

## Restatement Second of Torts

### § 892. Meaning of Consent

(1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.

(2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

### § 892A. Effect of Consent

(1) One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.

(2) To be effective, consent must be

(a) by one who has the capacity to consent or by a person empowered to consent for him, and

(b) to the particular conduct, or to substantially the same conduct.

(3) Conditional consent or consent restricted as to time, area or in other respects is effective only within the limits of the condition or restriction.

(4) If the actor exceeds the consent, it is not effective for the excess.

(5) Upon termination of consent its effectiveness is terminated, except as it may have become irrevocable by contract or otherwise, or except as its terms may include, expressly or by implication, a privilege to continue to act.

## Restatement Second of Torts

### § 892B. Consent Under Mistake, Misrepresentation or Duress

(1) Except as stated in Subsection (2), consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.

(2) If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.

(3) Consent is not effective if it is given under duress.

#### Comment on Subsection (3):

*j. Duress.* Duress is constraint of another's will by which he is compelled to give consent when he is not in reality willing to do so. Persuasion amounting to a form of constraint can take various forms and many of them, commonly encountered in daily life, are without legal effect and are not normally characterized as duress. Thus the threat of a good friend that unless the other consents to particular conduct he will never speak to him again is not a basis for any legal relief, even though it does in fact succeed in forcing a reluctant consent. Some forms of "economic duress" such as the threat of infliction of pecuniary loss, as in the case in which the actor threatens to obtain the other's discharge from his employment, may be ground for relief of an equitable origin and character, such as rescission of the transaction into which the parties have entered and restitution of what has been paid. On this, see Restatement, Second, Contracts, §§ 316-319 (Tent.Draft), and Restatement of Restitution, § 70, which discuss the factors involved in finding duress.

Subsection (3) of this Section does not attempt to define the type of duress to which it applies. The cases to date in which duress has been found to render the consent ineffective have involved those forms of duress that are quite drastic in their nature and that clearly and immediately amount to an overpowering of the will. These include force or threats of force against the person consenting or the members of his immediate

family or his valuable property; and also arrest, imprisonment or prosecution upon a serious criminal charge of the person consenting or a member of his family, as well as immediate threats of that force.

The cases, however, do not indicate that these are the limits of the duress that will render consent ineffective. The early common law view that duress is restricted to imprisonment or threats sufficient to put a brave man in fear of loss of life or limb or of imprisonment of himself or a member of his immediate family clearly does not apply. Nor is it certain that the duress must be of a type to which a person of ordinary firmness or a reasonable person would yield, though this may be important in determining whether the other party's will was actually overborne. Age, sex, mental capacity, the relation of the parties and antecedent circumstances all may be significant. The type of conduct to which the other party consents is also important. Thus one might reasonably submit to detention in a store for half an hour to regain a purse that was taken from her, although she could not reasonably submit to sexual liberties and maintain an action for battery. (See generally, § 871, Comment f).

#### **§ 892C. Consent to Crime**

(1) Except as stated in Subsection (2), consent is effective to bar recovery in a tort action although the conduct consented to is a crime.

(2) If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.

#### **§ 892D. Emergency Action Without Consent**

Conduct that injures another does not make the actor liable to the other, even though the other has not consented to it if

(a) an emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to consent for him, and

(b) the actor has no reason to believe that the other, if he had the opportunity to consent, would decline.

**BARBARA A. v. JOHN G.**

Court of Appeals, First District, California 1983.  
145 Cal.App.3d 369, 193 Cal.Rptr. 422.

**BARRY-DEAL, ASSOCIATE JUSTICE.**

The issue presented in this appeal is whether a woman (appellant) suffering injuries from an ectopic pregnancy has a cause of action in tort against the responsible man (respondent) for his misrepresentations of infertility. The trial court ruled that no cause of action would lie and granted respondent's motion for judgment on the pleadings. We reverse the judgment. ...

Appellant and respondent met about April 1978. Appellant retained respondent, an attorney, to represent her in a post-dissolution proceeding for modification of spousal support and child support for her three children; the legal relationship was in existence at the time of the alleged events. On two occasions, June 25 and June 30, 1978, she and respondent had sexual intercourse with each other. Before they engaged in sexual intercourse the first time, appellant demanded that respondent use a contraceptive device, i.e., a condom, and explained that for emotional and financial reasons she did not want to become pregnant. Appellant further told respondent "... that she would not engage in sexual intercourse with him if there was any likelihood of her becoming pregnant; ..." Respondent told appellant not to worry, saying, "I can't possibly get anyone pregnant." She understood this to mean that he was sterile by nature or as the result of a vasectomy.

Respondent's representation about his procreative inability was false, and he knew it was false. It was made with the intent to induce appellant to engage in sexual intercourse, protected or not. Appellant, relying on respondent's assurance of his sterility, consented to and did engage in sexual intercourse with respondent. The attorney-client relationship produced in appellant a sense of trust in respondent, and she justifiably relied on his representations.

As a result of sexual intercourse with respondent, appellant became pregnant. The pregnancy was determined to be tubal, and, as a consequence, appellant was forced to undergo surgery to save her life. Her Fallopian tube was removed, and she was rendered sterile by the surgery. She suffered physical, emotional, and financial injuries as a result of the pregnancy. . . .

Based on the alleged facts, appellant has stated a cause of action in battery, i.e., an unconsented invasion of her interest in freedom from intentional, unlawful, and harmful or offensive contact with her person. Consent to an act, otherwise a battery, normally vitiates the wrong. However, appellant has alleged alternate grounds for invalidating her consent and rendering respondent's act a battery: (1) that the act of impregnation exceeded the scope of the consent, and (2) that the consent to intercourse was fraudulently induced. As she has alleged physical, emotional, and financial damage proximately caused by the wrongful touching, appellant's cause of action for battery was sufficiently pleaded.

As an alternative theory for recovery in tort, appellant pleaded deceit, an action sanctioned by Civil Code section 1709, which provides: "One who willfully deceives another with intent to induce him [or her] to alter his [or her] position to his [or her] injury or risk, is liable for any damage which he [or she] thereby suffers."

... Respondent asserts that appellant's action comes within the statutory exception declared in Civil Code section 43.5 and is thus barred. We find that statute is not applicable. Section 43.5 provides, in relevant part, "No cause of action arises for: ... (c) Seduction...." The word "[s]eduction," as used in the statute, is a term of art involving elements substantively different from those alleged by appellant.

"Seduction imports the idea of illicit intercourse accomplished by the use of arts, persuasions, or wiles to overcome the resistance of a female who is not disposed of her own volition to step aside from the paths of virtue." It is no longer possible for two consenting adults in the State of California to engage in "illicit intercourse."

The old action for seduction required that the woman was "... chaste and virtuous at the time of the alleged seduction ...", and it was used primarily to protect young, inexperienced women who had succumbed to the sexual advances of older men.

In the instant case appellant complains not because her virtue was violated or because she suffered humiliation and loss of reputation, but

because the sexual act was *unprotected and led to an ectopic pregnancy* as a result of respondent's *misrepresentation*. The gravamen of the complaint in this situation is substantially different from an action for "[s]eduction," which is indeed precluded by Civil Code section 43.5.

Nevertheless, respondent argues that the public policy considerations underlying the statutory bar to seduction actions are sound and are applicable to the case before us. He points out that seduction actions are "... fruitful sources of fraud and extortion because of the ease with which they may be employed to embarrass, harass and besmirch the reputation of one wholly innocent of wrongdoing ...". He predicts a multitude of unfounded or fraudulent claims if appellant's claim is allowed.

Our Supreme Court has held that fear of unfounded or fraudulent claims is not a valid reason for disallowing a tort action predicated upon a meritorious claim. ...

The question remains, however, whether allowing appellant's action in the case before us encourages "... unwarranted governmental intrusion into matters affecting the individual's right to privacy ..." and thus contravenes public policy. ... The constitutional right to privacy extends to all matters relating to marriage, family, and sex. The right to privacy, however, is not absolute, and governmental intervention in matters affecting an individual's right to privacy in sexual matters has been sanctioned in both criminal and civil law.

California has adopted a general scheme for the regulation of the criminal aspects of sexual activity and has determined when sexual intercourse between persons not married to each other shall be criminal. Prosecution under many of the penal statutes, covering both consensual and forcible sexual acts, often requires testimony of a far more intimate sexual nature than in the case before us. The victim of many of the proscribed acts suffers an invasion of privacy in both the act and the required testimony. And, the state has a fundamental right to enact laws which promote public health, welfare, and safety, even though such laws may invade the offender's right of privacy.

Even sexual relations within marriage, long held sacrosanct, have recently been opened to scrutiny when a spouse complains of forcible sexual intercourse. The ancient policy of protecting the privacy of the marriage bed is outweighed in the modern view by the grievous harm to a man or woman caused by spousal rape. ...

Although the right to privacy is a freedom to be carefully guarded, it is evident that it does not insulate a person from all judicial inquiry into his or her sexual relations. We do not think it should insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other. Public policy does not demand such protection for the right of privacy. ...

SCOTT, ACTING PRESIDING JUSTICE . . .

The majority attempts to characterize appellant's cause of action as a battery or an action for deceit. But in fact, appellant was allegedly seduced by respondent's false representation of infertility. The gravamen of appellant's cause of action is the seduction, that is the act of sexual intercourse induced by appellant's false representations. The injury sustained as a result of the alleged seduction was the ectopic pregnancy and damages that flowed therefrom. Clearly if there can be no cause of action for seduction, there can be no damages for the consequences thereof.

In rejecting respondent's contention that appellant's action is barred by Civil Code section 43.5, subdivision (c), the majority argues that this is not a seduction action because "appellant complains not because her virtue was violated . . . but because the sexual act . . . led to an ectopic pregnancy as a result of respondent's misrepresentation." I find no support for the contention that the only damage from a seduction is loss of virtue. Surely a woman can suffer mentally and physically from an unwanted pregnancy whether it results in a live birth or is sooner terminated. All we are talking about is the damage that flows from the seduction.

I agree with the court in *Stephen K. v. Roni L.* (1980) 105 Cal. App.3d 640 at pages 644 and 645, 164 Cal.Rptr. 618, where it states: "Despite [the] legalism [of plaintiff's claim], it is nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct. To do so would encourage unwarranted governmental intrusion into matters affecting the individual's right of privacy." Should we grant appellant here a cause of action, we cannot logically foreclose a cause of action to a woman who carries the child to a live birth, or one who has a miscarriage. The possibilities are limitless. The courts should stay out of the bedroom. . . .

# Disciplining drops in sexual misconduct cases

By Allison Bass  
GLOBE STAFF

At a time when more and more patients are coming forward with stories of sexual victimization, the state board of medicine has regressed in its efforts to discipline psychiatrists and physicians for sexual misconduct.

To make matters worse, legislation that was filed last year to deter psychotherapists and doctors from having sex with their patients is sitting moribund, if not dead, on Beacon Hill.

"It's been incredibly frustrating," says Diane Aronson, an advocate for women who have been sexually abused by their therapists, and herself a victim. "We've made some great strides in terms of professionals understanding the devastating consequences of this kind of abuse, but we also feel like there's been some backsliding. People in this state are still too quick to blame the victim."

While victims of therapist abuse are now more willing to report the misconduct to other therapists and trusted friends, Aronson says many have become more cautious about going to the state Board of Medicine in Registration with their complaints. They fear that the board is slackening its efforts to discipline physicians and psychiatrists for this kind of behavior, she says.

Statistics back up that belief. Since the beginning of 1990, the board has disciplined one psychiatrist for sexual misconduct, but its file contains 12 unresolved misconduct cases; in 1989, 10 psychiatrists and physicians were disciplined for having sex with their patients; in 1988, nine were.

One of the unresolved cases, dating to 1989, is against Sheldon Zigelbaum, a high-profile Boston psychiatrist charged with sexually abusing four patients. Another case involves Edward Daniels, a Harvard Medical School psychiatrist who at one time was one of the most influential psychoanalysts in the Boston area. He also is charged with sexually abusing four

male patients.

Zigelbaum and Daniels, both of whom have denied the charges of sexual misconduct, are still practicing.

Sexual misconduct is not the only area where the board has slipped, observers say. The state agency ranks 49th in the nation in total disciplinary actions taken against doctors; it was ranked 20th in 1987. While the board has made some progress in whittling down its backlog of unprocessed complaints — in the past three weeks, it has processed 350 complaints out of 1,000 — 98 percent of those complaints were dismissed, leading some observers to wonder whether consumer concerns are receiving a fair hearing.

## Lack of resources

Board members and staff say the agency has been badly hurt by state budget cuts, and that the delay in resolving disciplinary cases is primarily due to a lack of resources. Alexander Fleming, the board's executive director, says that for more than a year — ever since the board's authority to hear cases was transferred to another agency — the board has had only one attorney on staff to write up unfinished cases and submit recommendations for disciplinary action to board members. And until July, that hearing officer also functioned as the board's sole counsel on other legal matters.

"These decisions have not been written because of our lack of staff," Fleming said. "I think the logjam has been broken a little bit by having a new general counsel, and I hope most of these decisions will be resolved by the first of next year."

Public concern over the board's poor performance has led to the formation of a special administrative task force to examine the agency's record and its overall mandate. The task force, which was convened in June and includes several state legislators, is expected to report its findings at the beginning of next year.

"This administration is moving quickly to address the backlog of cases," said Stephen Wallace, assistant secretary of consumer affairs, which oversees the board. "By the

time the task force issues its findings, we anticipate the backlog will have been completely disposed of."

#### Weaker rulings feared

But even when action is taken on these cases, some legal observers are concerned that these protracted delays will weaken board disciplinary decisions, allowing them to be more easily overturned by the Supreme Judicial Court. For example, if the board takes an entire year to revoke the license of a psychiatrist charged with multiple cases of sexual abuse, the higher court might question whether that particular psychiatrist was really a threat to the public and overturn his license revocation, one attorney familiar with the process noted.

In the absence of much regulatory activity, advocates say there is an even greater need for legislation that would provide a strong deterrent to sexual misconduct. The proposed legislative package includes a bill that would make it a crime for psychotherapists to have sex with their patients at any time and a crime for any doctor to have sex with a patient during office visits.

A second bill would make it easier for victims to seek damages from therapists and physicians who have sex with them; a third bill would require professionals to report cases of sexual misconduct; and a fourth would allow the state attorney general's office to bar from practice any unlicensed psychotherapist who has been found guilty of sexual misconduct.

The only bill that has been reported favorably out of committee is the mandatory reporting act. The others have been stalled in their respective committees for almost two years, despite the support of all the

medical and mental health societies whose practitioners would be directly affected by the new laws.

#### Issue of consent

The sticking point appears to be the issue of consent - whether physicians and psychotherapists charged with sexual misconduct should be allowed to use as a defense the idea that their patients consented to the sexual act. The proposed legislation would eliminate consent as a defense, on the grounds that the therapist/patient relationship is so obviously lopsided, that patients in such a relationship are not capable of giving consent - much as a child is not considered capable of consenting to sex with an adult.

Sen. Paul Harold (D-Quincy), who is holding up the criminal bill in his criminal justice committee, says removing consent as a defense would be a major departure from criminal law.

"I just don't believe that someone can have that much control over someone else," Harold says. "Are we going to put patients in the same boat with children and insane people?"

Rep. Salvatore DiMasi (D-Boston) has similar reservations about the civil bill now stalled in his judiciary committee. He has proposed a change that would allow defense attorneys to go before a judge and argue that consent should be allowed as a defense in some circumstances.

However, some attorneys say his suggestion would make the law even more hostile to victims of sexual abuse than it is now. They say they would rather withdraw the legislation than allow DiMasi's changes to stand.

"What DiMasi's proposal would do is provide a defense that presently doesn't exist in the law; so rather than be a victim's bill, it would become a perpetrator's bill," says Clyde Bergstresser, a Boston attorney who represents victims of sexual abuse.

"We are trying to codify in the law something that professional societies already recognize in their ethical codes - that under no circumstances should this kind of conduct be condoned. So let's not muck it up with something that says this behavior is OK under some circumstances. It's never OK."

## **HARVARD UNIVERSITY SEXUAL HARASSMENT POLICY**

Sexual harassment in the workplace is discriminatory, unlawful, and clearly inconsistent with the nature of an academic community. The University regards such behavior as a violation of the standards of conduct required of all persons associated with the institution.

Federal and state laws define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when submission to such conduct is made either explicitly or implicitly a term or condition of employment; submission to or rejection of such conduct is used as the basis for employment decisions; or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

It is difficult to define with precision what kinds of verbal or physical behavior constitute sexual harassment because it depends on circumstances such as the severity of the conduct and whether it is part of a pattern or an isolated incident. Although it is not possible to list all types of conduct which, if unwelcome, might under certain circumstances constitute sexual harassment, the following are some examples:

- sexual advances, whether or not they involve physical touching;
- requests for sexual favors in exchange for actual or promised job benefits, such as favorable reviews, salary increases, promotions, increased benefits, or continued employment;
- lewd or sexually suggestive comments, jokes, innuendoes, or gestures;
- displaying sexually suggestive objects, pictures, magazines, or cartoons;
- commenting about or inappropriately touching an individual's body;
- inquiries or discussion about an individual's sexual experiences or activities and other written or oral references to sexual conduct.

Any staff or faculty member who believes he or she has been harassed should report the incident promptly. Staff and faculty members are urged to bring any concerns or complaints of sexual harassment to the University's attention through the most comfortable of a variety of routes.

The staff or faculty member may select an informal process and discuss the problem with his or her supervisor or a designated contact, listed in the chart below. Most schools and departments also have formal procedures to investigate complaints of sexual harassment. A faculty or staff member may request a formal review of a sexual harassment complaint by submitting a written request for such action to his or her designated contact.

Staff may also consult the University Office of Employee Relations, located at Holyoke Center 754, 1350 Massachusetts Ave., Cambridge, MA 02138, 496-2214. Members of collective bargaining units may consult their union contracts for any additional resources. Both faculty and staff may find the counseling services of the Faculty and Staff Assistance Program or the University Health Services helpful in these circumstances.

Complaints of sexual harassment will be treated confidentially, to the extent that is consistent with conducting a fair investigation. Any staff or faculty member who after investigation is found to have violated this policy will be subject to appropriate disciplinary action by the University, up to and including dismissal.

It is unlawful to retaliate against a staff or faculty member for filing a complaint of sexual harassment or for cooperating in an investigation of such a complaint. Retaliation against a staff or faculty member who in good faith reports alleged harassment or who participates in an investigation is a violation of this policy and is subject to appropriate discipline.

#### DESIGNATED CONTACTS FOR HARVARD LAW SCHOOL

Faculty: Todd Rakoff  
Associate Dean  
495-4634  
Griswold 411  
Cambridge, MA 02138

Staff: Mary A. Cronin  
Assistant Dean for Personnel Services  
495-4611  
Areeda 138  
Cambridge, MA 02138

The following state and federal employment discrimination agencies enforce the law against sexual harassment and can be contacted at the addresses and telephone numbers listed:

Massachusetts Commission Against Discrimination  
One Ashburton Place, Room 601  
Boston, MA 02108  
(617) 727-3990

U.S. Equal Employment Opportunity Commission  
One Congress Street, Room 1001  
Boston, MA 02114  
(617) 565-3200

*Office of Human Resources  
Harvard University  
November, 1996*

## MEMORANDUM

To: Members of Harvard Law School  
Community

FROM: Dean Robert C. Clark

DATE: October 25, 1995

RE: Sexual Harassment Guidelines

The following is a copy of the Law School's Sexual Harassment Guidelines, which are now officially in force.

Parts I and II describe prohibited conduct. Part III describes implementing and enforcement procedures. In Parts I and II, the Guidelines themselves are clearly numbered, and are set out in the form of statutory provisions. Accompanying the Guidelines, but in smaller typeface, are passages labeled "Commentary" and "Illustrative Examples." While these materials are not part of the Guidelines per se, the Faculty did vote that they be included in this public document, in order to facilitate understanding and interpretation of the Guidelines, as well as meaningful instruction about them. The items labeled "Introduction" were not explicitly voted upon by the Faculty but were in the report submitted by the Sexual Harassment Committee. (All of this may remind upper-level students of the conventions used in presenting certain statutes, such as the Uniform Commercial Code.)

It should be noted that there are a number of related preexisting Guidelines and policies that deal with sexual harassment or the procedures for enforcing complaints. For example, there are separate sexual harassment guidelines applicable to the Law School's non-exempt (unionized) staff and to its exempt staff, and the Administrative Board has existing procedures for handling complaints of many kinds against students. If interested, you may obtain a copy of a document prepared by the Sexual Harassment Committee and entitled "Appendix of Related Materials," which collects these materials. (If you are a student, contact the Dean of Students office. If you are a member of the faculty or staff, contact the Academic Affairs office.)

## HARVARD LAW SCHOOL SEXUAL HARASSMENT GUIDELINES

(AS ADOPTED BY VOTE OF THE FACULTY, APRIL 1995)

### PART I

### GUIDELINES CONCERNING SEXUAL HARASSMENT

#### INTRODUCTION

Harvard Law School is committed to maintaining a learning and work environment free from sexual harassment. The following guidelines, which define sexual harassment as prohibited by the Law School, both express institutional values and carry out the mandates of state and federal law. As a reflection of institutional values, the guidelines uphold traditions of academic freedom and uncensored debate on matters of public concern. They effect no compromise of freedom of thought, inquiry, or debate. Rather, the guidelines seek to ensure an environment in which education, work, research, and discussion are not corrupted by sexual harassment.

The guidelines establish institutionally enforceable prohibitions, not aspirational standards. They do not preclude other, non-disciplinary efforts to resolve interpersonal grievances or to create a hospitable work and educational environment for all members of the Law School community, regardless of gender or sexual orientation.

The guidelines of this Part I deal with harassment through conduct and speech of an explicitly sexual nature. Sex-based harassment can take other forms — for example, physically intimidating conduct that is not inherently sexual but is targeted at others based on their gender or sexual orientation. Harassment of this kind is addressed in Part II of these guidelines.

A preliminary comment on this distinction may be appropriate. In common parlance, the term "sexual harassment" may well encompass harassment that is "sex-based" as well as inherently sexual. Certainly the Supreme Court's "sexual harassment" cases have not distinguished between these two forms of harassment. Because the Court clearly regards Title VII as creating rights to freedom from both, its broad use of the term "sexual harassment" to include both has been wholly understandable. In the context of a university, however, interests in free expression are of central importance, and must be weighed against interests in freedom from harassing speech. The analytical distinction between "sexual harassment" and harassment that is "sex-based" helps to clarify the collision of competing values and makes it possible to define protected and prohibited categories with enhanced precision.

## GUIDELINES

**1. QUID PRO QUO HARASSMENT.** Submission to or rejection of sexual advances, sexual overtures, or requests for sexual favors shall not be made a ground for any decision relating to employment, academic performance, extracurricular activities, or entitlement to services or opportunities at Harvard Law School.

### *Commentary*

No one's standing or opportunities at Harvard Law School should depend on submission to or rejection of sexual advances or requests for sexual favors. Decision-making on these bases is an affront to the dignity of those who are immediately affected and creates an environment of fear, degradation, resentment, and suspicion that is incompatible with the Law School's mission and ideals.

### *Illustrative examples*

(1) Professor A, who has made several rejected invitations to his secretary B, tells B that he will give her a better employment performance evaluation if she will have a drink with him after work. In the absence of circumstances indicating the contrary, the invitation would reasonably be understood as a "sexual overture," and Professor A has violated the guideline.

(2) Students C and D are both members of a Law School affiliated journal. C tells D that she will vote to accept his note for publication if he will sleep with her. C has made submission to a sexual advance or request for sexual favors a ground for decision relating to an extracurricular opportunity at Harvard Law School. Student C has violated the guideline.

(3) Student E tells Student F, with whom she has a romantic relationship, that she will review, offer comments on, and help him to edit a Law School paper the next day if he will spend a relaxed evening with her and if they can sleep together. (The offered assistance is of a kind that does not violate any independent Law School prohibition.) Because the help offered by E does not involve the use or abuse of any office, power, or authority relating to employment, academic performance, extracurricular activities, or entitlement to services or opportunities at Harvard Law School, Student E has not violated this guideline.

**2. HARASSMENT THROUGH SEXUAL RELATIONSHIPS AND REQUESTS TO INITIATE ROMANTIC OR SEXUAL RELATIONSHIPS BETWEEN FACULTY AND STUDENTS.** No Law School faculty member shall request or accept sexual favors from or solicit a romantic or sexual relationship with any student who is enrolled in a course taught by that faculty member or otherwise subject to that faculty

member's academic supervision before a final grade on the student's supervised academic performance has been submitted to the Registrar.

### *Commentary*

(i) Romantic relationships between Law School faculty and their students create the appearance of favoritism and are fraught with potential for actual favoritism and for quid pro quo sexual harassment. In addition, quid pro quo harassment may be difficult to prove in many cases in which pressure has been exerted or experienced. The blind-grading of examinations in large classes substantially alleviates, but does not wholly eliminate, these risks. Law School faculty are therefore forbidden to request or accept sexual favors from or to solicit a romantic or sexual relationship with any student currently enrolled in their classes or otherwise subject to their formal academic supervision.

To some extent, the potential for favoritism and actual or apparent abuse of power may exist whenever a faculty member solicits or enters a romantic relationship with a student, even if the student is not currently enrolled in a course taught by the faculty member. But no bright line marks the point at which the potential for abuse of power disappears, since students may rely on the recommendations of former teachers throughout their professional careers. A lifetime prohibition against romantic relations between faculty and their former students would represent an intolerable infringement on personal freedom. In addition, both faculty and students must be presumed to be mature and responsible adults entitled to make personal decisions concerning intimate relationships. A prophylactic prohibition, limited to the period in which a student is subject to being officially graded by a faculty member, reflects a middle course between a blanket prohibition against romantic relationships between students and faculty and a policy that countenances such relationships in the absence of provable quid pro quos.

(ii) There is inevitably some vagueness in a prohibition against solicitations to initiate romantic or sexual relationships. Faculty should of course be available to see students informally as well as formally, to go to lunch with students, and to dine with students and attend student parties under appropriate circumstances. Faculty should, however, avoid "dating" relationships with students subject to their immediate supervision.

(iii) For purposes of this prohibition, "faculty member" includes visiting professors, instructors, and anyone with responsibility for evaluating student performances for Law School grades or academic credit.

(iv) Romantic relationships between supervisors and staff directly or indirectly reporting to them raise many of the same concerns of favoritism and appearance of favoritism, and are fraught with the same potential for quid pro quo sexual harassment, as romantic relationships between faculty and students. Supervisory relationships in employ-

ment commonly last longer than a student's term in a faculty member's course, however. It is therefore more difficult to insist that mutually interested adult staff members should simply have to wait until one no longer reports to the other before initiating a romantic relationship. Although romantic relationships between supervisors and staff reporting to them are not categorically prohibited by this guideline, status differentials are sometimes relevant to determinations of whether requests for sexual favors, sexual advances, or other speech or conduct of a sexual nature constitute prohibited harassment under guideline 3 below.

#### *Illustrative examples*

(1) Student G, who has a longstanding romantic relationship with Professor H, is assigned to Professor H's section of a basic Law School course. This guideline potentially applies, and either G or H should communicate with the dean, the registrar, or another appropriate Law School official to arrange for G to be assigned to another section. Even in the case of a longstanding relationship, many of the considerations underlying the guideline remain relevant. If the relationship between G and H should sour, the potential would exist for subtle, difficult-to-prove forms of quid pro quo harassment to occur. In addition, the Law School has a powerful interest in avoiding favoritism and the appearance of favoritism based on sexual relationships.

The guideline would continue to apply even if Professor H taught the only section of an advanced course. G could of course audit H's course, or possibly arrange to take the same course at another law school.

(2) Student I, a Legal Methods instructor, allows himself to be seduced by J, a student in his section, before the course is completed. Student I has violated the guideline. As is made explicit in the commentary, for purposes this guideline, "faculty member" includes ... anyone with responsibility for evaluating student performances for Law School grades or academic credit." Although letter grades are not given in Legal Methods, academic credit is awarded, and the instructor has a responsibility for evaluating J's performance.

**3. HARASSMENT THROUGH REQUESTS FOR SEXUAL FAVORS, SEXUAL ADVANCES, OR OTHER SPEECH OR CONDUCT OF A SEXUAL NATURE.** No member of the Law School community shall subject any other member of the Law School community to any request for sexual favors, any sexual advance, or any other speech or conduct of a sexual nature that

(i) is unwelcome; and

(ii) is abusive or unreasonably recurring or invasive; and

(iii) has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment at Harvard Law School;

provided that no speech or combination of speech and conduct shall be deemed violative of this guideline if it is reasonably designed or intended to contribute to legal or public education, academic inquiry, or reasoned debate on issues of public concern or is protected by the Massachusetts Civil Rights Act or the First Amendment.

#### *Commentary*

(i) The educational and professional missions of the Law School require an environment in which all members of the Law School community can work, study, and learn without being harassed by sexual advances, requests for sexual favors, or other speech and conduct of a sexual nature. Perhaps the most egregious forms of proscribed conduct of a sexual nature are already prohibited by the criminal and civil law and by the University statement of Rights and Responsibilities. This guideline in no way derogates from or displaces those prohibitions, but instead creates a further-reaching protection against requests for sexual favors, sexual advances, and speech or conduct of a sexual nature that are incompatible with the School's educational and professional goals.

(ii) This guideline largely follows the model of the guidelines promulgated by the Equal Employment Opportunity Commission to define sexual harassment (other than "quid pro quo" harassment, as dealt with in guideline 1 above) that is prohibited in the workplace by Title VII. The EEOC guidelines have also been adapted by a number of courts to define prohibited sexual harassment in educational institutions under Title IX. Harvard Law School is subject to both Title VII and Title IX, and members of the Law School community already enjoy the protection of these statutes. This guideline adapts the EEOC model, as glossed by the courts, in two main respects. First, Title VII, Title IX, and the EEOC guidelines deal with the obligations of employers and educational institutions and their agents (including, e.g., supervisors and faculty) to provide a work or educational environment that is free from sexual harassment. This guideline imposes duties of non-harassment directly on other individual members of the Law School community. Second, this guideline makes clear that prohibitions against sexual harassment by members of the Law School community complement, rather than derogate from, traditions of uncensored debate on matters of public concern and especially of academic freedom. The guideline is also consistent with the Massachusetts Civil Rights Act, which prohibits coercive interferences with freedom of expression, regardless of whether state action is present.

(iii) A variety of independent criteria must each be satisfied for a violation of this guideline to occur. In addition, a number of those criteria should be understood as establishing primarily objective standards. Among these are the standards for determining when speech or conduct is "unwelcome"; is "abusive" or "unreasonably" recurring or invasive; has the purpose or effect of "unreasonably" interfering with a person's work or academic performance; creates a work or academic environment that is "intimidating, demeaning, degrading, hostile, or otherwise seriously offensive"; and is "reasonably designed or intended" to contribute to legal or public education, academic inquiry, or reasoned debate on issues of public concern. Nonetheless, the guideline would be violated by someone who knew or should have known that particular speech or conduct of a sexual nature would be perceived by its target or any one of its targets as abusive or unreasonably recurring or invasive and would therefore be experienced by that person as creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive work or educational environment at Harvard Law School, unless that speech or conduct is reasonably designed or intended to contribute to legal or public education, academic inquiry, or reasoned debate on issues of public concern.

(iv) Some judgments involving the application of the relevant criteria, including judgments of reasonableness, can only be made on a case-by-case basis. Nonetheless, three factors are likely to be of recurring importance.

First, requests for sexual favors, sexual advances, and individually targeted speech or conduct of a sexual nature between people of different statuses and authority present special risks of imposition, intimidation, and abuse. For example, speech or conduct directed by a superior at a subordinate or by a faculty member at a student is more likely to constitute prohibited sexual harassment than would the same speech or conduct among people of equal status within the institution.

Second, because the ultimate focus of concern is the working and educational environment at Harvard Law School, more stringent standards may be applied to requests for sexual favors, sexual advances, and to conduct of a sexual nature occurring in classrooms, libraries, and the workplace than to otherwise identical speech or conduct occurring in other, especially off-campus, settings. A similar distinction may apply to other speech of a sexual nature, except insofar as such speech is reasonably designed or intended to contribute to legal or public education, academic inquiry, or reasoned debate on issues of public concern. This difference in standards recognizes not only that speech or conduct occurring outside of the workplace or academic environment may be less likely to have the purpose or effect of unreasonably interfering with performance or of creating a hostile or otherwise offensive environment. It also recognizes that the application of standards such as these to every aspect of a person's speech or conduct — even as his or her residence, and even during

his or her leisure time — gives rise to concerns about the appropriate scope for Law School regulation of social life. These concerns may appropriately be considered by a decisionmaker in determining whether speech or conduct should be deemed to be violative of this guideline.

Third, within the Law School and its campus, people enjoy rights and reasonable expectations of privacy to varying degrees.

For example, the internal decoration of a student's dormitory room, except insofar as targeted at or displayed to the outside, is protected by strong expectations of privacy and generally lies beyond the scope of these guidelines. There is a more limited expectation of privacy in Law School offices, since educational and professional obligations normally involve in-office contact with other members of the Law School community. The internal decorations of faculty and other offices, and any music played at reasonable levels in such offices or in student dormitory rooms, should not be deemed to violate this guideline before the actual or potential complainant has raised any concern about such matters with the responsible person and given that person a reasonable opportunity to respond.

(v) Public and semi-public speeches, many of which are subject to Law School guidelines governing student-sponsored meetings to which speakers are invited, are unlikely to be affected by this guideline.

(vi) This guideline encompasses actions occurring off campus to the extent, but only to the extent, that such actions (alone or in combination with on-campus actions) unreasonably interfere with an individual's work or academic performance or have the purpose or effect of creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment at Harvard Law School.

(vii) As used throughout these guidelines, the term "Law School community" encompasses all faculty and students of Harvard Law School and all staff of Harvard Law School insofar as consistent with their employment contracts.

#### *Illustrative examples*

(1) After a heated and occasionally humorous classroom exchange, Professor K sends a sexually explicit greeting card to L, a student in his class who he thinks is intellectually promising but sanctimonious, rigid, and prudish. L tells K that she found his action inappropriate and disturbing. Professor K responds by sending several more sexually explicit cards. L's response makes it manifest that K's conduct is "unwelcome." Following L's response, K's action is also "unreasonably recurring." Especially in light of Professor K's position of authority, his conduct could "unreasonably interfere" with L's academic performance; in any event, K's conduct toward L suffices to create "an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive ... educational environment."

Professor K might respond that his conduct was "reasonably designed or intended" to contribute to legal education by getting Student L to "lighten up" or to learn to deal more effectively as a lawyer with people of differing sensibilities. As a general matter, the provision of the guideline privileging speech or conduct "that is reasonably designed or intended to contribute to legal or public education, academic inquiry, or reasoned debate on issues of public concern" should be construed broadly. Here, however, Professor K's unreasonably recurring, out-of-class conduct lies beyond the bounds of any "reasonable" design or intent to contribute to legal education.

(2) During a classroom discussion of the relationship between mental states and legal and moral culpability, Professor M tells an improbable story, taken from the Talmud, about a man who accidentally falls from a roof and onto a woman in such a way that sexual intercourse accidentally occurs. N, a student in the class, complains that the story was "unwelcome," that it was "abusive" of the sensibilities of women in the class, and that it created a seriously hostile environment for women by trivializing problems of sexual subordination and rape. N's arguments notwithstanding, Professor M has not violated this guideline. First, M's remark is not "abusive." General comments, not targeted or directed at a particular individual or small group of individuals, will seldom qualify as "abusive" under the objective standard called for by the commentary. Second, a single remark such as M's will seldom "unreasonably interfere" with someone's work or academic performance or create "an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment" within the meaning of the guideline. As established by Title VII caselaw, a prohibited hostile environment can be created only by conduct whose effect is "severe" or "pervasive." M's story satisfies neither requirement. Finally, M's story comes within the provision expressly privileging speech that is "reasonably designed or intended to contribute to legal ... education ... or reasoned debate on issues of public concern."

(3) Student O has too much to drink at a party in Somerville and boorishly propositions Student P in front of several other students. When P rebuffs the proposition, O becomes somewhat abusive and speculates loudly and crudely about P's sex life. Although O's outburst is "unwelcome" and "abusive," this isolated, wholly verbal, off-campus incident between students should not be deemed to "unreasonably interfere" with an individual's work or academic performance or to create a seriously offensive working or educational environment at Harvard Law School within the meaning of this guideline.

(4) Students Q, R, and S, who are male, develop a running "joke" that T, a woman in their first-year section, keeps a hotdog in her underpants. Having drunk too much at a student party, Q tells T that R and S say she has a hotdog in her pants and asks if it is true. T tells Q he is

"sick" and walks away. Thereafter, when T walks into a classroom, Q, R, and S routinely make sexually suggestive jokes, comments, and gestures based on the theme that T has a hotdog in her underwear. Q, R, and S have violated this guideline.

(5) As part of a classroom discussion of gender discrimination, Professor U asks students in the class to list and then discuss gender-based stereotypes. When students offer stereotypes of women, including purportedly stereotypical attitudes towards sex, U offers graphic elaborations, then asks: "And it's true, isn't it?" Professor U has not violated the guideline.<sup>1</sup> Even if the discussion is unwelcome by some students, U's exploration of gender-based and sexual stereotypes is not abusive or unreasonably recurring or invasive. Nor should classroom speech aimed at exposing sexual stereotypes be deemed to interfere "unreasonably" with anyone's work or academic performance or to create a seriously offensive working or educational environment. Finally, U's speech comes under the proviso expressly protecting speech that is "reasonably designed or intended to contribute to legal or public education, academic inquiry, or reasoned debate on issues of public concern," which should be broadly construed to protect free, challenging, and occasionally disturbing speech in the rightly honored tradition of academic freedom.

**4. SEXUAL HARASSMENT BY EMPLOYERS WHO USE THE SERVICES OF THE HARVARD LAW SCHOOL CAREER SERVICES OFFICE OR OFFICE OF PUBLIC INTEREST ADVISING.** It is forbidden sexual harassment for any partner, member, or employee of any law firm or other employer that uses the services of the Harvard Law School Career Services Office or Office of Public Interest Advising to

a. make submission to sexual advances, sexual overtures, or requests for sexual favors either implicitly or explicitly a ground for any decision relating to the employment or evaluation of any member of the Law School community; or

b. subject any other member of the Law School community to any request for sexual favors, any sexual advance, or any other speech or conduct of a sexual nature that

(i) is unwelcome; and

(ii) is abusive or unreasonably recurring or invasive; and

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<sup>1</sup> Not all members of the committee have seen this example, but <sup>1</sup> who have read it concur in this judgment.

(iii) has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working environment.

Decisions regarding enforcement of this guideline, including decisions as to whether and how to proceed with particular formal complaints, shall be within the principled discretion of the Placement Committee, based on factors including, but not limited to, the seriousness of the alleged violation; the nature and weight of the evidence supporting a claim of violation; the difficulty of resolving factual conflicts; and the response of the employer upon learning of a complaint.

#### *Commentary*

(i) As a professional school, the Law School appropriately provides a variety of services both to students seeking employment and to law firms and other employers who wish to recruit at the Law School. Although all of the conduct, speech, and combinations of conduct and speech subject to this guideline almost certainly come within the prohibitions of the criminal or civil law, including Title VII, this guideline expresses institutional values as well. Harassment through the speech and conduct prohibited by this guideline violates understandings on the basis of which Harvard Law School provides the services and facilities of the Career Services Office and Office of Public Interest Advising.

(ii) This guideline should be understood to rely heavily on primarily objective standards, as explained in the commentary to guideline 3.

(iii) The protections extended by this guideline are fully consistent with traditional norms of professional conduct and of uncensored debate on matters of public and professional concern. The quid pro quo harassment forbidden by subsection (a) has no colorable excuse. No speech or conduct should be deemed violative of subsection (b) if it is reasonably designed or intended to contribute to reasoned debate about or analysis of issues of public or professional concern, or if it would otherwise be protected by the First Amendment if the state action requirement did not apply.

## PART II

### GUIDELINES CONCERNING SEX-BASED HARASSMENT BY DISCRIMINATORY CONDUCT

#### INTRODUCTION

Every member of the Law School community deserves an educational and work environment that is free from discriminatory harassment on the basis of gender and sexual orientation. The Law School catalog includes a "notice of non-discrimination" that affirms a policy of non-discrimination with respect to gender and sexual orientation. Various provisions of federal and state law also forbid gender-based harassment. The following guidelines, which define categories of prohibited harassment on the basis of gender and sexual orientation as part of the Law School's general non-discrimination policy, both express institutional values and carry out the mandates of state and federal law.

As a reflection of institutional values, the guidelines respect traditions of academic freedom and uncensored debate on matters of public concern. They effect no compromise of freedom of thought, inquiry, or debate. Rather, the guidelines seek to ensure an environment in which education, work, research, and discussion are not corrupted by discrimination and discriminatory harassment on the basis of gender and sexual orientation.

The guidelines establish institutionally enforceable prohibitions, not aspirational standards. They do not preclude other, non-disciplinary efforts to resolve interpersonal grievances or to create a hospitable work and educational environment for all members of the Law School community, regardless of gender or sexual orientation.

#### GUIDELINES

**1. SEX-BASED HARASSMENT THROUGH DISCRIMINATORY CONDUCT.** It is forbidden discrimination for any member of the Law School community, on the basis of gender or sexual orientation, to:

a. subject any other member of the Law School community to any physical contact or interference with freedom of movement that has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment at Harvard Law School; or

b. deface or intentionally or recklessly damage Law School property or the property of any other

member of the Law School community with the purpose or effect of unreasonably interfering with an individual's work or academic performance or of creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment at Harvard Law School; or

c. engage in any conduct, speech, or combination of conduct and speech that would be viewed by a reasonable person as physically intimidating under the circumstances and that has the purpose or effect of unreasonably interfering with an individual's work or academic performance or of creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment at Harvard Law School.

*Commentary*

(i) This guideline forbids harassment through physical acts and other acts of intimidation that are incompatible with the goals and purposes of Harvard Law School. Wrongs such as these are prohibited by the Harvard University statement of Rights and Responsibilities, without reference to the motives of the perpetrators. But unreasonable physical contact and interferences with freedom of movement, the defacement and destruction of others' property, and physical intimidation can also be forms of harassment on the basis of gender and sexual orientation. Wrongful acts that are committed from these discriminatory motives can create or help to create an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working or educational environment at Harvard Law School for both their immediate victims and for other persons sharing the immediate victims' gender or sexual orientation.

(ii) This guideline relies on a number of primarily objective standards, including those for determining when conduct has the purpose or effect of "unreasonably" interfering with a person's work or academic performance and creates a work or academic environment that is "intimidating, demeaning, degrading, hostile, or otherwise seriously offensive."

(iii) Though appropriately broad on a university campus, the right of free expression does not encompass a right to engage in abusive or intimidating conduct or to deface or intentionally or recklessly damage the property of others. This guideline prohibits acts of physical harassment and intimidation that are directed against people because of their gender or sexual orientation, regardless of whether the acts express the beliefs or attitudes of their perpetrators.

**2. SEX-BASED HARASSMENT BY DISCRIMINATORY CONDUCT BY EMPLOYERS WHO USE THE SERVICES OF THE HARVARD LAW SCHOOL CAREER SERVICES OFFICE OR OFFICE OF THE PUBLIC INTEREST ADVISER.** It is forbidden sex-based harassment by discriminatory conduct for any partner, member, or employee of any law firm or other employer that uses the services of the Harvard Law School Career Services Office or Office of the Public Interest Adviser to subject any member of the Law School community, on the basis of that person's gender or sexual orientation, to:

i. physical contact or interference with freedom of movement that has the purpose or effect of unreasonably interfering with that person's work performance or employment opportunities or of creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working environment; or

ii. intentional or reckless damaging or destruction of property with the purpose or effect of unreasonably interfering with that person's work or employment opportunities or of creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working environment; or

iii. any conduct, speech, or combination of conduct and speech that would be viewed by a reasonable person as physically intimidating under the circumstances and that has the purpose or effect of unreasonably interfering with that person's work performance or employment opportunities or of creating an intimidating, demeaning, degrading, hostile, or otherwise seriously offensive working environment.

Decisions regarding enforcement of this guideline, including decisions as to whether and how to proceed with particular formal complaints, shall be within the principled discretion of the Placement Committee, based on factors including, but not limited to, the seriousness of the alleged violation; the nature and weight of the evidence supporting a claim of violation; the difficulty of resolving factual conflicts; and the response of the employer upon learning of a complaint.

*Commentary*

(i) Harassment prohibited by this guideline violates understandings on the basis of which Harvard Law School

provides the services and facilities of the Career Services Office and Office of the Public Interest Adviser

(ii) This guideline should be understood to rely heavily on primarily objective standards.

(iii) The prohibitions established by this guideline in no way intrude on traditional norms of professional conduct or of uncensored debate on matters of public concern.

### **PART III**

#### **HARASSMENT GUIDELINES: IMPLEMENTING AND ENFORCEMENT PROCEDURES**

Harvard Law School provides several options for students, staff, and faculty who believe that they have been subjected to harassment prohibited by the Law School's guidelines: (i) seeking informal and confidential information and advice, (ii) soliciting the aid of the Law School in attempting to reach a resolution through informal, non-disciplinary procedures, and (iii) invoking formal procedures against the alleged harasser.

The following implementation and enforcement procedures seek to promote a variety of ends. Information concerning the Law School's harassment policies should be widely disseminated. Counseling and support should be easily available to community members who believe they have been harassed. The implementation and enforcement structures aim to encourage the informal resolution of grievances, with or without the intervention of Law School officials, under the "informal complaint procedures" detailed below. Talking or writing to the alleged harasser, apprising him or her of the impact of his or her conduct, or asking him or her to stop the harassing behavior will often bring harassment to a stop.

Before filing a formal complaint, the complainant must first go through the informal complaint procedure or obtain a statement from the official designated in section 2 for the filing of an informal complaint that such a procedure would be inappropriate or unproductive in this case.

An important goal of these guidelines is to encourage victims of harassment to voice their complaints, whether informally or formally, without fear of adverse academic or employment consequences. As provided more fully below, retaliation of any kind for raising an issue or bringing a good faith complaint of harassment is strictly prohibited and constitutes an independent basis for disciplinary action.

The following procedures are available to stu-

dents, professional and administrative and support staff not covered by the Harvard Union of Clerical and Technical Workers ("HUCTW") agreement, and faculty members. Professional and administrative staff and support staff not covered by the HUCTW agreement who believe they have been harassed may also invoke the procedures of the University Personnel Manual. Support staff members covered by the Harvard Union of Clerical and Technical Workers should refer to the procedures provided in that agreement.<sup>2</sup>

**1. INFORMAL INFORMATION AND ADVICE.** Any Law School student or staff or faculty member who has a concern, inquiry, or complaint regarding prohibited harassment should feel free to seek information and advice concerning the Law School's Harassment Guidelines, its formal and informal grievance procedures, and the counseling and other services that the Law School makes available to people who believe they have been subjected to prohibited harassment. Informal information and advice should be imparted in as supportive a manner as reasonably possible.

*Sources:* Information and advice to students is available from either a designated Sexual Harassment Adviser in the Dean of Students' Office or from the Director of Student Life Counseling. Other members of the Law School community may contact any Sexual Harassment Information Representative, at least three of whom shall be designated each year by the Dean from among sympathetic faculty and administrative staff.

*Nature of information and advice:* The official to whom an inquiry is directed should provide information regarding the availability of institutional counseling and support and the procedures triggered by the filing of an informal and a formal complaint. Advice should normally be given about possibilities of resolving difficulties through informal means that do not require the

filing of either a formal or an informal complaint. Anyone seeking informal information and advice should be advised, however, that he or she is entitled to file a formal complaint seeking the imposition of disciplinary sanctions without pursuing informal dispute resolution of any kind.

As explained more fully below, upon request, the official to whom an inquiry is directed should attempt to furnish names of Law School students, faculty, or staff who might be willing to serve as an adviser in the proceedings initiated by an informal or a formal complaint. Upon request or if appropriate, advice should also be given concerning the forms in which informal and formal complaints might be stated or drafted.

*Anonymity and confidentiality:* The person seeking advice may maintain anonymity and need not, though he or she may, divulge the name(s) of the alleged harasser(s). No formal record shall be kept. All communications made in connection with a request for information and advice shall be treated as strictly confidential.

**2. INFORMAL COMPLAINT PROCEDURES.** Anyone who believes that he or she has been subjected to harassment in violation of the Law School's Guidelines is entitled to the assistance of the Law School in attempting to reach an informal resolution of the grievance.

*Officials to be contacted:* Any member of the Law School community who believes that he or she may wish to seek the assistance of the Law School in resolving an informal complaint of prohibited harassment may contact one of the following persons:

(i) *Associate Dean(s):* complaint about a faculty member;

(ii) *Personnel Director:* complaint about a staff member;

(iii) *Director of the Career Services Office, or the Office of Public Interest Advising:* complaint about an employer (In the case of summer employment, it is suggested that the student also enlist the help of the employer's representative for administering the summer program.);

<sup>2</sup> The procedures available to staff covered by the HUCTW agreement are not subject to faculty decision, but stem from the HUCTW contract. Although these guidelines do not of their own force extend to complaints by staff covered by the HUCTW agreement, nothing in the guidelines would preclude their incorporation in, or adoption pursuant to procedures that might be provided by, the union contract.

(iv) *Dean of Students*: complaint about a student.

In addition, as an alternative to contacting the officers identified above, (v) any member of the Law School community with a complaint about a student, staff member, or employer may contact the Associate Dean charged with responsibility for harassment issues. (vi) In unusual circumstances, any member of the Law School community wishing to bring an informal complaint against any other member of the Law School community may contact any of the officials identified above, regardless of either person's status.

An informal complaint against any of the officials named above should be brought to the Associate Dean charged with responsibility for harassment issues or, in the case of a complaint against that Associate Dean, to the chair of the Administrative Board.

**Timeliness:** An informal complaint must be filed within one year of any alleged violation of the School's Harassment Guidelines.

**Information:** The official contacted should first ascertain that the person invoking the informal complaint procedures has been fully apprised of available support mechanisms, of such entirely informal mechanisms of dispute resolution as directly contacting the alleged harasser, of the procedures for filing informal and formal complaints, and of the nature of the process that such complaints initiate.

**Nature of informal process:** An informal complaint, which may be made either orally or in writing, operates as a request to the official contacted either to act as or to designate an intermediary or mediator to assist in resolving a grievance by informal means. Ordinarily the official contacted will personally attempt to aid the parties in finding a mutually acceptable resolution. With the consent of both the complainant and the alleged harasser, the official may refer the matter to a mediator.

An informal complaint must identify the alleged harasser(s), if the identity is known, and describe the incident(s) of alleged harassment with reasonable specificity. The complainant must also indicate any steps that he or she has already taken

to arrive at an informal resolution.

Upon receipt of an informal complaint, the official contacted (or the person to whom the matter has been referred by the official contacted, as provided above) shall take such steps as he or she deems appropriate to reach an informal resolution. These may include such informal investigation as the official thinks necessary or appropriate to develop an understanding of the complaint and the incident(s) or behavior that may have triggered it.

At the earliest opportunity that the official regards as reasonable and appropriate, the official should notify the alleged harasser of the informal complaint, including the name of the complainant and the nature of the alleged harassment. The alleged harasser shall be given the opportunity to respond orally or in writing to the grievance. The official may supervise an exchange of views in writing between the parties in order to facilitate a mutually acceptable resolution. The exchange may be conducted in person if both parties so agree.

If appropriate, the official should inform the alleged harasser of his or her options, rights, and obligations under the Law School's substantive and procedural harassment guidelines. The official may apprise the alleged harasser of counseling or other relevant services available through the Law School. If appropriate, the official should also give notice of the Law School policy providing that no person shall be subject to harassment, intimidation, or retaliation of any kind for having brought a good faith complaint of sexual harassment, whether formal or informal.

**Confidentiality:** In conducting any informal investigation and in acting as an intermediary between the informal complainant and the alleged harasser, the official contacted or the person to whom the matter is referred should maintain as much confidentiality as is reasonably practicable under the circumstances. It is expected that parties pursuing informal grievance procedures will normally attempt to maintain reasonable confidentiality as well. Where appropriate, the official contacted or the person to whom a matter is referred may try to secure the agreement of the parties to mutually acceptable confidentiality norms.

**Resolution or conclusion:** An informal complaint will be deemed satisfactorily resolved when both parties state their agreement to an outcome in a form that is mutually acceptable and so advise the official contacted or the person to whom the matter is referred. The incident(s) providing the basis for an informal complaint that is satisfactorily resolved may not subsequently be the subject of any formal complaint by the same complainant against the same alleged harasser, except in cases involving a breach of the informal settlement agreement by the alleged harasser or continuing harassment.

An informal complaint proceeding may also be concluded when (i) the complainant notifies the official contacted or the person to whom the matter is referred that he or she wishes to withdraw the informal complaint; (ii) the official contacted or the person to whom the matter is referred notifies both parties, in writing, that the informal complaint appears so lacking in merit that further efforts at informal resolution are unwarranted; or (iii) the official contacted or the person to whom the matter is referred notifies both parties, in writing, that in his or her judgment further efforts at informal resolution would be futile and are therefore unwarranted. A conclusion that an informal complaint lacks merit or that further efforts at informal resolution would prove futile shall have no preclusive effect or evidentiary weight in any subsequent proceeding initiated by a formal complaint.

**Timetable:** Conclusion of an informal complaint proceeding should ordinarily be sought within three weeks of the beginning of informal proceedings. In any event, after one month from the beginning of the informal proceedings, the complainant shall have the right to institute formal proceedings, unless both parties wish to continue further informal proceedings.

**Recordkeeping:** No formal record of the proceedings of an informal complaint procedure shall be kept. Nonetheless, the person contacted and any person to whom an informal complaint is referred may keep such informal notes as he or she deems appropriate. Upon the resolution or conclusion of informal complaint proceedings,

any such notes shall be transferred to the Dean or a designated officer in the Dean's office to allow institutional monitoring of enforcement of the Law School's Harassment Guidelines. Except as provided below, however, the identity of the parties shall be treated by the Dean or the designated officer in the Dean's office as strictly confidential, and the notes shall be treated as privileged in any further proceeding within the Law School.

**Subsequent proceedings:** The official contacted and any person to whom an informal complaint is referred shall be precluded from giving oral or written evidence in any hearing on or inquiry into any formal complaint based on the same allegations of harassment as were included in the informal complaint, except concerning the date on which an informal complaint was filed, whether the complaint was resolved in a way mutually acceptable to the parties, and the terms of any informal settlement agreement. The content of any communication between the parties, or between the official contacted and one or both of the parties, that is made in connection with proceedings on an informal complaint shall not be allowed into evidence in such a subsequent proceeding. Nonetheless, if the official contacted or any person to whom a matter is referred believes that a particular person has manifested a pattern of harassment not adequately corrected by an informal resolution, he or she may so advise an appropriate Law School official. In addition, if the notes provided to the Dean or the designated official in the Dean's office should evince a recurring pattern of harassment by a particular person or indicate an unusual risk of continuing violations, the Dean or designated official in the Dean's office may take such action as he or she deems appropriate under the circumstances.

**3. FORMAL COMPLAINT PROCEDURES.** Anyone who believes that he or she has been the victim of harassment prohibited by Harvard Law School guidelines is entitled to file a formal complaint. Unlike an informal complaint, a formal complaint seeks a formal, institutional determination that a violation has occurred and the imposition of formal, disciplinary sanctions upon the alleged harasser.

**Timeliness:** A formal complaint must be filed within one year of the alleged incident or incidents of alleged harassment, except that this period shall be tolled during the pendency of a timely filed informal complaint.

**Decisionmakers:** Complaints shall be filed with the following decisionmakers, depending on the status of the alleged harasser:

(i) **Dean:** complaint against a faculty member or the administrative dean;

(ii) **Administrative Dean:** complaint against a staff member;

(iii) **Placement committee:** complaint against an employer who uses the placement facilities of the Law School;

(iv) **Administrative Board:** complaint against a student.

No individual who has participated as the official contacted or has been consulted by that official during proceedings based on an informal complaint shall sit as a member of or otherwise advise the formal decisionmaking body.

**Procedural rules:** Allegations of harassment in violation of the Law School's Harassment Guidelines shall be considered according to the rules and procedures of the above decisionmaking bodies, as set forth in Appendices A-D, except that the substantive enforcement jurisdiction of those bodies shall be extended if necessary to encompass all alleged violations of the Law School's guidelines and the additional specific procedures described below shall also apply and in cases of conflict shall prevail.

(i) **Formal Complaint:** A formal complaint of sexual harassment shall state the name(s) of the alleged offender(s) (if known) and shall specifically describe the incidents of alleged harassment. The complaint should identify the dates and places of such incidents with reasonable specificity and should list any known witnesses. A formal complaint shall be signed and dated by the complainant.

(ii) **Confidentiality:** Unless and until a disciplinary sanction is imposed, the decisionmaker shall

maintain as much confidentiality as is reasonably practicable under the circumstances. In particular, the decisionmaker should generally strive to keep confidential, except from the parties and the Dean, the identity of the parties, and the content of all documents, conversations, and hearings pertaining to the complaint. Nonetheless, upon the request of either party, any hearing shall be videotaped, and both the complainant and the alleged harasser shall be entitled to be accompanied by up to six family members or friends in addition to a designated representative or adviser. Moreover, upon the request of either party, the decisionmaker may conduct all or part of any hearing in public if the public interest in justice or the appearance of justice so requires. After a sanction is imposed, release of the record or of information included in the record shall be at the discretion of the decisionmaker. Records or their contents may also be disclosed if a harasser is subsequently found in any formal proceeding to have committed any additional act(s) of sexual harassment, in which case the records of prior proceedings may be treated as relevant to the imposition of sanctions only. Nothing in this section is intended to preclude the disclosure of the record in a formal proceeding to other Law School or University officials as required in related proceedings, including proceedings to review decisions or act upon recommendations to impose sanctions.

(iii) **Notice:** Each party shall have prompt notice of, and the opportunity to review and respond to, all documents or communications filed with the decisionmaker by the other party. The decisionmaker shall keep both parties informed on a timely basis of the status of the complaint and the timetable for resolving it.

(iv) **Timetable:** The decisionmaker shall establish a timetable for each case to be followed insofar as reasonably possible in order to assure a prompt resolution of the formal complaint procedure.

(v) **Special investigators or hearing officers:** Where appropriate, the decisionmaker shall be entitled to appoint a special, impartial investigator for purposes of fact-finding or a special, im-

partial hearing officer or panel for purposes of resolving a complaint.

(vi) *Written proceedings:* The decisionmaker shall ordinarily conduct fact-finding upon a written record consisting of a statement by the complainant, a statement from the respondent, and reply statements from each party if desired. Written statements from witnesses may be admitted. If so, the parties are entitled to an opportunity to review and reply to witnesses' statements. If an independent investigator is appointed, the record shall also include a statement from the investigator and such reply statements as the parties may wish to file.

(vii) *Hearings:* A hearing in person shall be held if either party requests one or if the decisionmaker finds that a hearing is essential to full and fair resolution of the complaint. The decisionmaker shall inform both parties of the specific procedures to be followed during the hearing. At any hearing so held, both the complainant and the respondent shall be allowed to be present at all times.

(viii) *Burden of proof:* Formal disciplinary sanctions shall be imposed only upon clear and convincing evidence.

(ix) *Sanctions:* Upon the decisionmaker's finding a violation, sanctions appropriate to the seriousness of the offense shall be imposed. In deciding the appropriate sanction, the decisionmaker may consider the degree of intent, the degree of harm, other acts of harassment (if any) by the respondent, the need for deterrence, and such other factors as reason and justice may require.

(x) *Enforcement discretion of the Placement Committee:* No rule of procedure shall be construed to eliminate or reduce the principled discretion of the Placement Committee in enforcement matters, as recognized by the substantive guidelines prohibiting harassment by employers that use the services of the Career Services Office or Office of the Public Interest Adviser.

4. **FURTHER GENERAL POLICIES.** The resolution of grievances pertaining to harassment under the above guidelines shall be pursued in accordance with the following general policies.

a. *Duty of good faith.* Any member of the Law School community is liable to sanction for knowingly or recklessly bringing a false complaint of institutionally sanctionable conduct against another member of the Law School community.

b. *Non-retaliation:* No person shall be subject to harassment, intimidation, or retaliation of any kind for having brought a good faith complaint of prohibited harassment, whether formal or informal. Any such retaliation shall provide a separate ground for complaint against the retaliator regardless of the outcome of the harassment complaint.

c. *Representation, advice, and counsel:* Any person seeking information or advice about the Law School's Harassment Guidelines, any informal or formal complainant, and anyone alleged to have engaged in harassment may be accompanied, aided, or represented by a friend, an adviser, or by counsel at any stage of the process. Upon request, the Harassment Adviser in the Dean of Students' Office, the Director of Student Life Counseling, or a Harassment Information Representative will endeavor to provide names of Law School students, staff, or faculty who might be willing to serve as advisers. The Law School will not ordinarily furnish counsel or pay attorneys' or advisers' fees. Nonetheless, in proceedings on formal complaints, the decisionmaker shall have discretion to provide for the payment of the reasonable attorneys' fees of either a complainant or an alleged harasser or both if considerations of justice so require.

d. *Education and training:* The Dean's Office, working with the Dean of Students and the Director of Personnel Services, as well as with the appropriate University bodies, will endeavor to provide training on issues of harassment to all contact persons and decisionmakers named in these guidelines.

e. *Designation of personnel:* The Dean shall designate at least three faculty members or ad-

ministrative staff to serve as the Law School's Harassment Information Representatives, charged with responsibility to provide informal and confidential information and advice on matters relating to prohibited harassment to any member of the Law School community, as discussed above. If the Dean chooses not personally to collect, maintain, and review any informal notes kept by officials contacted in informal complaint proceedings and the records of formal proceedings, the Dean shall also designate an official in the Dean's office to perform these functions. The Dean of Students shall designate a Harassment Adviser.

*f. Reporting:* The Dean or a designated official in the Dean's office shall be informed of the initiation and outcome of all formal complaint proceedings in order to ensure adequate record-keeping and coordination.