassment triggered the investigation that led to the termination of 20 employees and three executives, including Uber's CEO, when it went viral.

It took a lawsuit to end Roger Ailes' 20-year reign. Carlson prevailed in her lawsuit in part because she secretly recorded Ailes saying he thought she and he should have a sexual relationship and because her lawyer sued Ailes personally and not Fox News. Ultimately more than two dozen women accused Ailes of sexual harassment and spoke out against Fox News' culture of misogyny and hush money.

A media firestorm and advertisers' abandonment of his shows led Fox News' executives to withdraw support from O'Reilly.

The secret's out. Those who have had immunity lost it with Cosby, Weinstein, Ailes and Uber.

## HOW CAN YOU PROTECT YOUR COMPANY AND YOUR AND YOUR COMPANY'S REPUTATION?

The secret's out. Those who have had immunity lost it with Cosby, Weinstein, Ailes and Uber. If you're a practice manager or in HR, simply print the last several months of media reports and ask your Board members, investors or senior executives if they want your practice on the front page or destroyed. Ultimately, serial abusers can be brought down.

## Five dangers in dealing with harassment claims

As with firing, the rules for handling sexual harassment claims are well known, yet employers still make mistakes, says management consultant **Joseph Godwin** of F&H Solutions Group in Asheville, NC. Here are five areas that warrant attention.

### 1. NO, IT'S NOT SOUR GRAPES

Don't dismiss any complaint, particularly one from a fired or demoted employee, as sour grapes or a lame attempt at revenge. Many an employer does that and doesn't investigate properly.

But think it through. Did the office hire a disgruntled employee or did it make the employee that way?

There are indeed times "when the motive is getting even," Godwin says. But in his own experience investigating claims, he finds that when somebody makes a complaint, invariably "there's something to it."

### 2. THERE HAS TO BE A DECISION

Always come to a conclusion.

Not unknown is the scenario where the employer takes the victim's complaint to the accused, the accused denies it, and the matter becomes a he-said/she-said situation that never gets settled.

The employer's job "is to address it and resolve it," Godwin says. Don't expect to be able to determine guilt beyond all reasonable doubt. Use a lesser standard of credibility, but make a decision one way or the other based on the facts.

In most cases, the decision will be in terms of "it looks like we did (or didn't) have an incident here."

And if the finding is in the negative, tell the accuser "we talked to So-and-So. He did not behave properly, and he's sorry and we're sorry. But what happened really isn't harassment."

Be careful with anyone who has filed an EEOC complaint, Godwin says. Explain any action that adversely affects that person so there can be no suspicion of retaliation.

### 3. YES, SUSPICION COUNTS

Watch out for retaliation. It can occur even when a complaint is found to be meritless. And it doesn't have to be intentional or even real; the mere appearance of it is enough to cause problems.

In one case, four employees requested time off to take a vacation trip together and were granted it. Then in walks a fifth employee asking for leave to join them and the request was denied. And it just happened that the fifth employee had earlier filed a complaint of harassment.

The reason for the denial was valid – allowing the leave would have left the office short-handed. But the supervisor didn't explain that, and that allowed for the perception that the denial was retaliatory.

Be careful with anyone who has filed an EEOC complaint, Godwin says. Explain any action that adversely affects that person so there can be no suspicion of retaliation.

And another caution: don't mention the earlier complaint or say the action is not retaliatory. Doing so raises the question of "why is this getting mentioned?" and the wheels of suspicion start to turn.

#### 4. SIZE REALLY DOESN'T MATTER

Don't think a small office is immune to sexual harassment claims. True, Title VII of the Civil Right Act applies only to employers with 15 or more employees, but other employees "still have weapons."

There are state and local laws, and some allow claims against employers with only six employees.

Other actions can also be brought.

If there is unwelcome physical contact, there can be assault charges. Godwin cites one case where a federal court upheld an employee's suit for sexual harassment and battery after her supervisor grabbed her buttocks and told her he wanted to have sex with her in the back room.

There can also be tort claims, and unlike discrimination complaints, those carry money damages.

If there's fear of injury, there can be a claim of emotional distress. Or, if the harasser restricts the movement of the employee while making sexual advances, there can be a claim of false imprisonment.

And along with the legal issues is the bad publicity that can follow, he says. Picture the employee appearing on local TV saying "I'm getting sexually harassed at Practice X, and they won't do anything about it."

#### 5. BARE BONES AREN'T ENOUGH

Have a comprehensive complaint procedure.

"Bare bones procedures don't work." If the EEOC comes to call, the manager needs to be able to say "this is our procedure, and this is what we did."

It's not enough for the procedure to say simply "bring all complaints to management." It needs to give the title of the person who handles complaints.

In one case, a policy only designated management as the contact, and an employee reported a complaint to the benefits manager. The complaint did not get properly investigated, the employee filed a claim, and the employer responded that "the benefits manager wasn't really a manager, so the employee didn't really report it."

That argument didn't go over well. The court said that in the employee's eyes, the benefits manager was management.

The complaint procedure also needs to name more than one contact person lest the first person be the harasser.

And it needs to say whether complaints have to be in writing and if so, what they should include – what happened, when, the name of the harasser, and the names of witnesses.

The safest approach is to require that it all be in writing, he says.

That doesn't relieve the office from investigating verbal complaints. But it's a good provision to include, because having the facts in writing eliminates the situation where a witness's account is different from the account the accuser gave, and the accuser responds with "I didn't say that. I said something else."

## Defuzzifying dangerous company cultures

By [Rex Conner](#)

Google's recent events have called into question its company culture, and the cultures of others in Silicon Valley. The questions swirling around the company culture will continue long after the current situation is resolved. With that news and other high-profile company cultures in the spotlight, it's strange that no one is talking about the roots of company cultures.

What is at the roots of a culture? A lot of humans that are going to interpret rules, expectations, and policies are at the root. Until the roots are addressed, attempts to establish or change a company culture will only be temporary.

In the case of Google, the question that deals with the culture isn't as much about what is acceptable gender policy as much as it is, how subjective—open to interpretation—are those policies and other policies that influence the culture.

Of course, the more visible necessity of strong leadership sending a clear, strong message about the culture is essential. Equally as essential and not as obvious is the need to have policies, practices, and processes in place that are objective—not open to interpretation. Subjective policies, practices, and processes will counteract all of the constructive work of the leadership and the message.

### WHERE IS THE DANGER?

Fuzzy language, processes, and expectations are the danger and they hide in plain sight. "Fuzzy" means subjective—open to interpretation. That is where the few bad apples that want to resist, or to counteract a positive culture will hide.

For example, a financial services company in the Southwest had to recover from its first sexual harassment scandal and had to recover quickly.

Phrases such as "will not be tolerated," "unwelcome conduct," "an offensive environment," are examples of fuzzies.

Until that point, it had been a good-ol'-boy culture in which the compliant phrases about sexual harassment had been circulated, but the policies were fuzzy with plenty of room to protect the leaders that were used to getting around the rules.

Phrases such as "will not be tolerated," "unwelcome conduct," "an offensive environment," are examples of fuzzies. This is where the people that might cause trouble begin to rationalize their actions and hide behind the interpretations.

The fuzzies are dangerous when they are in the policies, processes, and consequences. If there is something open to interpretation, there are grounds for conflict.

### WHAT'S THE REMEDY?

Fuzzies can be squeezed out of policies, processes, and consequences through a relatively simple process taught by human performance guru, Dr. Robert Mager. He calls it Goal Analysis, but he describes it as defuzzifying fuzzies.

Once a fuzzy is discovered, it must be translated to observable performances. If done in conversation it sounds something like this:

**Boss:** "There will be no unwelcome conduct!"

**Defuzzifier:** "Well said, Boss. When you observe "unwelcome conduct" (or whatever the fuzzy is) what actions are you observing?"



**Boss:** "Well, no one should tell jokes that the listeners consider to be inappropriate for the workplace,"

**Defuzzifier:** "Fair enough. What else?"

**Boss:** "There should be no pictures on display that people consider to be sexually oriented."

**Defuzzifier:** "Got it. What else?"

The "what elses" continue until the boss decides the list of observable performances describes her fuzzy of "unwelcome conduct."

That process is how the fuzzies were addressed in the policies and in all of the communications dealing with sexual harassment in the financial services company. That complemented the leadership's strong message of the cultural "clarification." With the fuzzies translated into observable performances, there were no places left to hide.

Calling this a "simple" process does not mean this conversation or the efforts to review and revise work processes to rid them of subjectivity are easy. It takes a lot of effort, but the process is not complex.

The work processes that must be reviewed are all of those that support the message. In our sexual harassment example there are processes for:

- Educating people on the subject
- Reporting violations
- Addressing reports of violations
- Taking disciplinary actions
- Reviewing and revising policies

Each process is made-up of steps taken in order to achieve the intended outcome. The steps must be reviewed to ensure there are no gaps in the process and that the language is free of fuzzies.

The problem with having fuzzies is that it puts bosses in the tenuous position of being the judge.

## WHAT IS THE DANGER OF OTHER CULTURAL FUZZIES?

Subjectivity cannot be allowed in the language, policies, and practices of a critical cultural component of an organization. Sexual harassment is an obvious example, but this applies also to cultural descriptions, such as "high performance culture," "a great place to work," or "an inclusive culture."

The problem with having fuzzies is that it puts bosses in the tenuous position of being the judge. Yes, you want bosses to have good judgment, but you don't want work processes to cause them to interpret subjective guidance on what should be done, how it should be done, and how it should be evaluated. That opens each situation to conflict, which is a tremendous obstacle to performance in the workplace.

When you drill down to the root of most workplace conflict, you will find the disagreement is over a work process that is subjective—left open to interpretation. Even a good boss will find it difficult to be good when they are trying to defend subjective work processes and systems. As W. Edwards Deming—the acknowledged Father of the Quality Movement—put it, "A bad process will beat a good person every time."

Subjective work processes and systems are the dangerous root of most all evil in the workplace.

## Physicians behaving badly: what to do when it affects patients

Poor physician behavior. It can run the gamut from rudeness to actions that invite malpractice claims. When does it cross the line from unpleasant to necessitating action from the practice? The answer is when it impacts the patient or has potential legal significance. And sometimes it does both.

### PATIENT LOSSES, COURT LOSSES

The first concern is the patients. Whenever a physician's behavior negatively affects patients, the office needs to address it promptly. That doesn't mean a patient has to be on the receiving end of rudeness or even experience direct harm. It simply means the behavior is bad enough that patients notice it.

When a doctor shows outbursts of anger or berates a nurse or staff member within earshot of patients, consequences are apt to arise. At best, there's going to be a loss of patients. Some of that loss will occur because patients simply go elsewhere. The rest of it will come in the form of declining referrals. Other doctors witness the behavior at the hospital or hear about it via the grapevine and drop their referrals because they don't want to subject their patients to it.

Added to the patient loss is the risk that the doctor will expose the group to employment law claims.

That can happen, for example, if the behavior is discriminatory or falls into the area of sexual harassment.

A big danger is malpractice exposure. A good doctor-patient relationship, characterized by communication and confidence, tends to keep malpractice at bay.

The problem of disruptive behavior is not limited to medical practices.

### GOOD LEADERSHIP PLUS COUNSELING

The problem of disruptive behavior is not limited to medical practices. All professional organizations experience it, mainly because professional people are lots of times highly strung and highly motivated, which can lead to "a high level of tension in the practice.

The main line of defense, therefore, is a physician leader who can exercise authority, who can win the respect of the other doctors, and who can either moderate their behavior or nudge them into psychological counseling.

Counseling is the route medical organizations most often take when a member's behavior is inappropriate. That's because practices have a heavy investment in every physician and needs to keep their physicians on board if at all possible. Often the counseling takes the form of anger management. But it can also be organizational counseling geared simply to helping the doctor get a better organized lifestyle and thereby reduce the stress level. It's not uncommon for a physician's personal life to be so disorganized as to cause frustration and disruptive behavior.

### WHAT IF IT'S HOPELESS?

While most practices are able to solve their physician personality issues amicably, it can be necessary to dismiss a physician – not an easy job. Dismissing a doctor is far different from firing an employee, because doctors almost always work under employment contracts, and

dismissals are governed by the terms of those contracts. Review the contract to see if the dismissal terms need to be changed. Offices tend to put agreements into place and then not look at them for years until they're needed. And by then, there are gaps and provisions that don't suit the current situation.

Some contracts say the group can terminate a physician for any cause whatsoever with a certain amount of notice. Others set out carefully defined instances of termination. Stay away from the open-ended contract, because it can lead to claims that the termination was personal retribution or age or racial discrimination. By contrast, when there is a carefully defined list of instances and one of them is violated, there's little likelihood that a dismissed physician will bring litigation.

Make one of the trigger elements unacceptable behavior. The clause should say that disruptive, abusive, or unprofessional behavior will not be tolerated and that a doctor can be terminated for repeated instances of it.

With that spelled out, the office can handle a physician behavior problem the same way it would handle any staff behavior problem. All it has to do is build the case, or record what happens, warn, counsel, and document everything that's done.

That way, a rare outburst on a bad day gets tolerated as an isolated event. But when the outbursts are habitual, the practice can show a pattern of repetition and solid ground for dismissal.

## BEHAVIOR OUTSIDE THE OFFICE TOO

The behavior provisions of the contract need to cover behavior outside the practice as well as in it. It's not uncommon to see that omitted. Employers are alert to issues that involve their own employees, yet rarely are they prepared to handle problems that involve somebody

else's employees. One such situation had a physician who was middle-aged and married starting carrying on an affair with a 23-year-old technician at the hospital. It was a small town, and the affair became an embarrassment to the practice. The other doctors met with the physician and told him to quit the relationship, but the response was "I'm in love," and the situation went from bad to horrible with a nasty divorce following.

The doctors were wringing their hands. But because there was nothing in the employment contract to address behavior outside the practice, they had no basis to act. In the end, the love-smitten doctor left. But a provision in the contract could have given the practice a means of solving the issue much sooner.

## THE IMPAIRED PHYSICIAN – EASIER

Another type of behavior issue is impairment, whether by drugs or alcohol. Surprisingly, that's easier to handle than the tense, stressed, brusque, and disruptive behavior. The place to turn is to the state licensing board's impaired physician program. That type of program usually works quite well for several reasons. One is that doctors are willing to cooperate, because their entire professional life is at stake. They could lose their licenses. Another is that most practices don't hesitate to refer doctors there because of the malpractice exposure impairment creates and also because the liability is worse when there is impairment. Impairment is quickly recognized in the medical office because the other doctors and staff are educated watchers and are aware when Dr. A is drinking or gobbling tranquilizers like candy.

## Culture, psychology complicate many office issues

By [Steve M. Cohen](#)

You are probably tired of hearing about it, but some people never seem to understand that sexual harassment is not okay. “No” really does mean “no,” and the workplace is not a singles bar. Sexual harassment can also be a form of bullying or predatory behavior.

Regardless, sexual harassment is not acceptable and organizations that fail to deal with it make a mistake in many ways. These mistakes can threaten the life of an organization or business.

Sometimes, however, the issue involves differences in how people view things. I suspect that might be of special interest to many medical offices for a number of reasons.

I had a case involving a sexual harassment complaint by a female graduate student against a dean at a large university. I was on retainer with the university. My role was especially fortunate because the statutes only allow 72 hours to begin a sexual harassment investigation. My job was to understand the situation, assess the severity, and make a report.

Sexual harassment allegations are serious, but there are other factors as well. The criterion for determining sexual harassment is this question: “Would a reasonable person find this behavior offensive?” If yes, you probably have sexual harassment. If no, you probably don’t.

In this case, the allegation was that the dean had invited the female student to lunch. He didn’t sexually assault her, discuss or imply anything of a sexual nature; he invited her to lunch. It turned out that he consistently did this with all of the school’s new grad students—it was all very collegial and aboveboard. Regardless, the female student filed a complaint.

It turned out the woman was a native of Pakistan and married. To her culture, an invitation from

a man who was not her husband, father or son had illicit intentions. In her eyes, it sincerely was sexual harassment.

Schools are required to self-report allegations so I advised the provost to hotline the case to his state’s relevant department even though I felt no harassment would be found. The state investigated and in fact found no basis for the complaint. They shut down any further opportunities for recourse from the student and she withdrew from the program.

Although the rules may vary somewhat, this can happen in any business or organization.

Management needs to be aware of cultural differences within the organization as much as possible. We all have different thresholds resulting from our upbringing, and these cultural differences exist separately and apart from the laws and rules that apply in the business setting. In hindsight, these differences seem clear. In some cases they are subtler.

Bullying and harassment is very real, and the future of a business or organization can hinge on eliminating them. If an allegation does occur, go with mediation as it puts the authority to decide in the hands of the disputants, and allows for facilitation instead of arbitration.

### **But not in my medical office**

More than four of every five Americans believe that sexual harassment is taking place in the workplace, but most men say they haven’t thought about changing their behavior, according to a recent NBC News/SurveyMonkey poll.

The survey found, however, that very few people – just nine percent of those employed – believe that sexual harassment is a problem in their own office. And three-quarters of those now working believe that their workplace demonstrates about the right amount of sensitivity on the emotionally-charged issue.



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