UNMASKED: PSEUDONYM PLAINTIFFS IN THE LEGAL INDUSTRY IN THE ERA OF #METOO

Jean Schroll Knapp[*]

I. INTRODUCTION

"Are you hitting on me?"[1] In this pivotal moment in the legal movie classic, *Legally Blonde*, Elle Woods realizes that her male attorney mentor is a raging misogynist. Elle, of course, manages to one-up and publicly shame this man while simultaneously saving an innocent woman from a conviction for a murder she did not commit, all before ever graduating from Harvard Law School.[2] In the real world, however, vulnerable female attorneys face a serious uphill battle to achieve such a satisfying ending. The fear of retaliation is particularly acute in fields such as the legal industry, where reputation is key[3] and everyone knows everyone. The increased availability of court dockets to the public[4] and the speed at which information can go viral across the internet has only exacerbated the ease with which such knowledge transfers. As a result, female lawyers increasingly face the prospect of "career suicide" by raising complaints about sexual harassment and gender discrimination, even as firms and bar associations take positions and draft best practices on these issues in the wake of the #MeToo movement.[5]

While the public right to access court proceedings is a longstanding principle that is well-established across jurisdictions, so too is the personal right to privacy. The Federal Rules of Civil Procedure require that a filed complaint name all parties to the action.[6] Even so, certain

[*]J.D. Candidate, 2021, Seton Hall University School of Law; B.A., Rutgers University. My sincere thanks to Professor Solangel Maldonado for her guidance and to the editors of the SETON HALL LAW REVIEW for their helpful feedback. In memory of my dear friend and mentor, Diane Sugrue Franzese.

1 LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001).

2 *Id.*

3 Fisher & Endress, *infra* note 90.

4 *See, e.g.*, PACER, http://pacer.gov (last visited Aug. 2, 2020); *Judiciary eCourts Public Access System*, N.J. COURTS, https://portal.njcourts.gov/webe1/CIVILCaseJacketWeb/pages/publicAccessDisclaimer.faces (last visited Aug. 2, 2020) [hereinafter PACER].

5 Derocher, *infra* note 76.

6 FED. R. CIV. P. 10(a).

exceptions to this rule have been made, generally in "hot button" cases involving sensitive or personal matters.[7] Sexual harassment and gender discrimination, however, have largely been excluded from this category. Currently, courts apply a test balancing a plaintiff's interest in anonymity against the public's interest in open judicial proceedings.[8] In light of the #MeToo Movement, should courts reframe this test? Do we give short shrift to plaintiffs and force them to choose between their career and vindication for a wrong committed against them? The volumes of stories of unresolved harassment and discrimination claims suggest that the system as it stands is not working for women: even high-powered women with the means to pursue their case would sometimes rather drop the matter than openly identify themselves and suffer the accompanying public scrutiny.[9] This Comment argues that societal shifts in the attitude toward sexual harassment and gender discrimination present an opportunity for courts to reevaluate their position on permitting plaintiffs in these types of suits to proceed under a pseudonym, particularly through the lens of challenges faced by women in the legal field.

Part II of this Comment examines the historical basis for permitting open access to judicial proceedings and the #MeToo movement's background, including its rapid development and the resulting ripple effect throughout the legal industry. It further discusses how sexual harassment and gender discrimination cases have typically unfolded in the past in traditionally male-dominated fields. Part III discusses how courts have approached the limited circumstances where plaintiffs were permitted to proceed under pseudonyms, including how courts are approaching the issue given ever-increasing public access to court proceedings. Part IV looks at recent and ongoing cases involving female attorneys suing law firms where courts have continued to grapple with the issue of proceeding under a pseudonym. Finally, Part V discusses what changes might be made to maintain the balance between competing interests while still allowing the social needle to move toward eradicating sexual harassment and gender-based discrimination.

---

[7] Doe v. Rostker, 89 F.R.D. 158, 161 (N.D. Cal. 1981).

[8] *See* Memorandum and Order at 3, Tolton v. Jones Day, No. 19-cv-00945-RDM, 2019 WL 4305789 (D.D.C. Sept. 11, 2019) ("In the past . . . two different but analogous tests have been applied in this circuit.").

[9] *See, e.g.*, Patrick Dorrian, *Jones Day Sex Bias Suit's Jane Doe 4 Dropped as Named Plaintiff*, BLOOMBERG L. BUS. & PRACTICE. (Aug. 13, 2019), https://biglawbusiness.com/jones-day-sex-bias-suits-jane-doe-4-dropped-as-named-plaintiff.

II. HISTORICAL BACKGROUND

A. *Public Access to Courts is a Well-Established Principle*

It is no exaggeration to say that the notions of transparency and government accountability are two of the foundations of American democracy itself. American democracy was born against the backdrop of British oppression, including arbitrary prosecutions.[10] From its inception, the American psyche collectively rebelled against such secretive and capricious processes.[11] As a result, open access to judicial and governmental proceedings was incorporated into the system from the very beginning. For example, the Sixth Amendment guarantees a criminal defendant a "speedy and public trial."[12] This idea of transparency has not been limited to the criminal context, however, and courts have established that the public right to access court proceedings is a longstanding principle which is well-accepted in American jurisprudence.[13]

Continuing this tradition, the Federal Rules of Civil Procedure, adopted in 1937, require that all parties involved in a suit be identified.[14] Rule 10 states, "The title of the complaint must name *all* the parties."[15] This means that, simply by initiating a lawsuit, certain aspects of an individual's life are by default open to inspection by the public at large. Where a matter is potentially sensitive or embarrassing, this rule would no doubt be a factor for plaintiffs considering whether to file suit.

As much as transparency is a cornerstone of the American legal system, so too is the idea of a right to privacy. In their now-famous 1890 law review article, Samuel Warren and Louis Brandeis described what they called "the right to be let alone."[16] They explained the need to respond to technological advances at the time, stating, "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical

---

[10] HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 156 (1953).

[11] *See id.*

[12] U.S. CONST. amend. VI.

[13] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property.").

[14] FED. R. CIV. P. 10(a).

[15] *Id.* (emphasis added).

[16] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[17] One can only imagine what Warren and Brandeis would have thought of Facebook, Twitter, or Snapchat. As will be discussed below, modern technologies such as these have only exacerbated the "invasion" into the private precincts.

Courts, too, have acknowledged the right to privacy. In *Roe v. Wade*, the Court reaffirmed a line of cases that "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[18] While there is no federal rule explicitly stating as such, it is clear that individual autonomy is a protected right.[19] What are courts to do, then, when the values of transparency and privacy conflict? Must an individual give up their "sacred precinct" for the sake of a greater good? And how does enforcement of Rule 10 contribute to this tension? It is within this context that this Comment analyzes the overwhelming prevalence of gender-based harassment and discrimination and the judicial response to such issues.

B. *Male-Dominated Fields are Particularly Prone to Sexual Harassment and Gender Discrimination*

The legal industry does not operate in isolation, and women across many industries experience the same gender-based challenges as female attorneys. These challenges are particularly acute in fields that are traditionally male-dominated, such as technology and entertainment.[20] Women in these fields, like female attorneys, not only face sexual harassment and gender discrimination, but they frequently run into patriarchal walls when they attempt to voice complaints.[21] The results of such complaints can often have severe detrimental effects on a woman's career.[22]

---

[17] *Id.* at 195.

[18] Roe v. Wade, 410 U.S. 113, 153 (1973).

[19] *Id; see also* Lawrence v. Tex., 539 U.S. 558, 562 (2003).

[20] Mariela V. Campuzano, *Force and Inertia: A Systematic Review of Women's Leadership in Male-Dominated Organizational Cultures in the United States*, 18 HUM. RESOURCE DEV. REV. 437, 438 (2019); Kim Parker, *Women in Majority-Male Workplaces Report Higher Rates of Gender Discrimination*, PEW RESEARCH CTR. (Mar. 7, 2018), https://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination.

[21] *See, e.g.*, Campuzano, *supra* note 20 at 442 (describing the organizational structures reinforcing a male-centric workplace).

[22] Parker, *supra* note 20.

1. Technology

The technology industry is not so different an environment from the legal industry, and there are many comparisons between the two.[23] For example, the number of women in both the legal and technology fields has increased over recent years,[24] but women are still drastically underrepresented in leadership positions in both industries.[25] Notably, only six percent of venture capitalists are female.[26] It is not difficult to transplant the experiences of someone such as Ellen Pao into that of a female attorney. Pao, a high-powered executive in a venture capital firm, sued the firm alleging systemic discrimination and exclusion of women from company events.[27] Documents in the case portray a rampant sexist and misogynist culture, including a discussion surrounding a company ski trip for which one man wrote, "Why don't we punt on her and find 2 guys who are awesome . . . . We can add 4–8 women next year."[28] Additionally, male colleagues openly discussed pornography and rated the attractiveness of the female CEO of Yahoo, Marissa Mayer.[29] Pao and another female executive once had to sit at the back of the room during a meeting, rather than at the conference room table with the male executives.[30] Pao endured all this despite her impressive credentials, including three Ivy League degrees and a resume that includes multiple executive positions.[31]

Despite this, a jury rejected all of Pao's claims, saying that they "did not take on the role of 'conscience of this community,'" and that Pao's performance was the problem.[32] It is difficult to look at this case—one involving a highly-educated woman in a high-level position—and not feel disheartened for the average up-and-coming, career-minded

---

[23] *See, e.g.*, Campuzano, *supra* note 20 at 438 (describing commonalities across male-dominated industries).

[24] *Women in Law: Quick Take*, CATALYST (Oct. 2, 2018), https://www.catalyst.org/research/women-in-law; Tom Finn, *Getting Better? More Women in Tech but Not at the Top*, REUTERS (Nov. 6, 2019), https://www.reuters.com/article/us-global-tech-women-trfn/getting-better-more-women-in-tech-but-not-at-the-top-idUSKBN1XG2PN.

[25] *Women in Law: Quick Take*, *supra* note 24; Finn, *supra* note 24.

[26] David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES (Mar. 27, 2015), https://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html.

[27] Farhad Manjoo, *Ellen Pao Disrupts How Silicon Valley Does Business*, N.Y. TIMES (Mar. 27, 2015), https://www.nytimes.com/2015/03/28/technology/ellen-pao-disrupts-how-silicon-valley-does-business.html.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Streitfeld, *supra* note 26.

woman. Essentially, Pao's concerns that sharing her negative experience could subject her to career repercussions and social stigma have now been confirmed. Women in similar positions and fields relate to Ms. Pao; in her experiences, they see a reflection of their own lives.[33] Pao's story is not uncommon for women in tech, or, in fact, for women everywhere.[34] To the male powers in charge, Pao was never going to meet their impossible expectations; she "was criticized both for being too timid and for being too aggressive, for speaking up too much and for not speaking up enough."[35] Despite receiving high written evaluations, including recognition for being highly collaborative,[36] she was accused of lacking "chemistry."[37] In other words, Pao's collaborative professional relationship with her colleagues was not enough, nor was being good at her job; she was expected to walk an intangible, undefined tightrope.[38] Failure to do so meant she was a "bad fit."

Pao's story is unique, however, because she shared it, while "most women stay silent when they experience wrongdoing for fear of being shut out of the industry entirely."[39] Usually, women who complain receive a settlement—on the condition that they agree to confidentiality provisions.[40] This was a common tactic of Harvey Weinstein, who will be discussed in detail below, as well as other harassers in order to prevent an open dialogue about their behavior.[41] Women are paid to be quiet, and Pao broke that mold by refusing to accept a confidential settlement, despite the inherent risk to her reputation and her career.[42]

---

33 Manjoo, *supra* note 27.

34 Parker, *supra* note 20.

35 Manjoo, *supra* note 27. Such contradictory expectations are far from new for professional women. In fact, the seminal case which established gender stereotyping as sex discrimination arose when a female partner in a major accounting firm was criticized for being overly aggressive and advised to take "a course at charm school" and behave more femininely. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

36 Kimberly Weisul, *Ellen Pao and the Impossibility of Being Sheryl Sandberg*, INC.COM (Mar. 26, 2015), https://www.inc.com/kimberly-weisul/ellen-pao-imperfect-personality.html.

37 Manjoo, *supra* note 27.

38 Weisul, *supra* note 36.

39 Manjoo, *supra* note 27.

40 *Id.*

41 *See* Michelle Kaminsky, *The Harvey Weinstein Effect: The End of Nondisclosure Agreements in Sexual Assault Cases?*, FORBES (Oct. 26, 2017), https://www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/#50b2a11d2c11 (discussing the use of settlements between Weinstein and at least eight women, as well as confidential settlements by Fox News founder Roger Ailes and television host Bill O'Reilly).

42 Manjoo, *supra* note 27.

While Pao's claims were ultimately unsuccessful, her story resonated with countless women across the industry and brought attention to an issue that was otherwise kept under wraps.[43] Notably, Pao's case was decided before the #MeToo movement had made major headlines.[44] Even so, Pao described a similar feeling to that shared by women coming forward in the #MeToo movement.[45] Pao said:

> A lot of things had happened to individuals, and they didn't know how to process it . . . . And here was a way of looking at it in context, and having it voiced: 'This is actually discriminatory, this is actually biased and this is what is systemically preventing you from succeeding, and it's not your own fault.'[46]

This moment of clarity is not unlike the stories currently gaining traction in the #MeToo world; perhaps if Pao's case were tried in today's climate, the outcome would be different.

2. Entertainment

Perhaps the most notorious sexual harasser in today's age, Harvey Weinstein, arose within the entertainment industry.[47] To understand the allegations against Weinstein, it is important to understand the scope of his power. Weinstein formed Miramax Films in 1979, which went on to produce films such as *Pulp Fiction*, *Good Will Hunting*, and *Shakespeare in Love*.[48] Miramax and Weinstein's subsequent company, The Weinstein Company, have been nominated for 341 Academy Awards and won 81.[49] Today, Weinstein's name has practically become

---

[43] *Id.*

[44] *See* Schmidt, *infra* note 47.

[45] Colleen Taylor, *Ellen Pao's Statement on Losing The Kleiner Perkins Case: "The Battle Was Worth It"*, TECH CRUNCH, (Mar. 27, 2015), https://techcrunch.com/2015/03/27/ellen-paos-statement-on-losing-the-kleiner-perkins-case-the-battle-was-worth-it ("I'm grateful . . . to everyone around the world, male and female, who have reached out . . . to tell me that my story is their story too . . . ."); *see* Burke, *infra* note 67.

[46] Eric Johnson, *Why Did Ellen Pao Lose Her Gender Discrimination Lawsuit? 'People Were Not Ready'*, VOX (Oct. 2, 2017), https://www.vox.com/2017/10/2/16393480/ellen-pao-kleiner-perkins-discrimination-lawsuit-reset-book-kara-swisher-recode-decode-podcast.

[47] Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive.

[48] *Harvey Weinstein*, BIOGRAPHY, https://www.biography.com/filmmaker/harvey-weinstein (last visited January 10, 2020).

[49] Madeline Berg, *After Expulsion from the Academy, Here Are All of Harvey Weinstein's 81 Oscar Wins*, FORBES (Oct. 13, 2017), https://www.forbes.com/sites/maddieberg/2017/10/13/here-are-all-of-harvey-weinsteins-oscar-wins/#47fc08acd946.

synonymous with all things predatory, from sexual harassment to assault,[50] and the revelations surrounding the allegations against him were the trigger for the #MeToo movement as we know it.[51] Weinstein's behavior went unchecked for decades.[52] For example, over twenty years ago, Ashley Judd, a rising actress at the time, was invited to Weinstein's hotel room for what she believed was a business meeting.[53] Instead, Weinstein appeared in a bathrobe and asked to give her a massage or for her to watch him shower.[54] Judd's thoughts at the time were not just "How do I get away from this man," but "'How do I get out of the room as fast as possible *without alienating Harvey Weinstein*?'"[55] This was a common Weinstein tactic: offer to help an upcoming actress' career in exchange for submission to his harassment, up to and including sexual assault.[56] This power dynamic is not limited to the entertainment field; female associates in law firms also note the vulnerability inherent in a mentor-mentee relationship and the possibility that a high-level partner could abuse this bond.[57]

As seen in Silicon Valley, described above, it was not uncommon for Harvey Weinstein to buy the silence of his victims through confidential settlement agreements.[58] During the nearly thirty years in which Weinstein got away with his behavior, he made confidential settlements with at least eight women.[59] Lauren O'Connor, an employee who wrote an internal memo about Weinstein's conduct addressed to executives at Weinstein's company, put it most succinctly: "I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. The balance of power is me: 0, Harvey Weinstein: 10."[60] Weinstein had the power to make or break

50 *See The Daily: The Weinstein Jury Believed the Women*, N.Y. TIMES (Feb. 25, 2020), https://www.nytimes.com/2020/02/25/podcasts/the-daily/weinstein.html. Although Weinstein was ultimately acquitted of the most serious charge against him—predatory sexual assault—his trial may represent the beginning of a new era of prosecution of this type of crime and accountability for harassers. *Id.*

51 Schmidt, *supra* note 47.

52 Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?module=inline.

53 *Id.*

54 *Id.*

55 *Id.* (emphasis added).

56 *Id.*

57 Kaye Wiggins, *Third of Female Lawyers Have Been Sexually Harassed, Report Finds*, BLOOMBERG (May 14, 2019), https://www.bloomberg.com/news/articles/2019-05-14/third-of-female-lawyers-sexually-harassed-metoo-report-finds.

58 Kantor & Twohey, *supra* note 52.

59 *Id.*

60 *Id.* (quoting Ms. O'Connor's memo).

a career, and many of his employees have gone on to successful careers in Hollywood.[61] As a result, "[s]peaking up could have been costly."[62] Perhaps this is why, six days after her memo was released, O'Connor reached a settlement with the Weinstein company and made a statement saying, "Because this matter has been resolved and no further action is required, I withdraw my complaint."[63]

C. *The Historic Rise of the #MeToo Movement*

The #MeToo movement is a historical phenomenon that shifted the cultural lens on sexual harassment.[64] It has also impacted how the legal industry approaches sexual harassment and gender discrimination.[65] It remains to be seen, however, whether the #MeToo Movement's effect has reached the legal industry's core or whether the renewed attention to sexual harassment and gender discrimination will last.

The #MeToo Movement has empowered women across every industry to speak more openly about shared experiences of gender discrimination and sexual harassment, which, before the movement, were more likely to be swept under the proverbial rug.[66] Tarana Burke founded the #MeToo movement in 2006.[67] Burke describes the feeling behind the meaning of #MeToo as being unable to communicate with her experiences to others, stating:

> I just watched her walk away from me, visibly struggling to recapture those secrets and tuck them back into their hiding place. I watched her put her "mask" back on her face and return to the world. And as I stood there, I couldn't even bring myself to whisper the words circling my mind and soul: "me too[.]"[68]

Burke founded the movement as a way to tell survivors that they are heard and understood.[69] But it was not until actress Alyssa Milano

---

61 *Id.*

62 *Id*.

63 *Id*.

64 *See* Schmidt, *supra* note 47.

65 *See* Derocher, *infra* note 76.

66 *See* Jessica Bennett, *The 'Click' Moment: How the Weinstein Scandal Unleashed a Tsunami*, N.Y. TIMES (Nov. 5, 2017), https://www.nytimes.com/2017/11/05/us/sexual-harrasment-weinstein-trump.html.

67 Tarana Burke, *History & Inception*, ME TOO., https://metoomvmt.org/get-to-know-us/history-inception (last visited Aug. 2, 2020).

68 *Id.*

69 Anna North, *7 Positive Changes That Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019), https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019.

tweeted the hashtag #MeToo that the movement as we now know it was born.[70]

The #MeToo movement truly "went viral" in 2017, with the revelations about Harvey Weinstein's widespread, systemic, decades-long abuse of women in Hollywood.[71] Since that time, a cultural shift has begun, with more and more women feeling comfortable sharing their stories openly.[72] Additionally, public outrage over incidents of sexual harassment and assault has drastically increased, and more and more harassers have been driven out or held accountable.[73] This phenomenon has been compared to a "dam breaking, the cumulative effect of harassment claims" over time.[74] Now that the momentum has started, all industries, including the legal field, are feeling the effects.

1. How #MeToo Has Impacted the Legal Field

As discussed further below, female attorneys experience sexual harassment and discrimination at alarmingly high rates.[75] Combined with the increased public attention after the #MeToo movement, bar associations are being pressured to take action, just as in other industries.[76] People want to know that firms take the issues of sexual harassment and gender discrimination seriously, and as a result, policies and procedures are being put into place.[77] For example, the American Bar Association ("ABA") Commission on Women in the Profession has recently released a "Zero Tolerance Toolkit," designed to help firms respond to allegations of sexual and gender-based harassment.[78] The primary goal of the toolkit is to provide the tools necessary to appropriately deal with harassment situations, including hypothetical scenarios to facilitate the conversation about harassment

70 *Id.*

71 *See* Schmidt, *supra* note 47.

72 *Id.*

73 Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 23, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html. The individuals removed from their positions came from a broad spectrum of fields, including technology, hospitality, media, politics, and many more. *Id*.

74 Bennett, *supra* note 66.

75 *See* Wiggins, *supra* note 57.

76 *See* Robert J. Derocher, *As Women Lawyers Across the Country Say #MeToo, Bar Associations Play an Important Role*, A.B.A., https://www.americanbar.org/groups/bar_services/publications/bar_leader/2018_19/september-october/as-women-lawyers-across-the-country-say-metoo-bar-associations-play-an-important-role (last visited Sept. 11, 2019).

77 *Id.*

78 *Zero Tolerance*, A.B.A., https://www.americanbar.org/groups/diversity/women/initiatives_awards/the-zero-tolerance-program-toolkit (last visited Sept. 20, 2019).

and a list of resources for victims.[79] Additionally, the Commission on Women in the Profession has conducted multiple webinars on the topic.[80]

The ABA is not an outlier. Many bar associations conduct surveys and create resources to generate momentum toward eradicating sexual and gender-based harassment in the legal profession.[81] While studies about women's experiences in the law have been done previously, never before has the momentum toward change been so fast-moving.[82] Not only is valuable work product being generated, but real attention (and money) is being paid to assess how pervasive the issue truly is.[83] For example, the Women's Bar Association of Massachusetts sponsored a survey to assess the extent of sexual harassment among Massachusetts lawyers.[84] While it is too early to tell what, if any, real use will be made of such studies, it is a promising step that the data is even being compiled.

The numbers, however, are frightening. Recent studies of female lawyers, such as the one conducted in Massachusetts, show that sexual harassment is a significant issue in the legal community.[85] In North America, 43.3% of female attorneys say they have faced sexual harassment in the workplace.[86] And yet, seventy-five percent of sexual harassment incidents are never reported.[87] Thirty-eight percent of respondents reported receiving an unwanted "email, text, or instant message of a personal or sexual nature," and sixty-six percent of these respondents "did not report the incident."[88] These numbers suggest that the true statistics of gender-based harassment in the legal profession may actually be higher than the reports show.

---

79 *Id.*

80 *Id.*

81 Derocher, *supra* note 76.

82 *Id.* (quoting Michelle Suskauer, president of The Florida Bar, stating, "This is really the first time, because of the national conversation, that we're really going to move the needle forward. So many people are propelling this forward.").

83 *See* Derocher, *supra* note 76.

84 Derocher, *supra* note 76.

85 *See id.*

86 INT'L BAR ASS'N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 52 (2019). Additionally, in a multinational study of 6,980 attorneys across 135 countries, one in three female attorneys responded that they had been sexually harassed at work, and 50% have been bullied at work. Wiggins, *supra* note 57.

87 *Id.*

88 Derocher, *supra* note 76.

So, is the uptick in attention more than just words? "The Boston Larger Law Firm Managing Partner Group," which represents sixteen of the "largest law firms in Massachusetts," responded to the Massachusetts survey by saying:

> It is clear from the survey that much work needs to be done and we are committed to addressing these issues together—and in our own firms—to ensure that we are providing workplace cultures where negative behaviors are not tolerated and where people can work in a safe and respectful environment.[89]

As the #MeToo movement is still developing, only time will tell if these assertions truly have any effect. Further, the outcome of several pending litigations, which are discussed below, will likely reflect whether the needle has moved in the right direction. The legal industry possesses a set of unique challenges, which may make this type of movement particularly challenging.

D. *Challenges Faced by Women in the Legal Field*

The legal field has a long history and deep roots. Traditions and culture which have existed for hundreds of years are not easily upended. This is particularly so based on the insular and generally close-knit nature of the legal community.[90] In the legal world, reputation is everything.[91] Young attorneys rely heavily on mentors and sponsors to recommend them for positions and open doors in a highly competitive industry.[92] They are often not in a position to challenge the status quo for fear of being denied access to opportunities.[93] When a challenge is made, the reaction by the establishment is often to "circle the wagons," keep the problem in-house, and (most importantly) keep it quiet.[94]

---

89 *Id.*

90 Ian H. Fisher & Eugene E. Endress, *Reputations and Relationships*, A.B.A. (Mar. 29, 2017), https://www.americanbar.org/groups/litigation/pages/reputation_and_relationships ("The legal community is surprisingly small, and you will run across the people sitting next to you in class for the rest of your career.").

91 *Id.* (stating, in an advice column for first-year law students, that "[a]n attorney's reputation is his or her most valuable asset.").

92 *See* Allison R. Day, *The Importance of Having a Mentor in the Legal Profession*, LAW.COM (May 29, 2019, 9:52 AM), https://www.law.com/dailybusinessreview/2019/05/29/the-importance-of-having-a-mentor-in-the-legal-profession.

93 *See* Randazzo & Hong, *infra* note 122.

94 *Id.*

On day one, law students are told how important networking and reputation will be to the success of their career:[95] "Your reputation is an extension of your character, and we are in an industry where you live or die by your reputation."; "Because every situation you are in, whether as an attorney or a private citizen, affects your reputation, it is important to always consider your actions."[96] Translation: You better make important people like you, at work and outside of it, because a bad reputation will kill your career. Those important people include judges and high-earning partners who hold great power over up-and-coming attorneys.

1. The Career-Influencing Power Held by Judges

Judges, in particular, hold extreme power over a young attorney's career.[97] A clerkship with a reputable judge is a highly-coveted position, and for many law students seeking to work in BigLaw, a clerkship is a must-have.[98] The culture of clerking has been described as "hero-worship," where career-minded supplicants idolize judges.[99] But such hero-worship presents a problem: what do we do when an individual who has been placed on such a pedestal acts badly?

Recent examples would suggest that the answer to this question is disheartening. Judge Kozinski, the now-former chief judge of the Ninth Circuit, allegedly subjected multiple clerks to egregious sexual harassment over many years.[100] Six women, all former clerks or junior staffers, told the Washington Post that Kozinski acted inappropriately toward them.[101] This behavior included exposing clerks to pornography and asking one if it aroused her and telling another clerk, during a

95 Fisher & Endress, *supra* note 90.

96 Jonathan D. Klein, *Reputation Is the Key to Success for a Young Lawyer*, LEGAL INTELLIGENCER (June 9, 2016), https://www.clarkhill.com/uploads/medium/resource/1631/Klein_Reputation_is_Key_Legal_Intelligencer_06.09.16.pdf.

97 Nicholas Alexiou, *To Clerk or Not to Clerk . . . It's Actually Not Much of a Question*, ABOVE L. (June 7, 2018, 11:33 AM), https://abovethelaw.com/2018/06/to-clerk-or-not-to-clerk-its-actually-not-much-of-a-question/ ("[C]lerking can be the best move a young lawyer can make for their long-term legal career.").

98 *Id.* "BigLaw" is a term used to describe the largest law firms in the country, which often have a global presence and pay a high salary. *See* Alison Monahan, *How to Get a BigLaw Job*, THE BALANCE CAREERS (June 25, 2019), https://www.thebalancecareers.com/how-to-get-a-biglaw-job-2164672.

99 Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes,* 69 ALA. L. REV. 663, 664 (2018).

100 Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html.

101 *Id.*

conversation in front of other colleagues, that she should work out in the nude.[102] Notably, four of the women who spoke to the Washington Post did so only on the condition that their names would not be published "out of fear that they might face retaliation from Kozinski or others."[103] Judge Kozinski is not an outlier; another Ninth Circuit judge, the late Stephen R. Reinhardt, is also alleged to have subjected his clerks to repeated sexual harassment.[104]

So how did this behavior continue for so long unchecked? It could not be ignorance of the problem, as Kozinski had already been the subject of a previous investigation. That investigation occurred after it was publicized that he maintained an email distribution list to send out sexually-explicit jokes and had a publicly accessible website containing pornographic images.[105] The investigation concluded only that Kozinski did not intend to make the material public and was careless in failing to keep a private server from being publicly accessible.[106] The chief judge of the U.S. Court of Appeals for the Third Circuit said at the time that Kozinski showed "poor judgment" and "created a public controversy that can reasonably be seen as having resulted in embarrassment to the institution of the federal judiciary."[107]

Based upon the revelations about Judge Kozinski in the Washington Post, a picture of how this problem managed to be swept under the rug for so long began to appear.[108] One former clerk said that "she feared that not leaving with a good recommendation from him might jeopardize her career."[109] Another summed up the issue by saying, "I was afraid. . . . I mean, who would I tell? Who do you even tell? Who do you go to?"[110] Given that Kozinski had already come through a previous investigation unscathed,[111] this is not an unreasonable question to ask.

---

102 *Id.*

103 *Id.*

104 Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html.

105 Zapotosky, *supra* note 100.

106 *Id.*

107 *Id.*

108 *See id.*

109 *Id.*

110 *Id.*

111 Kozinski was admonished for "exhibiting poor judgment" and apologized for his actions, but no further disciplinary action was taken. Zapotosky, *supra* note 100.

In another example of judicial misconduct, dozens of women have claimed that California state appellate Justice Jeffrey Johnson sexually harassed them over almost two decades.[112] The allegations include inappropriate touching and harassing comments.[113] Justice Johnson has, in fact, admitted a number of the comments, claiming that he was simply trying to be chivalrous and is a victim of his own "curiosity" about people.[114] Meanwhile, one of the female employees working under Justice Johnson as a research attorney testified that she did not raise concerns about Justice Johnson's behavior because to do so would have been "committing career suicide."[115] When faced with the prospect of annihilating their legal career or staying silent, many female attorneys chose the latter, and understandably so.

2. Bad Behavior Has Become Entrenched in the Legal Industry

This reluctance to come forward, as exhibited by female attorneys working with Judge Kosinski and Justice Johnson, is not so surprising when considered in the context of the structure of the legal profession. Law firms are male-dominated and deeply hierarchical.[116] To be staffed on desirable projects, junior associates are dependent upon the goodwill of senior attorneys and partners.[117] Conversely, provoking the disapproval of someone in a senior position can lead to dead-end assignments and a lack of advancement opportunities, potentially impacting the trajectory of an individual's entire career.[118]

One female associate described her experiences with harassment, and her knowledge of the repercussions if she were to object, as such: "One of the senior partners offered to help me get a training contract, if I went to casinos with him and agreed to 'get to know him better,'" the woman said. "I never reported it because it would have meant exclusion from the project. Nothing happens to the partners."[119] Another pointedly said, "The firm had a history of ousting women who reported

112 Amanda Bronstad, *CA Judge Calls Sexual Harassment Allegations at Trial 'Insulting' and Racist*, LAW.COM (Aug. 22, 2019, 4:31 PM), https://www.law.com/therecorder/2019/08/22/ca-judge-calls-sexual-harassment-allegations-at-trial-insulting-and-racist.

113 *Id.*

114 *Id.*

115 Lauren Berg, *Atty Feared 'Career Suicide' In Reporting Judge, Panel Told*, LAW360 (Aug. 6, 2019), https://www.law360.com/articles/1185662/atty-feared-career-suicide-in-reporting-judge-panel-told.

116 Wiggins, *supra* note 57.

117 *See id.*

118 *Id.*

119 *Id.*

issues. He was a practice group co-leader at the point. We were junior associates. We preferred to stay employed."[120] This situation puts junior female attorneys in a catch-22: endure the conduct and progress professionally, or object and commit what amounts to career suicide.

3. Firms' Reluctance to Oust Rainmakers

Even when women do report, this does not mean that the harasser is out of the picture entirely.[121] Many powerful male attorneys who have been ousted from one firm can simply walk right into another one, particularly when they have a reputation as a "rainmaker."[122] It is a well-known secret in the legal industry that a rainmaker who behaves badly will most likely be given multiple chances at redemption, even where past conduct would suggest that he has no intention of changing his ways.[123] Why? "Firms' sole assets are lawyers and their client relationships. As demand for work from the biggest law firms has softened since the financial crisis, poaching top partners has become one of the few ways to boost revenue."[124] Put simply, money talks, and many firms are willing to turn a blind eye in favor of the bottom line.

The following presents a textbook example of this dynamic. Jeffrey Reeves, a partner in charge of Gibson, Dunn & Crutcher's Orange County office in 2015, was caught by coworkers kissing a junior associate during an office retreat.[125] He was removed from a leadership role but

120 Derocher, *supra* note 76.

121 Undoubtedly, there have been circumstances across all of the industries discussed in this Comment where women engage in and have been accused of harassing behavior. This Comment focuses on male harassers toward female victims due to the disturbingly high frequency at which female attorneys experience sexual harassment and gender discrimination. Derocher, *supra* note 76.

122 Sara Randazzo & Nicole Hong, *At Law Firms, Rainmakers Accused of Harassment Can Switch Jobs with Ease*, WALL ST. J. (July 30, 2018), https://www.wsj.com/articles/at-law-firms-rainmakers-accused-of-harassment-can-switch-jobs-with-ease-153296 5126. A "rainmaker" is defined as "a person (such as a partner in a law firm) who brings in new business." *Rainmaker*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/rainmaker (last visited Feb. 14, 2020). More colloquially, a rainmaker is "someone who brings in the big bucks for their firm." Gabriella Khorasanee, *BigLaw 101: What "Rainmaker" Really Means*, FINDLAW (Dec. 19, 2013), https://blogs.findlaw.com/greedy_associates/2013/12/biglaw-101-what-rainmaker-really-means.html.

123 Randazzo & Hong, *supra* note 122 ("Law firms stand out in a corporate landscape where rainmakers accused of bad behavior often receive second and third chances, according to interviews with dozens of lawyers, legal recruiters, consultants and leaders at some of the country's largest firms."); *see also* Vivia Chen, *Is That Lateral Partner a Sexual Harasser?*, CAREERIST (Aug. 13, 2018), https://thecareerist.typepad.com/thecareerist/2018/08/harveys-of-big-law.html.

124 Randazzo & Hong, *supra* note 122.

125 *Id.*

stayed on as a partner.[126] Additionally, the firm began holding sexual harassment trainings and stopped serving alcohol at partner lunches.[127] In August 2017, Reeves took a female associate to lunch, after which, according to people familiar with the matter, he forced her to perform oral sex on him in his office.[128] The firm investigated the incident, after which Reeves left the firm.[129] Shortly thereafter, Reeves joined the firm of Umberg Zipser, before joining the firm of Theodora Oringher, where he is still employed.[130] This would suggest that despite the serious allegations against him, for firms, Reeves' economic value outweighs the risk.

4. The Potentially Career-Ending Effects of Sexual Harassment Litigation

Although not an attorney, the case of Rena Weeks serves as a cautionary tale to women in the legal industry who take action against powerful men and their correspondingly powerful firms.[131] In 1994, Ms. Weeks was a legal secretary for Baker & McKenzie, now the largest law firm in the United States.[132] Ms. Weeks brought suit against Baker & McKenzie based on egregious sexual harassment by partner Martin R. Greenstein.[133] Greenstein had a history of harassing behavior and was ultimately forced out as a result of the suit.[134] After the suit was filed, several more women came forward, alleging similar complaints.[135] Among these was an associate who alleged that Greenstein asked her if she were wearing underwear and a secretary who alleged that Greenstein put his hand down her shirt.[136]

---

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* According to a statement by Gibson, Dunn & Crutcher, the allegations were "promptly investigated" when brought to the firm's attention, and as a result, Reeves is no longer with the firm. Chen, *supra* note 123.

130 Randazzo & Hong, *supra* note 122. *Jeffrey H. Reeves*, THEODORA ORINGHER, http://www.tocounsel.com/professionals/Jeffrey_Reeves (last visited Oct. 24, 2020).

131 Jane Gross, *When the Biggest Firm Faces Sexual Harassment Suit*, N.Y. TIMES (July 29, 1994), https://www.nytimes.com/1994/07/29/us/when-the-biggest-firm-faces-sexual-harassment-suit.html.

132 *Id.*; *Baker McKenzie*, LAW.COM, https://www.law.com/law-firm-profile/?id=20&name=Baker-McKenzie (last visited Nov. 3, 2019).

133 Gross, *supra* note 131.

134 *Id.*

135 *Id.*

136 *Id.*

Weeks ultimately prevailed in her lawsuit and was awarded $3.5 million, a result that had a ripple effect of policy changes in multiple firms.[137] Despite this, Weeks never worked in the legal field again.[138] She described being "blackballed in the marketplace totally" and being told, "[n]obody's going to want to hire you, because you're a liability."[139] Despite being a quarter-century old case, echoes of Ms. Week's experience can be heard in many of the accounts of being heard for the first time as a result of the #MeToo movement.[140] Ms. Weeks actually suffered the career-ending effects feared by so many women.[141] Perhaps, if she had been allowed to proceed under a pseudonym as an exception to Federal Rule 10(a), such damaging effects could have been avoided.

III. COURTS HAVE ALLOWED CERTAIN EXCEPTIONS TO THE RULE 10(A) REQUIREMENT

While Rule 10(a) does mandate that a complaint name all parties, courts have permitted certain exceptions.[142] These are applied sparingly and generally only in limited scenarios, which courts have traditionally treated as particularly sensitive.[143] Unfortunately, the case law surrounding the issue of when a pseudonym should be permitted is less than clear, and different courts may have different results.[144] But the Supreme Court seems to have implicitly condoned the practice of allowing at least some plaintiffs to proceed pseudonymously in cases such as *Roe v. Wade*.[145] In the decision, the Court simply said, "[d]espite the use of a pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established,

137 Bruce Covert, *Sexual Harassment Will Change Your Career Forever*, CUT (Oct. 24, 2017), https://www.thecut.com/2017/10/sexual-harassment-affects-women-career.html.

138 *Id.*

139 *Id.*

140 *See, e.g.*, Zapotosky, *supra* note 100.

141 *See, e.g.*, Derocher, *supra* note 76.

142 *See* Doe v. Rostker, 89 F.R.D. 158, 161 (N.D. Cal. 1981).

143 *Id.*

144 *Compare* Choice, Inc. of Tex. v. Graham, 226 F.R.D. 545, 548 (E.D. La. 2005) (permitting plaintiffs to proceed under a pseudonym in a lawsuit against anti-abortion clinic), *with* Doe v. City of Chi., 360 F.3d 667, 669 (7th Cir. 2004) (expressing concern with letting the plaintiff proceed under a pseudonym in a lawsuit alleging severe sexual harassment against a police officer).

145 Roe v. Wade, 410 U.S. 113, 124 (1973).

her existence . . . ."[146] This offhand disposition is particularly interesting when juxtaposed against the clear language of Rule 10, which clearly states, "[t]he title of the complaint must name all the parties."[147] It is no surprise, then, that courts have struggled to find a balance between the two powerful but competing interests of personal privacy and transparent judicial proceedings.[148]

Jurisdictions have adopted different tests in an attempt to find this balance.[149] At the core of each of these tests is an evaluation of a plaintiff's interest in proceeding anonymously against the presumption of public access and the potential for prejudice to defendants.[150] In considering a plaintiff's interests, the potential for mere embarrassment is generally not sufficient to justify proceeding under a pseudonym.[151] In general, courts have permitted pseudonyms under one of three situations: (i) identification of the plaintiff would create a risk of physical or mental harm, (ii) it is necessary to preserve the plaintiff's privacy in matters concerning sensitive or highly personal information, or (iii) the plaintiff would be compelled to admit something that would risk criminal prosecution.[152]

---

[146] *Id; see also* Doe v. Bolton, 410 U.S. 179, 187 (1973) (finding that the Court's decision in *Roe v. Wade* establishes "that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence").

[147] FED. R. CIV. P. 10(a).

[148] *See generally supra* note 144.

[149] *See* Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189 (2d Cir. 2008) (addressing as a matter of first impression the standard of review for a request to proceed under a pseudonym and adopting the Ninth Circuit's test of balancing a "plaintiff's interest in anonymity . . . against both the public interest in disclosure and any prejudice to defendant.").

[150] *Id.*

[151] *See* Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992) ("The risk that a plaintiff may suffer some embarrassment is not enough. This case does not present such an unusual situation in which the need for party anonymity outweighs the presumption of openness."); *see also* Doe v. Rostker, 89 F.R.D. 158, 162 (N.D. Cal. 1981) ("That the plaintiff may suffer some embarrassment or economic harm is not enough."). *But see* Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1067–68 (9th Cir. 2000) ("In this circuit, we allow parties to use pseudonyms in the 'unusual case' when nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.'" (quoting United States v. Doe, 655 F.2d 920, 922 n.1 (9th Cir. 1981)).

[152] *Does I thru XXIII*, 214 F.3d at 1068.

A. *Preference for Sensitive or "Hot Button" Issues*

Typically, cases that satisfy the standard involve sensitive or "hot button" issues, such as abortion, mental illness, or sexual assault.[153] For example, the court in *Roe v. Aware Woman Ctr. for Choice, Inc.*, an abortion case, permitted the plaintiff to proceed under a pseudonym because abortion is "the paradigmatic example of the type of highly sensitive and personal matter that warrants a grant of anonymity."[154] In *Doe v. Provident Life & Accident Insurance Co.*, the court found that the stigma associated with mental illness justified allowing the plaintiff to proceed under a pseudonym.[155] The court further noted that the plaintiff should be allowed to proceed under a pseudonym to avoid deterring future plaintiffs with mental illnesses from bringing lawsuits.[156] Interestingly, the court noted the potential for professional harm, stating:

> [T]here is a great risk that plaintiff will be stigmatized in his professional life. Plaintiff, as an employee benefits and insurance broker, dealt with attorneys on a regular basis. There is a strong possibility that some of these attorneys will follow this case in legal publications with the result being that plaintiff's professional reputation will be permanently damaged.[157]

Consistent with courts' willingness to allow pseudonyms in cases involving sensitive matters, anonymity is typically permitted in sexual assault cases.[158] In fact, such cases have been described—in almost identical language to *Roe v. Aware Woman Center For Choice, Inc.*—as the "paradigmatic example of those entitled to a grant of anonymity."[159] As in *Doe v. Provident Life & Accident Insurance Co.*, the court in *Doe No. 2 v. Kolko* noted the public interest in allowing sexual assault victims to

153 *Rostker*, 89 F.R.D. at 161 (noting that courts have made exceptions to Rule 10 in cases involving issues, such as "abortion, mental illness, personal safety, homosexuality, transsexuality and illegitimate or abandoned children."); Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997) ("Records or parts of records are sometimes sealed for good reasons, including the protection of . . . rape victims, and other particularly vulnerable parties or witnesses.").

154 Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 686 (11th Cir. 2001).

155 Doe v. Provident Life & Accident Ins., 176 F.R.D. 464, 468 (E.D. Pa. 1997).

156 *Id.*

157 *Id.*

158 Doe v. Cabrera, 307 F.R.D. 1, 5 (D.D.C. 2014) ("Courts generally allow a plaintiff to litigate under a pseudonym in cases containing allegations of sexual assault because they concern highly sensitive and personal subjects.").

159 Doe No. 2 v. Kolko, 242 F.R.D. 193, 195 (E.D.N.Y. 2006).

proceed anonymously so as not to deter other victims from reporting such crimes.[160]

B. *Sexual Harassment Has Not Been Treated as a "Hot Button" Issue*

Sexual harassment, however, has not been given the same weight as sexual assault.[161] Courts are more likely to perceive plaintiffs in sexual harassment cases as having a "choice" in whether to sue, unlike a rape victim who becomes involved in a criminal case unwillingly.[162] Additionally, courts tend to downplay the traumatic nature of sexual harassment, particularly when compared to sexual assault.[163] In *Doe v. City of Chicago*, the plaintiff alleged that a police officer pulled her over, harassed her repeatedly for a date, obtained her address from a second traffic stop, and ultimately broke into her house while she was sleeping, grabbed her, and exposed his penis.[164] The victim, using a pseudonym, sued the city and the officer claiming sexual harassment.[165] In expressing its concern with allowing the plaintiff to proceed anonymously, the court noted that "sexual harassment cases are not brought anonymously even when the facts are gamier than they are here."[166] The court further observed that the plaintiff was not "a minor, a rape or torture victim."[167] This, it would seem, is a distinction without a difference. Had the officer completed an act of penetration, would the court's analysis have been different? While the answer to that question is speculative, the cases discussed above seem to suggest that it would have been.

In an attempt to draw the line between sexual assault and other gender-motivated causes of action, courts have treated sexual harassment and gender discrimination plaintiffs more along the lines of a whistleblower who observes certain conduct rather than a victim who experiences it.[168] In a Title VII case, *Southern Methodist University*

---

160 *Id.*

161 *See* Roe v. Bernabei & Wachtel PLLC, 85 F. Supp. 3d 89, 96 (D.D.C. 2015) ("Sexual harassment is not typically considered a matter so highly personal as to warrant proceeding by pseudonym.").

162 Doe v. Bell Atl. Bus. Sys. Servs., Inc., 162 F.R.D. 418, 422 (D. Mass. 1995) ("In the civil context, the plaintiff instigates the action, and, except in the most exceptional cases, must be prepared to proceed on the public record.").

163 *See* Doe v. City of Chicago, 360 F.3d 667, 669 (7th Cir. 2004).

164 *Id.*

165 *Id.* at 668–69.

166 *Id.* at 669.

167 *Id.*

168 *See* S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712–13 (5th Cir. 1979) (distinguishing gender discrimination from other "highly

Association of Women Law Students v. Wynne & Jaffe, a group of female law students sued two law firms claiming gender discrimination in their summer law clerk hiring practice.[169] The plaintiffs sought to proceed under a pseudonym so they would not face retaliation from not only their current employers but from "an organized bar that does 'not like lawyers who sue lawyers.'"[170] Initially, the court acknowledged that "the normal practice of disclosing the parties' identities yields 'to a policy of protecting privacy in a very private matter.'"[171] Even so, the court opined that the women faced no greater threat of retaliation than any other Title VII plaintiff.[172] Because the court did not find a compelling privacy interest to protect, and because Congress had not expressly granted the right to proceed under a pseudonym, the women were not allowed to proceed anonymously.[173]

C. *Defendants' Interests*

In *Southern Methodist*, the court found that "the mere filing of a civil action" against a defendant has the potential to damage their reputation or cause economic harm.[174] As such, "basic fairness" dictates that plaintiffs proceed under their real names if a defendant must also do so.[175] To be sure, defendants are justified in having legitimate concerns about reputational harm, and courts should consider the potential for prejudice against defendants.[176] Courts should, however, take into account the often-skewed power dynamic between a plaintiff and defendant in these cases. While the plaintiffs in *Southern Methodist* had the backing of a student association, they were four female lawyers at the outset of their careers suing an established firm.[177] The impact of reputational harm to an unknown junior associate is proportionately much greater than that to a firm, which is better positioned to absorb such a blow.

personal" issues and stating that the plaintiffs faced no more retaliation than the typical Title VII plaintiff).

169 *Id.* at 709.

170 *Id.* at 713.

171 *Id.* (quoting Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974)).

172 *Id.*

173 *Id.*

174 *S. Methodist Univ. Ass'n of Women Law Students*, 599 F.2d at 713.

175 *Id.*

176 *Id.* (noting that the mere filing of a lawsuit against a private party may cause reputational or economic harm).

177 *Id.* at 708–09.

This dynamic has recently played out in the currently-pending case of *Tolton v. Jones Day*, where four out of six plaintiffs attempted to proceed anonymously.[178] The plaintiffs were former associates of Jones Day.[179] Jones Day is the seventh-largest law firm in the United States and thirteenth highest-grossing law firm in the world, with gross revenue of $2,077,000,000 in 2019.[180] Picking up on the *Southern Methodist* court's position, Jones Day argued that the mere filing of a complaint causes reputational harm, and that "pseudonyms exacerbate that reputational harm" because it would imply that Jones Day would retaliate against the plaintiffs.[181] Additionally, Jones Day argued that permitting pseudonyms would prevent the public, including clients and recruits, from assessing the plaintiffs' credibility.[182] Jones Day does not explain why the public—who are not the triers of fact, and whose credibility determinations have no bearing on the case whatsoever—are entitled to make such an evaluation.[183] This argument is a far stretch from the values underlying the principle of public access to court proceedings, allowing oversight and preventing abuses.[184] At no point did the founders of American democracy say that cases should be tried in the court of public opinion. And yet, that appears to be exactly the argument that Jones Day is making.[185] Such a perversion of the principles of transparency demonstrates the need to revisit how evaluations of pseudonym cases are conducted.

In addition to reputational harm, defendants have argued against the use of pseudonyms by alleging that anonymity will hinder the discovery process.[186] For example, Jones Day claims to have been "hamstrung" by the use of pseudonyms because it would prevent them from contacting former coworkers or obtaining evidence from outside

178 Kathryn Rubino, *Jones Day Wants Gender Discrimination Plaintiffs to Reveal Themselves to the Public*, ABOVE L. (May 21, 2019), https://abovethelaw.com/2019/05/jones-day-wants-gender-discrimination-plaintiffs-to-reveal-themselves-to-the-public.

179 Jane Doe Plaintiffs' Memorandum of Points and Authorities in Support of Motion to Proceed Under Pseudonyms and to Seal Personally Identifying Information at 2–3, Tolton v. Jones Day, No. 19-cv-00945 (D.D.C. Apr. 3, 2019).

180 *Jones Day*, LAW.COM, https://www.law.com/law-firm-profile/?id=163&name=Jones-Day&slreturn=20191003004840 (last visited Sept. 27, 2020).

181 Motion to Compel Compliance with Federal Rule 10(a) at 13, Tolton v. Jones Day, No. 19-cv-00945, 2019 WL 4305789 (D.D.C. Sept. 11, 2019) [hereinafter Motion to Compel Compliance].

182 *Id.*

183 *See generally* Motion to Compel Compliance, *supra* note 181.

184 CROSS, *supra* note 10, at 156–57.

185 Motion to Compel Compliance at 13, *supra* note 181, at 13.

186 *Id.*

the firm.[187] As recognized in *Roe v. Aware Woman Center. for Choice, Inc.*, however, these concerns are likely overblown.[188] The *Aware Woman* court found that a reasonable protective order would sufficiently assuage such concerns and reconcile the competing interests of the plaintiff's privacy and the defendant's right to obtain discovery.[189]

D. *Increased Public Access to Courts*

While transparency of judicial proceedings has always been a cornerstone of the American legal system,[190] the ease with which the public can now access information is unprecedented. Gone are the days when a reporter would have to physically be in a courtroom to record what was happening in a case, as many dockets are instantly available online[191] and news spreads at the speed of a tweet. All federal court dockets and many state court dockets are fully available online for free or at a low cost.[192] Courts have recently begun to grapple with these technological developments and how they affect the analysis of whether a plaintiff may proceed anonymously.[193]

One notable development occurred in a recent sexual assault case out of the District of Columbia, *Doe v. Cabrera*, in which the court specifically recognized the change in accessibility of information. The court recognized that "[h]aving the plaintiff's name in the public domain, especially in the Internet age, could subject the plaintiff to future unnecessary interrogation, criticism, or psychological trauma, as a result of bringing this case."[194] In evaluating the plaintiff's request to proceed under a pseudonym, the court utilized a five-factor test.[195] One of these factors was whether there is a risk of retaliatory physical or mental harm;[196] in evaluating this factor, the court noted that "compelling the plaintiff to identify her name on every court filing would make the plaintiff's name indefinitely available to the public."[197] The court stated that though it appreciated the "public benefits of the Internet," the flip side is that "it has the unfortunate drawback of

187 *Id.*
188 253 F.3d 678, 686–87 (11th Cir. 2001).
189 *Id.*
190 CROSS, *supra* note 10, at 156.
191 PACER, *supra* note 4.
192 *Id.*
193 *See* Doe v. Cabrera, 307 F.R.D. 1 (D.D.C. 2014).
194 *Id.* at 7.
195 *Id.* at 5.
196 *Id.*
197 *Id.* at 6–7.

providing an avenue for harassing people."[198] It is important to note that this case dealt with a severe sexual assault, and the court acknowledged the serious psychological impact on the plaintiff.[199] It is unclear if the issue would have been decided the same way if the case did not involve a physical assault.

IV. RECENT TRENDS IN THE USE OF PSEUDONYMS IN SEXUAL HARASSMENT AND GENDER DISCRIMINATION CASES AGAINST LAW FIRMS

While there is no doubt that the #MeToo movement has opened the floodgate of discourse around the issues of sexual harassment and gender discrimination, whether the legal system has kept pace with these developments is unclear. Several pending cases may shed light on this question, particularly concerning whether plaintiffs may proceed under pseudonyms in prosecuting their sexual harassment or gender discrimination claims.

A. Tolton v. Jones Day

The first of these cases is *Tolton v. Jones Day*, mentioned above. The plaintiffs, who are female attorneys, brought a class action against their former employer, Jones Day, alleging gender, pregnancy, and maternity discrimination and retaliation.[200] Four of the plaintiffs (Jane Does 1–4) sought to proceed under a pseudonym based on the sensitive information at the center of the lawsuit and the risk of retaliation.[201] The plaintiffs' identities were already known to the defendant, and they sought only to prevent public disclosure.[202] In addition to seeking to protect health information and information about minor children, the plaintiffs were "concerned that filing this Complaint under their true identities at this time [would] further interfere with their standing among partners and peers at their current workplaces and beyond, including by permitting Jones Day to publicly impugn their professional reputations to chill this litigation and irreparably harm their future career prospects."[203]

198 *Id.* at 7.

199 *Cabrera*, 307 F.R.D. at 6.

200 Jane Doe Plaintiffs' Memorandum of Points and Authorities in Support of Motion to Proceed Under Pseudonyms and to Seal Personally Identifying Information at 1, Tolton v. Jones Day, No. 19-cv-00945, 2019 WL 4305789 (D.D.C. Sept. 11, 2019).

201 *Id.* at 1–2.

202 *Id.* at 2.

203 *Id.*

Initially, the District Court's chief judge granted the plaintiffs' motion to temporarily proceed under pseudonyms.[204] In so finding, the court agreed with the plaintiffs' contention that the firm could "publicly impugn their professional reputations to chill this litigation and irreparably harm their future career prospects."[205] Further, disclosure would not only be embarrassing to the plaintiffs but could be "potentially damaging to their reputations and careers as successful attorneys."[206] In responding to the defendant's allegations of prejudice, the court found that a limited period of anonymity, which included reciprocal anonymity to certain partners mentioned in the complaint, posed little risk of unfairness to Jones Day.[207]

This measure was temporary, however, and, after the defendant moved to compel the plaintiffs to identify themselves, three of the four anonymous plaintiffs gave up their bid to proceed under a pseudonym.[208] The fourth Jane Doe was denied anonymity; the court remained unpersuaded despite noting that the plaintiff's allegations of professional retaliation were serious.[209] The court found that pseudonymous treatment alone could not protect the plaintiff "from Jones Day's alleged whisper campaign" and that the unsubstantiated claims of retaliation were nothing more than hearsay.[210] Ultimately the court found that "public interest in open access to judicial proceedings, and defendant's interest in avoiding the suggestion that it will, if given the opportunity, retaliate against a former employee, outweigh[ed] Doe 4's 'interest in anonymity.'"[211] As a result of this holding, Doe 4 chose to drop out of the litigation rather than identify herself publicly.[212]

B. Jane Doe v. Proskauer Rose LLP

The second recent case in this area is that of *Jane Doe v. Proskauer Rose LLP*.[213] There, plaintiff Jane Doe alleged male partners at the firm made comments about her appearance and that she was paid less than

---

204 Memorandum and Order at 7, Tolton v. Jones Day, No. 19-cv-00945, 2019 WL 4305789 (D.D.C. Sept. April 311, 2019).

205 *Id.* at 5 (quoting Pls.' Mem. at 2).

206 *Id.*

207 *Id.* at 6.

208 *Id. at* 1–2.

209 *Id.* at 6.

210 Memorandum and Order at 6, Tolton v. Jones Day, No. 19-cv-00945, 2019 WL 4305789, *at 6–7 (D.D.C. Sept. 11, 2019).

211 *Id.* at 10.

212 Dorrian, *supra* note 9.

213 *See* Gayle Cinquegrani, *Partner Suing Proskauer Reveals Identity, Alleges Retaliation*, BLOOMBERG (Apr. 27, 2018), https://news.bloomberglaw.com/daily-labor-report/partner-suing-proskauer-reveals-identity-alleges-retaliation.

comparable male partners.[214] Jane Doe was eventually revealed to be Connie Bertram, head of Proskauer's labor and employment group.[215] This revelation came about only because the case was proceeding to trial and the plaintiff's counsel said, "you can't have an anonymous Jane Doe at trial."[216] Bertram originally proceeded under a pseudonym, however, because she feared that the litigation would hurt her career.[217] This case bears a striking resemblance to that of Ellen Pao.[218] Both women were high-powered women in executive positions: Pao was a venture capitalist executive,[219] and Bertram is head of her practice group.[220] To an objective outsider, Bertram would seem to be near the top of the food chain; she is someone who controls, not who is controlled. The revelation of Bertram's identity only further serves to show how pervasive the fear of public disclosure is among female attorneys.

V. WHAT CHANGES NEED TO (OR CAN) BE MADE?

Despite these examples suggesting otherwise, it is not an entirely bleak outlook for sexual harassment plaintiffs seeking to proceed anonymously. Though the court in *Jones Day* denied Jane Doe 4's bid to proceed anonymously, it noted that the judgment of whether such denial would chill future litigants is a question "better left to Congress and those charged with periodically updating the Federal Rules of Civil Procedure."[221] It is, of course, within Congress' prerogative to modify the legal standard of a given law and to create a statutory right to proceed under a pseudonym in cases brought under a harassment statute.[222] In the meantime, however, courts are not without recourse to adapt to modern trends; despite no clear congressional direction thus far, courts have still carved out limited exceptions to Rule 10. It is time for sexual harassment and gender discrimination to be treated with the same gravity as other matters of a highly personal nature.

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 Manjoo, *supra* note 27.

219 *Id.*

220 Cinquegrani, *supra* note 213.

221 Memorandum Opinion and Order at 4, Tolton v. Jones Day, No. 19-cv-00945, 2019 WL 4305789 (D.D.C. Sept. 11, 2019).

222 *See, e.g.*, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992) (upholding a statute that modified the legal standard upon which the underlying litigation was based).

Regardless of the details, courts generally apply some variation of the same test.[223] At its core, this test evaluates a plaintiff's interest in anonymity against the public's interest in open judicial proceedings while keeping in mind the potential unfairness to a defendant.[224] The foundation of this balancing test is sound. But proper weight is not given to a plaintiff's interests.[225] Particularly, courts focus too much on the potential for "embarrassment" without considering the serious and actual harm that may result.[226] Courts undervalue the potential harm to a plaintiff's career, particularly in cases involving fields where a plaintiff's reputation is critical in establishing him or herself professionally.[227] Female lawyers face much more than mere embarrassment. They face career-ending consequences amounting to career suicide. Given the abundance of evidence that women do not report harassment and gender discrimination for fear of professional retaliation,[228] it is inconceivable that courts can persist in treating these concerns so lightly, particularly in the #MeToo climate.

As an initial matter, courts should, at the very least, follow the D.C. Circuit's lead in recognizing the immediate accessibility and viral nature of publicly available information.[229] There, the court recognized the immediate and permanent nature of publicly identifying a plaintiff on the internet, as well as the potential for negative effects as a result.[230] Such considerations should not be limited to cases involving physical assault, as they were in *Cabrera*. As discussed, sexual harassment and gender discrimination victims in the workplace, particularly those early in their career, are incredibly susceptible to manipulation and blacklisting as a result of their complaints.[231] Courts should analyze a request to proceed anonymously in these types of complaints with the same level of discretion that they approach other sensitive matters,

223 *See* Memorandum Opinion and Order at 2, Tolton v. Jones Day, No. 19-cv-00945, 2019 WL 4305789 (D.D.C. Sept. 11, 2019).

224 *Id.* (quoting Nat'l Ass'n of Waterfront Emp'rs v. Chao, 587 F. Supp. 2d 90, 99 (D.D.C. 2008)).

225 *See* Doe v. City of Chicago, 360 F.3d 667, 669–70 (7th Cir. 2004) (finding no compelling interest in anonymity where the plaintiff was not a minor or a rape victim).

226 *See* Doe 1 v. George Washington Univ., 369 F. Supp. 3d 49, 62 (D.D.C. 2019) ("Personal embarrassment is normally not a sufficient basis for permitting anonymous litigation.").

227 Memorandum Opinion and Order at 6–7, Tolton v. Jones Day, No. 19-cv-00945, 2019 WL 4305789 (D.D.C. Sept. 11, 2019).

228 *See supra* Section II.D.2.

229 Doe v. Cabrera, 307 F.R.D. 1, 6–7 (D.D.C. 2014).

230 *Id.*

231 *See supra* Section II.D.

which should include considerations of the harmful effects of public disclosure.

VI. CONCLUSION

Sexual harassment and gender discrimination are pervasive and deep-seated in most fields, but especially in the legal profession, steeped as it is in tradition. While the #MeToo movement has shone a much needed light on the problem, there is a great deal of work that must be done to effect true change. This work is going to move slowly, however, if plaintiffs are too afraid to challenge the system for fear of retribution. Until plaintiffs can feel comfortable bringing litigation without fear of retaliation or "career suicide," courts should carefully consider requests to proceed under pseudonyms and should take into account the very real potential for damage to the plaintiff's career. Simply put, pseudonyms should not only be reserved for "delicate" matters. Courts have typically not treated damage to one's career in the same way that they treat mental harm or deeply personal information, which could both justify use of a pseudonym.

In reality, the impact on an individual's career caused by the repercussions of sexual harassment should be treated as spanning both categories: the harm caused by the destruction of one's chosen career path—potentially one's life's work—is no trivial matter. To treat it as such does a disservice not only to the plaintiff involved but to the justice system itself. We are at the beginning of a sea change in society's attitude toward sexual harassment and gender discrimination, and the legal community must recognize that history will not be kind to those who obstruct the path of progress.

At the very least, courts must provide a safe space for these plaintiffs' stories to be heard; if that safe space requires the use of a pseudonym, it should be considered. While anonymity may not be appropriate in every case, neither should it be discounted so quickly based on outdated considerations of the availability of information or misplaced notions that a plaintiff has voluntarily put herself in the public eye. Given the speed and permanency of information available today, courts need to give appropriate weight to a plaintiff's privacy interests and the severe, long-term consequences of exposing that plaintiff's reputation in the workplace to the spotlight. Rather than make the courts accessible, the effect is to drive away the individuals who have the potential to make real change for women in the legal industry and beyond.