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Schwarzenegger, Weiner and Friends

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Eight years ago, I wrote a commentary about lessons we could learn in sexual harassment law from California voters who elected Arnold Schwarzenegger as their governor, despite reports that he had groped or sexually harassed more than a dozen women.

The lessons then included three basics: context matters in sexual harassment law, and any forward behavior on Hollywood movie sets might be the norm; the alleged victims' delays in reporting their claims weakened their credibility; and Schwarzenegger's prompt apology likely led to forgiveness by the public and reduced the likelihood of litigation.

Well, here we are eight years later and, unfortunately, the ex-governor has some new, darker lessons to teach. Schwarzenegger disclosed last month that he fathered a child with his housekeeper (his employee) nearly 14 years ago — and never disclosed it to his wife. And he has been joined by a springtime parade of men with sexual misconduct issues, including Rep. Anthony Weiner and former presidential candidate John Edwards.

As tawdry as these episodes may be, they provide more teachable moments in sexual harassment law and litigation.

Sexual harassment is like potato chips. Just one victim is never enough. Men who engage in harassing or predatory behavior with women tend to be serial offenders. Boorish, aggressive behavior — especially toward vulnerable, less powerful women, like Schwarzenegger's housekeeper — seems to be hard-wired into some men, including those who are highly successful.

Therefore, employers who receive a report of sexual harassment should realize that they might be dealing with the tip of the iceberg. Often, investigation will reveal multiple episodes of sexual advances and inappropriate behavior.

Under the law, the employer must take prompt and effective action that is reasonably calculated to end the harassment. As a result, when harassment is found, the only way to break the pattern is to take serious action, which may range from termination or demotion, to professional training and therapy — before he resigned, Weiner announced he would be underdoing therapy for an undisclosed condition. Employers who take the harasser's word — "I'll never do it again" — are destined to feel as jilted as Maria Shriver.

Forget the rules of evidence — past acts do matter. A bedrock principle in the Federal Rules of Evidence is that past bad acts should not be used "to show action in conformity therewith," unless limited exceptions apply. The rule recognizes the overwhelming influence that knowledge of similar prior bad acts can have on a fact-finder.

When it comes to sexual harassment litigation, defense attorneys know their case may be "hasta la vista, baby," if evidence of prior bad acts comes in. Defense counsel therefore fight tenaciously to block discovery — or entry into the record — of such evidence. Plaintiffs' counsel, on the other hand, aggressively seek discovery and admission of such evidence from current and past employers.

Because discrimination and harassment involve questions of motive and intent, the law favors letting the evidence in. The Third U.S. Circuit Court of Appeals has repeatedly cautioned against applying "crabbed notions" of relevance and "undue prejudice" to exclude prior acts.

Harassers are liars. I've been in this field for more than 15 years, and on occasion an alleged harasser will surprise me with a candid admission that he or she had a romantic interest in the victim, or that he "thought she was interested" and that's why he leaned in for the offending kiss. Those are the cases I can salvage. But more often than not I find that people who engage in sexual harassment or similar inappropriate conduct are like alcoholics or drug addicts — clever, unreliable liars. Think Edwards or Weiner, who were both adamant in their denials of sexual impropriety until confronted with irrefutable evidence.

Any alleged harasser who denies everything is usually lying — but maybe not about everything. The problem is, once an accused harasser is caught in one lie, the fact-finder is free to disbelieve everything he says — and in employment-discrimination law, permitted to find a pretextual cover-up for discrimination. If you are defense counsel, you must stop the lies.

Be like a D.A. — and carefully investigate and interview. To avoid a cascade of lies from the harasser becoming part of the record, defense counsel must plan a careful, strategic investigation before interviewing the alleged harasser, much like the one that would be conducted by the police or the district attorney investigating a crime. Gather information from other sources — not just the accuser, but workplace email and co-worker interviews as well — before confronting the alleged harasser. At the interview, test the witness on the obvious and provable facts, before he knows you have the goods. Check out any alibis for proof. Then, when you've laid out your cards, get him to tell you what really happened — and warn him about the consequences of lying.

Once the facts are clear, decide the discipline, if any. Sometimes, you may find that you can "stand by your man" and survive the allegations (a la Bill Clinton). Other times, you may need to tell your client to be the Terminator and end the employment.

Thank you, Arnold, for showing us the way yet again.

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