

Takeaways: Real World Implications of #MeToo - Transforming the Legal Ecosystem Series Part VIII

October 2, 2019 Roundtable Discussion

NEW YORK: On Wednesday, October 2, 2019, Viacom hosted the eighth roundtable discussion in the series “The Real-World Implications of #MeToo-Transforming the Legal Ecosystem” organized by FiscalNote, Her Justice and Thomson Reuters. This was one of the most powerful discussions to date and brought together corporate executives and senior attorneys from New York City and across the country to engage in an off-the-record, real-world conversation about how #MeToo issues affect the corporate environment.

Dave Curran, Senior Vice President & Chief Business Officer at FiscalNote, moderated the discussion. Joe Kennedy, a committed community organizer and advocate of women’s rights, and Caitlin Fitzmaurice, Senior Director of Culture at Viacom, played vital roles in organizing the event. Curran and Kennedy developed the series in collaboration with Her Justice, with the purpose of facilitating a senior level discussion with top lawyers and corporate leaders about the unique role that lawyers play in addressing #MeToo issues.

At the outset of the meeting, Curran gave some introductory remarks, noting that the discussion would be off-the-record and only those interested in receiving attribution for their comments would be mentioned by name in this summary. Curran observed that lawyers are arguably part of the ecosystem that gave people like Harvey Weinstein the oxygen to exist, through defensive internal investigations, non-disclosure agreements and other legal tools available.

Comments from Our Host, Christa D’Alimonte

Curran then introduced Christa D’Alimonte, the General Counsel of Viacom, and thanked her for hosting the event. D’Alimonte spoke about Viacom’s wide-reaching diversity and inclusiveness program and the high representation of women in positions of leadership up to and including the board. D’Alimonte described Viacom’s culture as diverse and inclusive and stated that the company places an emphasis on “everyone belonging and feeling comfortable.” She elaborated that presentations to the company’s board members—of which 50% are women—frequently touch on issues of culture. Viacom is also proud to have a Global Inclusion Advisory Council that shares ideas and best practices on diversity and inclusiveness.

Standing with Women in Poverty

Curran then introduced Amy Barasch, the Executive Director of Her Justice. Barasch explained that Her Justice is an organization that stands with women living in poverty in New York City. In Barasch's experience, corporate #MeToo issues are not dissimilar to the intimate partner violence that many women in poverty that Her Justice supports experience. Intimate partner violence and #MeToo issues both arise as a result of an abuse of power implicit in an unequal power dynamic, which can exist between intimate partners or between colleagues. She commented that the phrase "quid pro quo" is not unlike this abuse of power. When someone holds power, you do not need to make an explicit threat to know that there are consequences. Her Justice clients often speak about this dynamic in their own lives. If their abuser shows them his gun once, he does not need to bring it out again. It is an understood imbalance of power. Her Justice clients are often fighting this power imbalance in the courts as well as in their homes. Some of the ways we approach domestic violence situations can be applied to #MeToo issues, for example, a coordinated community response so that victims are stronger knowing that they have allies on their side. Building on earlier roundtable discussions, Barasch encouraged the group to consider the importance of third-party "bystander" intervention in addressing and elevating these situations and stressed the need for clear protocols for reporting and clear and transparent policies to address issues when they arise.

#MeToo Issues: Why the Increase in the Number of Reported Incidents

Dovetailing on Barasch's comments, Curran observed that an increase in #MeToo incidents has been reported this year and he queried whether this increase was a result of increased incidents or something else. A general counsel from a large corporation that had recently gone through a highly public #MeToo investigation spoke about lessons learned and some of the changes that the organization has made. Replying to Curran, she proposed that the increased reporting of incidents might be due to positive changes made in corporate America. For example, she explained that diversity and inclusion issues are now part of performance evaluations at her company and affect bonuses. Coaching has been made available to employees to address the style and manner of speech and encourage inclusion. As a result, she thought that a higher percentage of #MeToo issues at her company would be reported. She also proudly added that her board is now 50% women.

Grey Areas, Tech and Addressing the Bro Culture

Playing devil's advocate, Curran expressed skepticism that an equal number of women in leadership would solve #MeToo issues. As evidence, he pointed to Fox Corporation and other companies helmed by women (executives and attorneys) that had significant #MeToo issues.

Responding to Curran, an executive from FiscalNote, Krystal Putman-Garcia, shared some statistics with the group that showed the benefits of having a larger number of women in positions of leadership including more diverse problem-solving, better organizational collaboration, and stronger financial performance.

An attorney working for a new technology company explained that #MeToo issues were a regular occurrence in the “bro” culture. Taking a slightly different view, an in-house attorney from a mature technology company explained that her company was experiencing a spike in #MeToo incidents and attributed this to a broader understanding and increased reporting by victims and third-parties.

She explained that her company is focused on understanding and resolving the subtleties of #MeToo issues. Within her company, she said that women generally did not report “grey area” incidents. In hopes of elevating and addressing these incidents, her company focuses on developing an “upstander” culture that encourages employees who witness #MeToo incidents to report them.

Curran hypothesized that smaller companies in male dominated industries, such as technology, experience these issues more frequently than traditional companies. In a “quick” start-up culture that values immediate action, attention is not paid towards developing an inclusive culture. Curran also called out the sports industry as an example. Another attendee replied that the sports industry is actually a more inclusive industry than the finance, and specifically private equity, industry. She observed that the difference between sports and finance is attire—three-piece suits vs. tracksuits. The group nodded and observed that #MeToo isn’t industry specific.

An attorney from a different technology company countered, noting that her company does not have a “bro” culture. She attributed this to her company having a strong bystander-intervention culture. Her company has a policy of “if you see something, say something.” Sharing a real life example, she stated that they’d recently had a discussion with several employees who had been present when an employee had made a joke that made a colleague uncomfortable. Nearly all the employees present stated that they realized that the joke might be inappropriate, however none felt comfortable raising this. Employees were then given training about the importance of speaking up.

Do Something, Say Something

An attorney from an accounting firm stated that #MeToo issues were about brand and tone from the top. The brand has to be aligned with diversity and inclusion, caring about people. In his company, the female CEO delivered a webcast to the company’s 55,000 employees talking about these issues. Echoing the comments of the attorney who spoke earlier in the program, he stated that performance evaluations were tied to diversity and inclusiveness advancements. He stated that his company’s aim is to cure the power imbalance between men and women within the company and they’ve made good progress, though no company can say that it’s all the way there yet.

Curran then questioned how these noble efforts of various companies and law firms could be scaled to address a wide audience, stating that none of this was taught in law school or at law firms. How were attorneys to learn these skills? Chris Lu, FiscalNote Senior Advisor and former Deputy Secretary of Labor under President Obama, explained that there’s too often a culture of acceptance and non-reporting when employees see wrongdoing happening in an organization. Lu thinks that there needs to be a paradigm shift about what is appropriate; if something is seen as acceptable, then employees are unlikely to report it. If you’re a leader, you need to get out of your office, speak to your employees, ask hard questions, and create a communication channel for employees to report wrongdoing. Lu also posited that companies must train the front line managers as they are most likely to be aware of, witness, and correct issues; they are the first line of defense.

Responding to Lu's statements, another participant replied that companies need to create a culture of accountability such that employees feel responsible for saying something if they see something. To do so, employees need to be equipped with the appropriate language.

The Upstander Culture, Due Process and Consequences

Agreeing, another participant added that there needs to be a disciplinary system to demonstrate the seriousness of #MeToo issues. He posited that concrete examples of individuals losing bonuses or employment would lead employees to take these issues seriously. Another in-house counsel disagreed with this approach, observing that employees are hesitant to report issues because they are concerned that it would ruin someone's career and therefore they did not report "grey area" issues. To address this problem, while still emphasizing the importance of reporting #MeToo issues, her company's training videos include video vignettes of employees accused of #MeToo issues who were not penalized when the issue was minor or unfounded. These videos give employees assurance that individuals accused of #MeToo issues will not automatically be terminated.

Another in-house attorney agreed, stating that due process is important when evaluating #MeToo issues. Her company focuses on progressive discipline, such that #MeToo accusations do not lead to termination unless necessary. She emphasized other remedies, such as additional training, in lieu of termination. This helps create an "upstander" culture. An attorney from a different company chimed in to note the importance of circling back to the victim-employee or employees who reported the incident regardless of whether the accused employee is disciplined.

An attorney who worked for a sports industry company where she was one of four women in an 80 person company agreed that an "upstander/bystander" reporting culture is important. Her solution is to provide scenario-based training that helps employees simulate how they should respond to #MeToo issues.

The Role of Mandatory Arbitration Agreements

Curran pointed out that another tool for encouraging the reporting of #MeToo issues is the elimination of mandatory arbitration agreements. Curran pointed out that many technology companies have taken a pledge to eliminate mandatory arbitration. Further, a number of companies that have participated in this series of roundtable discussions have also pledged to eliminate mandatory arbitration. Pushing back on Curran, an attorney from a large company disagreed that mandatory arbitration agreements are to blame for the lack of reporting, noting that, whether or not arbitration agreements exist, these issues frequently become public anyway. A law firm attorney disagreed. She explained that the issue isn't whether #MeToo issues are ultimately made public, but whether mandatory arbitration agreements disincentivize employees from reporting employees for inappropriate behavior. She observed that while attorneys might appreciate the subtleties of arbitration agreements, their very existence is probably enough to discourage many employees from reporting #MeToo issues.

Lessons from the Public Sector

A law firm attorney who formerly worked in government spoke to the complexities of handling #MeToo issues in government. Guidance from different levels of government often vary, creating confusion. Furthermore, government employees receive important trainings on so many different topics that it's difficult to distinguish which trainings leadership really cares about. He also noted that there is often an issue of incentives. By analogy, he explained that police officers are judged on the number of arrests that they make. The results of policing might be different if police officers were rewarded for not discharging their firearms. In private practice, he noted that incentives need to be aligned with preventing #MeToo issues.

Tone from the Top & What People Did Not Go to Law School to Do

Curran asked the group about the effect of the millennial professional culture of transitioning employment several times throughout one's career. Contrasting with earlier generations that frequently worked for one or two employers for their entire career, millennials change employers regularly and frequently seek out or demand progressive corporate cultures. How does this encourage or discourage building a strong company culture? An executive from the National Association of Corporate Directors responded to Curran's question by explaining that she has seen a push towards corporations developing diversity and inclusiveness programs, particularly in the context of building diverse boards of directors. She cited a California law which now requires at least one woman on every corporate board as an example of a movement towards formalizing diversity within the corporate structure.

Curran questioned whether requiring one woman on a board poses a risk of tokenism. To counter this, Curran suggested that boards also look at verbatim transcripts from their anonymous reporting hotlines to get a sense of what's going on within their corporation. Curran also proposed that directors act out the scenarios reported on the hotline, with some playing the victim. He explained that this is a fantastic way to gain perspective.

Another participant thought that implicit bias training for directors and senior executives is also crucial. She also thought that directors and officers should be encouraged to avoid "group think" and "exhibit a little bravery" by speaking up when they see #MeToo incidents occurring.

Concurring, an attorney from a media company stated that it is important for leaders not to be complicit in #MeToo issues by standing by and observing them happen. He explained that this is why tone from the top matters, adding that it's important for employees to be courageous enough to report #MeToo issues even though there is no legal obligation to do so. Instead, he sees reporting #MeToo issues as an ethical duty.

Curran agreed, reiterating that while law school doesn't teach lawyers how to report #MeToo issues, he does not believe that anyone is motivated to go to law school with the intention of covering-up and protecting sexual harassers and abusers. Attorneys in the room nodded in agreement.

On this note, Curran concluded by thanking Viacom for hosting and the participants for attending.