

*Insight into sexual harassment & assault in the workplace and alternative solutions with a criminal lawyer.*

## Marcy Segal



### Interviewer:

*I suppose my first question is - what has been your professional courtroom experience over time, and especially the last few years with regard to the results of sexual harassment cases occurring in the workplace?*

### Marcy Segal

You know, people are focusing on this happening in the work place, but the truth is, it's your behaviour inside and outside the work place and it transcends from one to the other. So, you've got to make people understand what is appropriate in both environments. The criminal court is very isolated from the rest of society and it is rare that a member of the public will be charged with sexual assault. That is now changing.

In a criminal trial, this is what happens; the crown brings out the allegations, and when they bring out the allegations of the actual act, they also go through a narrative. So... let's say for the sake of argument, this is a domestic assault charge, or sexual assault charge. The crown is entitled to bring out this narrative. So, there will be a background as to the conduct of the parties, and usually what will happen is that you will have the complainant talk about a pattern of abuse. 'It started with emotional, mental abuse and then at some point it went on to be physical.' The same with respect to sexual assault. So, for example, I've had cases where the complainant has gone to the police and said, you know, "Between ten years ago, and two years ago, there were times when I didn't want to have sex, and times that I did want to have sex". And notwithstanding that, the person was charged over a twenty-year period - let's say, for example - or a ten year period, that there was sexual assault. The same with respect to domestic assault.

So, when we talk about the workplace - let's say for the sake of argument, in the workplace there's a tolerance. There's a tolerance for abusive behaviour. But which came first, the chicken or the egg? Did you learn it in your environment and then bring it into the workplace? Did you learn it in the workplace, seeing other people, and then it transcends out of the workplace? It's not like there's a line or a wall. It happens in corporate settings, it happens outside of corporate settings. It happens in the entertainment business. It happens in the family environment. It is pervasive throughout. And so, a criminal trial is a tug of war between crown and defense.

### "The Crown Presents Damaging Evidence"

The crown presents damaging evidence. The defense tries to either whittle it down, or put forward contradictory evidence, or cross-examine with the view to negating this type of conduct. The crown tries to put in more egregious conduct. The defense tries to, as we say, 'woodshed' that conduct. It's not a game, and it's not as if it's a question of winning or losing. But that's what it is, it's a tug of war. And so, you win some points, you lose some points. And so, over the years, defending people on domestic assaults, on sexual assaults, where you have that constant tug of war, and the reaction of the judges or the juries, you determine what is appropriate and what isn't appropriate. So the criminal code is not exclusive. It's all encompassing. So if you look at the definition of sexual assault, if you look at the definition of assault, it includes - for example - throwing something at someone or even threatening to throw something at someone. Assault with a weapon could be a French fry, it could be a shoe. It captures as much inappropriate conduct as possible okay - so that you can never say, 'that was not an as-

sault.' So, the criminal code is a weapon - so to speak - for people to fit into when they feel they've been abused. So, the experience I've had by doing criminal trials is to see, first of all, what the state views as appropriate, what a judge or jury views as appropriate, and how certain conduct is seen by the bench and by the jury.

So, for example, yes, when you're talking about throwing a French fry at someone, technically that is an assault with a weapon. Now, would we see those type of cases in court? Probably not, because it starts off with the police. That's where it starts. That is when you go to the police station and allege that something has happened. And police aren't robots. Although there is a zero tolerance, they are individuals themselves, and there is some sort of gate keeping at the outset by the police when they question the complainant. Now, although they try not scrutinize what the complainant says, how it's presented to the police will factor into whether or not charges are laid. So, when you ask me how I've benefited from being in the court room, it's like being in a war zone. That's what trials are, it's a war zone every time, and you have to factor in the reaction of the public, of the police, of the judge, victim services, of the crown, of the accused, of the complainant. You have redundancy. So, over and over and over again, we as criminal lawyers, whether we like

"We hear the stories, we are part of the trials where we see variations of conduct."

it or not, have learned the skill of analyzing peoples' behaviours. Considering what they say and don't say, and how they present themselves. We are parachuted into this environment every day and it has to be lawful.

So, we hear the stories, we are part of trials, where we see variations of conduct. We have had the benefit - I mean, I've had the benefit of over 27 years being inside the court, time and again. Outside the court dealing with the police and the crown, inside the court watching the judges, reading past cases where judges have given an analysis over whether or not the conduct is appropriate or not - in other words, legal or not. So, I'd like to say it's a talent, but I'm not sure that's the best word, because I have to be careful what I wish for. Being a criminal lawyer and being able to analyze on the fly, and being able to scrutinize and read through, or between the lines, and understanding what a court will accept or not as appropriate

behaviour, allows us to be Monday morning quarter-backs all the time, every day.

And so, that's the experience we have. And whether we like it or not, it becomes ingrained in us, almost to the detriment of our personal lives, because we are so analytical, so critical, searching for moving targets. We're always looking at everything that happens in the courtroom. It's not just what's being said, it's how it's being said, how the judge is reacting.

**Interviewer:**

*I think your audience is going to want to know what rules exist in regards to sexual harassment or assault, and where you find the rules? Or is it just a matter of common sense?"*

**Marcy Segal**

So, here's the problem. In a corporate setting, you have HR assisting in delving out rules and protocol. They're not criminal lawyers, they don't have the background of being immersed in the criminal justice system and the civil justice system as well. And also, they're internal to the company. So, in terms of understanding the rules, first of all, - of course it's common sense and boundaries. People don't understand that there are boundaries. That everyone is different. That there's a physical boundary for which, in general, we should not be encroaching on.

You know, in the old days, if you touch somebody's back, or rub their back, or gave them a kiss, or made an inappropriate joke, people got away with it. Now, we have to temper, because we don't want to develop a system where everybody is so afraid to do anything so there's no social interaction. So, it's on a continuum and part of the problem is, that people need to understand that a work environment should be a

"There really should be two lawyers involved"

place of safety. It is your own sanctuary, so to speak. You spend 8, 10, 12 hours there. You probably spend more time with your work colleagues than you do in your home. And so, the rules need to be defined. And I think part of the problem with the internal organization of a corporate setting is, is that they don't necessarily know what the rules should be, and they can change and evolve.

Whereas, there really should be two lawyers involved setting up rules and managing employee behavior.

There should be a criminal lawyer and a corporate lawyer. Criminal lawyers understand the civil aspect for the most part, in the sense that the burden of proof is less than in a criminal trial. It's terrible. The criminal burden of proof is **'beyond a reasonable doubt**. In the civil setting it's **on a balance of probabilities**. So, it's tipping the scale a bit. But, you need both lawyers there to explain the rules. What the rules actually are. First of all, conferring with the criminal code. The criminal code makes it abundantly clear what constitutes sexual assault, what constitutes assault. So, it's right there in plain English. However, of course what the criminal code does not give you are unlimited, or specific, examples. And so, that's the starting point for anybody's behaviour as we interact with others in society, because those are the rules, that's the code of conduct. And so, unfortunately, just reading the criminal code, (not that complicated, however), is the practical part of it.

"We have seen what society will tolerate"

Being able to say to people, with the experience that we've had as criminal lawyers, "This is what will get you charged. This is what will not get you charged. This is what the police will probably do. This is what you will be facing if you acted in this way."

So, the criminal lawyer is now in role of a consultant (because we have finally, been recognized as being invaluable in the process). We have seen what society will tolerate.

**Interviewer:**

*The role the media plays in high-profile cases probably transcends - it probably means that for any case that gets media attention, there's a determination of guilt even before a court appearance. If someone is charged with sexual harassment, or sexual assault, they are already convicted in the public eye.*

**Marcy Segal**

I think that's starting to change. I agree with you that traditionally, because law has evolved to allow the media to report more, the media is now, I think, trying to provide more of a balanced picture pre-trial. Now, having said that, we also have social media. For example, Twitter - everybody can say whatever they want at a moment's notice. So, now what you're seeing is knee-jerk reactions from, the **pro-women's movement**, the **anti-women's movement**, the **MeToo movement**, the

**anti-MeToo movement**. Everybody's chirping, as the teenagers say, now. And so, it's a significant amount of white noise, which does make it more balanced. But, I do believe that, traditionally, the media would report a slanted version more often than not when the person was just arrested. I think the Gimeshi case really changed how the media portrays individuals, and I think that it brought to the forefront discussions that should have been had a long time ago. So, I think the media brings out transparency. I don't have any problem with the media becoming more involved. I actually think that TV should be allowed in the courtroom, so the public really understands the ramifications of reporting a sexual assault or an assault.

**Interviewer:**

*The role the media plays in high-profile cases probably incorporates a lot of wrong information, outright lies, disinformation, things that people have created because they have their own agenda, or their own biases, and that can grow exponentially within a day or within hours. And someone can be convicted in the social media arena without any just cause. .*

**Marcy Segal**

People thrive on gossip. People thrive on other's misfortunes. I'll give you a perfect example. How many times do you find that when you're driving, and there's a little fender-bender and the entire highway has slowed down because everybody has to look. Everybody wants to see other people's misfortune. They want to read about it. They love it. And, in terms of trying to fix the fact that people lie, I can't, because it will continue. And part of the problem with that is, if your own perception is that you're not lying, then you're not going to be convinced otherwise. But that's the problem with society, is that there is a lack of transparency, there's a lack of honesty. People do have their agendas. We're Americanized. We have become Americanized, or on our way to it.

**Interviewer:**

*The 'MeToo' Movement*

**Marcy Segal**

Here's my problem. I do believe strength in numbers. I do believe knowledge is power. I have grown up, and I don't know which came first, but I've become tough and resilient. Maybe it's the job, maybe it's my personal life, I don't know. So, I don't have - as you can see - any difficulty expressing how I feel, or being honest, or talking about my misfortunes, if only to reach out to another individual. I think there are

number of men and women, who, for whatever reason, perhaps because of how they've grown up, are very afraid to speak about their transgressions - being victims of rape, being victims of domestic violence. So, they need the help. The problem is, at what point does it become a mob mentality? It's a fine line. So, there will be people that want their day in the limelight. I mean, just think about it. People wrote to Paul Bernardo so that they could have a relationship with him. Who does that? People want to connect with the most notorious people in jail. So, people like turmoil. People like their name in lights. So, do I think some people will falsify that they were victims? I think 100% yes! Do I think that part of the problem with the 'MeToo' movement is that it is somewhat of a mob mentality in some instances? Yes, I do. Do I think it's a great movement? Yes. Do I think the pendulum has swung too far? Yes.

I can see now more than ever more resentment by men towards women as a result of the 'MeToo' move-

### The 'MeToo' Movement

ment. Or maybe it's has just come to the forefront. I'm not saying therefore it should have never happened, okay? People need to be accountable for their actions. That's what they have to do. But going too far will result in men, and some women in the movement, being afraid to interact, they'll hesitate to say anything. And I think people are afraid that whatever they do and whatever they say, their job is on the line, their credibility is on the line, their life is precarious because of the movement. I just think there needs to be a bit of a pushback, and an honest discussion about it.

#### Interviewer:

**Why should employers hire a Criminal Lawyer in a consulting role with regard to SH&A**

#### Marcy Segal

You know, I've thought about why anybody would want to hire a criminal lawyer to be a consultant, and why not just keep with the employment lawyer who focuses on liability. What determines liability in a corporate environment where there's been a sexual harassment case, or an assault, and it's determined the company itself was either fostering that kind of behaviour, or not discouraging it by turning a blind eye to many incidents - previous incidents? It's a two-part process. The criminal lawyer will lay it on the line. They won't give it a soft shoe. They will say to the staff

as opposed to HR saying it - "This is what will be tolerated, this is not what will be tolerated". And these are the rules, and these are the rules you're going to have to follow without exception, whether you like it or not." The criminal lawyer is the bad guy. I will come in as the bad guy, come in as an outsider. I'm objective, I'm dispassionate, and I'm explaining in a corporate environment what is appropriate and what isn't appropriate, and what needs to transcend out of the corporate environment. I don't know how many years of severance an individual is likely to get. Or, I can't give advice - nor would I want to give advice - on how to discharge that employee who's alleged to have committed sexual harassment, or sexual assault, or assault in the workplace. It's a partnership.

"It shouldn't be all or nothing"

I explain when the conduct is enough, the employment lawyer talks about how to write up the contract or how to terminate. So, I'm not going to write the contract, I'm going to give the rules - I'm going to give the game rules, so to speak. And the employment lawyer is the one that writes up the contract that follows through with what the consultant has indicated should happen. Now, also, it shouldn't be an all-or-nothing, as what has been happening, as a knee-jerk reaction, okay? Gimeshi was the first - fired automatically without even being convicted, okay? It shouldn't be a knee-jerk reaction. There should be room and movement for arbitration, for mediation, for a way to fix the problem. Let's say, for the sake of argument, a 20-year employee, or a 10-year employee, has rubbed a woman's back, or has said an inappropriate joke. Should they be fired? Obviously that will depend on their track record. But, there can be solutions. There can be mediation, as I've said. There can be a discussion amongst all parties. There can be apologies, there can be losing of a week's pay. It doesn't have to be all-or-nothing. It can be fixing the problem to the satisfaction of the complainant and of the company. So, that's where I come in.

**Interviewer:**

*What determines liability in a corporate environment where there's been a sexual harassment case, or an assault, and it's determined the company itself was either fostering that kind of behaviour, or not discouraging it by turning a blind eye to many incidents - previous incidents.*

**Marcy Segal**

Okay, so here's the analogy: Rule number 1, the worst thing you can do is go to a judge on sentencing and saying, "Okay, now he's going to change." The best thing to do is prior to sentencing start changing yourself, and then you can show the judge that in fact you've already made your amend - you've already started your path for rehabilitation. Here's the corollary, or the analogy: you don't do nothing in a corporate environment, you implement rules from the get-go. You implement signs from the get-go. You have memos that are sent around. You have monthly meetings. You are proactive. And so, if you're proactive, and you advise the employees that it's a zero-tolerance policy, then you have already gone a long way shielding yourself from liability. What's even a better way? The better way is, again, to have a criminal lawyer turned consultant, hired either on a ad hoc ba-

### Liability vs transparency

sis, or on a full-time basis, and they're the bad guys. They're the go-to people. They're the ones that come in and say, "This is what it's going to be. You have a problem, you come to me." So, liability is actually taken off the shoulders of the company and put into an outside party, a criminal lawyer who completely understands the law, and completely understands what is appropriate and what isn't. And that's another benefit, is that then if there are complaints by anyone in the company that the corporation is not proactive, they have already done their due diligence, they have an outside lawyer.

**Interviewer:**

*I've heard of cases where someone has left the employer, turned around, and accused the company of permitting a scenario of abuse, verbal abuse or whatever it might be, and the company has paid out a substantial sum to satisfy the complainant, to avoid the courtroom. To avoid a lawsuit.*

**Marcy Segal**

So, here's the problem, lawyers are expensive. Being able to retain a lawyer to do a civil trial could cost double, triple, to what would be a reasonable amount to pay out. So, sometimes companies will negotiate a settlement because from a economical point of view, it's cheaper than fighting it in court where you don't know what the result will be. And so, not always just because there's been a settlement, does that mean that in fact they're guilty of allowing this sort of sexual harassment or abuse to happen in the workplace. So, it's misleading to think that if you settle something out of court, it's because you're guilty. There's a large cost of litigation. Not in a criminal setting, of course. It doesn't cost an accused person - other than the lawyers - but, it's not like the crown can say, if you run your trial, I'm going to make you pay costs of running the prosecution. It's not like that. In a civil setting, the costs can be enormous. And so, that's why people settle more often than not. Look at the insurance companies. They settle all the time because it's cheaper.

**Interviewer:**

*So, would it be better that they would hire a consultant to come in first, because that would be less expensive than to be paying out constantly.*

**Marcy Segal**

I never believe in chasing someone's tail, In not being proactive. You have to be proactive. It shows transparency, it shows authenticity, it shows you care. You don't just wait until there's an allegation, and then you bring someone in as a band aid. It should be part of the company. When you hire an accountant for your company, you should also be hiring a consultant for

### Workplace harmony equals productivity

your company at the same time, because if it's a safer environment, it's a more productive environment. It's a win-win situation. So, no, it shouldn't be just as time goes on. Every company, in my view, that's more than, let's say, a dozen people, should have a consultant who will be able to explain to the employees from the get-go. Or, having it as part of an employment contract where as soon as you sign it, you understand and you've been warned. Prior warning makes it difficult later on for someone to cry wolf.

**Interviewer:**

*What's your view on workplace harmony, wellness, productivity, with regards to that feeling of being safe versus the feeling of being questionably safe, depending on which company you're working for - whether it's an old-boy network style firm, or something with younger bosses with more a humanistic view of how their employees should be performing, or living their work environment.*

**Marcy Segal**

I don't think it'd be a surprise for you to hear that I think that the work ethic in Canada versus some other countries is lacking. Work is for work. I know it can be boring. I know the people want some liveliness during work. But, there should be 100% safety - emotionally, physically - it should be a safe environment. How do we promote that? Well, first of all, if your employees are happy, they're productive. If they're productive, it helps the company. If it helps the company, it helps the environment. I'm a big believer in physical fitness and some spiritual training as well. So, in my perfect company, besides the fact that there would be zero tolerance for any inappropriateness, you need the company - and you need the directors, those higher up - promoting a sense of completeness - physical fitness, meditation, group building. I think the problem with that is, the flaw in having that occur, is that in a corporation - in a work setting, there's a hierarchical setting. You're always going to have some people more competitive than others. And trust is a big issue in any company. It's difficult enough to feel valued. It's difficult enough to feel that you're trusted. On top of that, there's a lot of inappropriate conduct in a corporation, and it just shouldn't be tolerated anymore. You can go home, you can have fun with your family, but at work, it should not be tolerated.

**Interviewer:**

*There are a lot of grey areas, a lot of situations where an employee may feel discriminated against because they feel that someone higher up doesn't happen to like them, so a comment from that person might be the same comment that someone else made they do get along with, or feel they're equal to, same comment, different person, but a different feeling results for the recipient, whether it's inappropriate or not. How does that effect an employee's attitude, not knowing whether or not they can work with someone that they can't trust to be appropriate.*

**Marcy Segal**

Well, that's part of the problem with having an internal mediation or arbitration. People that work in the company, they learn about other people. Some are competitive, some are not. Some are happy, some are

unhappy. People can't generally get along, and with social media, it's come to the forefront of how we really see how unhappy people are. So, yes, you will always have to look behind your back to see whether or not somebody is trying to stab you. That's why you don't use an internal asset. That's why you don't use HR. That's why you use an outsider, who is objective and impartial, and has had years and years of experience to be able to critique what the problems are within the company, and how to best satisfy those concerns.

**Interviewer:**

*If there is an allegation that gets fixed, how does that effect someone's career?*

**Marcy Segal**

That's an interesting question. If HR doesn't like you, and you start talking, you can't really talk about somebody else, you're still restricted. Plus, what are they supposed to do when there's an allegation against their boss?

And part of the problem is most Canadians live hand-to-mouth. They live paycheck to paycheck. So, right away we have an employee, that is going to be fearful. You know how many times I hear over and over again, "I'm afraid to tell my boss, I'm afraid to go to the police, I'm afraid to say something." Everybody is afraid, and a lot of it has to do with being able to support your family. And so, it's a culture of fear because

### Culture of fear

it's even harder to obtain employment. The old days, you could get a BA and you'd get a really good job. Now, even if you're educated, it's a very competitive world - at least in our society. And so, when you have someone internally that's going to measure what's happened without the training - especially without the training - how is that fair? Already, it's imbalanced. Already you have someone who is paid by the bosses, and they're supposed to stand up on behalf of that person and do something about it? Plus, you know, they know all the people.

So, let's say for instance that nobody wants to have to deal with lawyers. Nobody wants to pay lawyers. Nobody wants to have to hire a lawyer because there's an allegation of sexual harassment, or sexual assault, or any type of abuse. Because once it starts getting out, is the 'MeToo' going to happen? Is there going to be more of a fallout? And, corporations especially these days - are more competitive - it's their name and reputation. I'll give you an example. You remember Tiger Woods. All of a sudden it came out that Ti-

ger Woods had an affair with this woman, okay? How many sponsors dropped him overnight? All about an allegation. Here's the irony: Tiger Woods had an affair, so he should be shunned, but Ashley Madison can exist? And, the truth is, lots of people have affairs, what goes on behind closed doors is your business, nobody else's. If it doesn't effect your work ethic, then quite frankly, that's your own time. That's between your husband, your wife, your god, your maker. Everybody has to own their behavior. But companies have a knee-jerk reaction now. There was that TV newscaster - I think it was a sports newscaster - there was an allegation that came out, fired right away. Same with Gomeshi. So, corporations spend millions and millions of dollars on marketing. They want to be seen as the upper echelon. They want to be on the cutting edge. So, if in fact there's allegations of sexual harassment, sexual assault, and assault, it will negatively affect how their company is perceived. And so, if there's ever a reason to make sure that the lines are drawn from the outset - that there is an outsider that comes in, analyzes, scrutinizes, observes, reminds - that will only go to their benefit. They will be able to boast about the fact that they not only have internal, but they have external help to make sure there is fairness. So, in answer to your question, let's say an employee comes and says, "You know, I was at the water cooler, I was talking to an older employee, he was getting in my space, and then he rubbed my back." Okay? HR knows that other employee. Maybe HR likes that employee. What's the first reaction? "Oh, maybe he was

### Alternative Solutions Matter

just being kind to you. Maybe he was comforting you. Well, listen, you know what, I'll have a talk with him." And already internally, there is, I think more often than not, a willingness to tolerate the inappropriate behavior because of the potential fallout. Let me give you another example. This employee calls me. "This is what's happened, what do I do? How do I deal with this?" Well it's an easy answer: I come in. I sit down with the employee. I explain to the employee - either in front of the other employee, or absent - what is wrong with this behavior, what is appropriate and what is inappropriate. And, you give them a chance. They've been warned. They've been educated again. They've been told, okay? They're on, sort of, probation. If it continues the next time, they're fired. HR doesn't have to be involved. There doesn't have to be any concern that there are jealousies, or envies, or favouritism or lack of favouritism. It's all being done outside. So, the directors, they can wash their hands of any concern that they're favouring one employee

over another. It may be somewhat costly from time to time, but if the employees know that this service is there, and that this person can be called - sort of like a police man, but not a police man - and they say it like it is, as opposed to the soft touch, and you know, let's all have a group hug, it's like the policeman coming in, saying, "No, this will not be tolerated." They're the bad guy.

#### Interviewer:

*I've worked in corporate environment for 30 years, and I've never seen material on harassment, or sexual harassment, or the rules. It was never part of any information package that I ever received. It was never mentioned*

#### Marcy Segal

It is incomprehensible to think that exists. I guess being sheltered in the criminal justice system from really the first month of law school, when I started working in the clinic, I really thought that everybody knew the law. They don't.

Even now, with social media, with the fact that you can go on free legal sites - you can google all these cases that are on there where it talks about what's sexual assault and what isn't, people still don't know. Somebody grabbed my daughter once, inappropriately. She was 13. Grabbed her and said, "Don't interrupt me." Okay? This was somebody who was training my daughter. Not only was I in shock, but when I confronted him and his wife after, they said, "I didn't understand that was assault." How do you not understand that's an assault? So, these are educated people. This happens even now. And I guess people aren't listening to the right people. Or, maybe part of the problem is when HR, who are not lawyers - and I don't mean that in the worst way, they're valuable. Directors, who aren't lawyers, who aren't versed in the law, they're going to explain the law? That doesn't make any sense. It's the lawyer that needs to explain the law. Should an employment lawyer explain the law in a criminal court? I don't think so, no. We know it. We live it. We breathe it.

That's all we do, is have arguments with the police, and crowns, and with judges, about whether or not it's a sexual assault, whether or not it's an assault or not. Whether or it's what we call the "diminimist" concept, which is, "Oh, it's minor, it shouldn't be a criminal matter." We argue every single day about what is appropriate and what isn't. And we learn over and over again from all aspects of the criminal justice system what each participant feels is appropriate. We've gained the knowledge. We have, I'm not going to say the expertise, because that's a tough question, and it's very subjective. But, we have lived and breathed

this, and every corporation needs to have rules. They need to have written rules. It needs to be in writing for the safety of everyone.

**Interviewer:**

*What constitutes Proof of an allegation? We need to explain what that means, in some general way.*

**Marcy Segal**

Any victim in a criminal justice system... most of the victims in the criminal justice system don't agree with the burden of proof beyond a reasonable doubt. Now, it has taken years of court cases and jurisprudence to really understand for the layperson what it means. It means it's not a fanciful doubt, but it's a real doubt. So, as an example, in the civil burden, it's on a balance of probabilities. Toss the scale, 51% is the best way to say it. Not because we can qualify it by way of a percentage, but because it means just over equal. Proof beyond a reasonable doubt is somewhere between absolute proof and Proof beyond a reasonable doubt means that there is very little doubt. So, it's not perfection. It's not 100%, but it's close to it. And, I'll give you an example. When a judge or jury has to decide the credibility of an individual, because you're charged criminally, and because ramifications of a conviction are so devastating, in a credibility analysis, if you believe the accused person you must acquit.

### Proof beyond a reasonable doubt

If you don't believe the accused person, but have a doubt, you must acquit. Even if you disbelieve the accused person. On the crown's evidence, are you convinced beyond a reasonable doubt? It's a real doubt. Not a fanciful doubt, but a real doubt. It can't be measured except to say that when you go home after the trial is over, do you have any lingering doubts? Are you able to say, "He's probably guilty, but I can't be certain." That's beyond a reasonable doubt. If you can go home after the trial is over and be satisfied, and have no doubt about your decision, that's proof beyond a reasonable doubt.

**Interviewer:**

*The police. When you walk into a police station and you say, "I want to bring charges against somebody for sexual assault." What's most likely is going to be a happen. I don't think anybody really has any idea of what they're in for.*

**Marcy Segal**

Nobody has any idea of what they're in for. And unfortunately, that's part of the problem with not having cameras inside the courtroom, and not having cameras inside the police station - there's privacy interests

of course. It is a very daunting experience.

So, you walk up to the desk. Sometimes you've called the police and they come there. You walk up to the desk and you have a front person. Sometimes they're cadets, sometimes they're the staff sergeant. And let's say you're a woman, and you are frightened to go up there and say to a man - even though he's a police officer - "I want to report a sexual assault." Now, we as victims - I'm not saying me - but victims go through their self-doubt. "Could I have done something different?" So, for example, one of the reasons why people really need to understand is when you go into a courtroom you're cross-examined. The defense will have your entire statement, and they will try to pull it apart. Nothing wrong with that. People lie a lot. And, not all sexual assault complainants are telling the truth. Not all accused people are telling the truth. It's not like when we were younger and you put the butter cup underneath your chin, and I think the tale was if it was yellow, you were a good person. If it didn't show yellow, you weren't a good person.

It's not like people are like vending machines, okay? We honestly won't know if someone is telling the truth or not. And here's the other thing - surprise, surprise - most of the time it's between two people behind closed doors, you know, between the sheets. So, you then, as a woman - or a man - as a victim go through your own self-loathing. I can assure you that a lot of times you do that. So, when you go to the police station, I think by the time you get to the police station you've already gone through the circumstances in your head over and over again. For example, "How could I have let this happen to me? How could I have done it differently? Was I wrong to go out for dinner with him? Was I wrong to kiss him? Was I wrong to

### The Police after all are human

let him feel my breast? By letting him feel my breast, was that an invitation for sexual intercourse?" It's all a question of degrees, okay? So, the time when people could say, "She allowed me, or he allowed me, to touch part of them, how was I to know I couldn't go farther?" That's over. Those days are done, okay?

Now, obviously you don't have to ask someone permission before you go every step of the way, but common courtesy dictates that it's a discussion. I don't mean a lengthy discussion, but for the most part you know whether or not someone wants more or not. It's the after the fact that you start to rationalize. So, let's imagine going to the police station. You already worry that you're going to be asked questions like, "Why'd you go out with him? Why'd you stay as long?"

So, when you start to give your after-the-fact statement to the police, your head is spinning. You are in a foreign environment, you don't know what questions are going to be asked. You're afraid, you're afraid of ramifications. Are people going to look down on you because you've reported this sex assault. Is it at work? Is it at home? What are your own ramifications? By the time you've finished your interview, you don't even remember half of what you've said. And quite frankly, your interview is dependent on how good your interviewer is.

And so, all of that alone is a daunting experience. Then what happens? Then, when the charges are laid, there's a silence. There's a silence for months and months. Because of the lack of court resources. Here's what happens. Here's what I think should happen: you give your statement to police, you then walk out of the station and I will assure you that you will have forgotten to say certain things, because your head is racing, because you're not an expert at giving statements, because you're not a lawyer. Because you're trying to do the best that you can. A week later you're going to remember something else. So, now you're caught between a rock and a hard place. Do you go and you tell the police and the crown that

### What to expect

you've remembered something else? Or are you worried that if you do that, you're going to be accused of making something up after the fact. So, what usually happens is, a week before the case starts, or a couple of weeks before the case starts, you come in and watch your video tape statement. And, sometimes you're asked if you can remember anything else, but usually you're not because if you are asked a couple weeks before trial if in fact you have anything else that you wish to say, and you tell them something different, the crown has to disclose that to the defense. The defense then gets all up in arms, "I need an adjournment. I needed to know this earlier." Or, they get to say, "Why didn't you say that originally?" So, if you want a more transparent, authentic system, which is what everyone should want - I want - then a week or so after the incident you should come back to the station, review your videotape statement, and then advise if there's anything else that you remember. At least it is authentic, your memory is fresher then. A lot of times, by the time you get to trial, you're so worried about being cross-examined that you spend more time trying to memorize what you said to the police as opposed to what really happened - assuming what you said to the police wasn't truthful. So, the whole system in and of itself is flawed, because

crowns and police want you to be consistent with statement whether or not it's truthful. Please don't get me wrong, they assume it's truthful. So, it's not as if they know that the person is lying. They take each case as it comes, and they have no personal interest into it. But at the time when they interview and prepare the person to give evidence, they just want them to stick to the script.

**Interviewer:**

*Social media. What if somebody puts something inappropriate on line?*

**Marcy Segal**

That's the problem. The problem is that there's no gate keeping function with social media. People can say whatever they want, whenever they want. They can be sued, you can bring them to court, but that will take a while and that's the danger of social media.

**Interviewer:**

*Are there rules? Should a company have rules about the use of social media?*

**Marcy Segal**

One hundred percent, I think when you work for a company, you've made a commitment to that company. You're part of that company. If you don't like what the company stands for, work with another company. But as I am a participant in the criminal justice system, or as a lawyer with the Law Society of Ontario, I have rules as to what I can do and what I can't do. And I have to work within those rules. And I like to work within those rules. And so, yes, when you work for a company, you need to adhere to their rules about social media, and if their position is "no

### Rules for social media

social media", then no social media. A company needs to control it's employees to a certain degree. Control can be a good thing if it's for the right reasons, and for appropriate reasons. I think some young people that are entering the work place have learned their social media norms from high school or from university, which is a little different arena. The problem with social media is that it is more of a game at that age and the consequences are readily realized, but they carry on with the same, set of loose rules that they've always had. They get into the workplace and they do the same kind of thing. How do you expect people to follow rules that you haven't established? How do you expect people to follow rules if you haven't written them down? That's irresponsible.

**Interviewer:**

*So, if you were giving a seminar on sexual harassment, sexual assault, behaviour rules, would rules on social media usage be part of that?*

**Marcy Segal**

Yes. There are many things that you can put on social media that are humorous. However, you should never be putting on social media any derogatory comments about men, about women, about gender, none of that. This is our culture now, and our culture has evolved a long way from the traditional roles of men and women. And there should be social media rules that do not permit insulting, degrading, demeaning, comments towards a race, religion, or gender.

**Interviewer:**

*How have societies norms and rules changed from the previous generation*

**Marcy Segal**

I understand in the old days, traditionally the men worked, the women stayed home. In the traditional setting, men were the earners. They were bringing home the bacon, so to speak. And so, because they were there to support the family, they would receive a better remuneration than a woman, than their female counterparts. But that traditional lifestyle norm no longer exists for most couples or families. You have two income-earning families, especially in Toronto, because how else are you going to be able to survive. And so, I find it incredulous that, in a corporate setting, a woman or a man would have to be subjected to that kind of harassment. Because it's bad enough that they feel uncomfortable. It's bad enough that their whole lifestyle is dependent on a paycheck. Forget about the fact they want to do better, but they now have to worry that when they go into work, are they going to be judged on how they dressed. I guess some people at work are bored doing what they do. But what I have found is - and I'm sure people will understand that most people are ordinary. Few people are extraordinary. It's those extraordinary people that stand up for others, that defend others, that go to bat for others. The problem is, when you have a society of complacency. When you have a society where each is on their own, where there's no loyalty, then you will have to worry every moment of every day as to whether or not you're going to be stabbed in the back. And the fact that a woman today has to worry about how she dresses is unconscionable. Now, please don't get me wrong, there's appropriate dress in a workplace. You don't wear halter-top. You don't expose your midriff, okay? I think appropriate cleavage is the best type of cleavage, just because I think we owe ourselves self-respect as well. But the fact

that, on top of all your other responsibilities, you have to worry about how your co-workers of the opposite sex are going to look at you and treat you is unfathomable. We are in 2018, why is this still happening? I'll tell you why this is still happening, because now that there is more competition for men, because now women are starting to get better positions in the workplace, they're not just competing with each other anymore, they're now competing with the female sex as well. That's a lot of competition. And most people don't like competition, and most people are afraid of change, afraid to compete. So, what do you do to increase your position? You try to hold back others. You don't try to elevate your competition. You squash the competition. You do whatever you can to belittle, demean, or degrade others that you work with in the hope that you will gain advantage in the workplace, or maybe just control. Maybe there is another problem perhaps at home, in your environment, you're being controlled. Your spouse, female, male, it doesn't matter, but now you're in the workplace, your life at home

It's easier to knock somebody off  
than bring your best self

is miserable. You're uncomfortable being controlled. The workplace is a great place, to maintain control, or gain control. And so, very often we see in corporate environments, in the criminal justice system, how and individuals quirks, need for control, or lack of control, their inability to be competitive, to bring out their best self. If people are prepared to bring their best self, if people are prepared to honour themselves, if they're prepared to do what's required of them and then some. You're not going to see as much of this anymore. But people don't want to. People would rather, it's easier, isn't it, to knock somebody off, than to bring out your best behaviour. And so, that's going to keep happening. So, any woman, (as an example) a woman who is concerned about telling their boss that they have this problem - that will never go away. That fear will never go away unless you have a process - not internally, but externally - to deal with these situations, and not deal with them so that a person gets charged and then eight to nine months down the road it's resolved.

The solution is immediate action. There's a consultant, an outside consultant, who immediately comes in, sits with them, and says, "This is the problem." this is how we can solve it. And not just that, there has to be an employment contract that states that there will be no negative ramifications. The more inclusive the

contract, the more you are transparent. The more you discuss what's happening, the more other people will feel that they're part of the problem and they're not alone. It's the fear of being alone and not having people in your corner that prevents people from stepping forward.

**Interviewer:**

*So, in a situation where a woman finds herself uncomfortable in the office, what can she do to prevent that even from the onset. When she's hired, should she insist on this being addressed in her contract?*

**Marcy Segal**

I think there should be... Look, there is no reason why, there is absolutely no reason why there shouldn't be a formal plan in writing. An employment contract should say right there what your redress is and how you deal with it. I'll tell you what else I would do if these are co-workers, I'd email them right away and confirm what just happened, because now it's in writing. If you don't confirm in writing what's happened, then you're going to be called upon later on - if for whatever reason just to save the employer of the company - to have just made it up. That's why contemporaneous notes are important. In police work there's an exception in the criminal justice system.

A formal plan is essential for bringing an allegation.

A witness can't go on the witness stand with their statement and read from it. It has to be their independent recollection. They get to review the statement first. Police officers and experts are the exception. Police officers have their notes - 'because they have so many calls - and they're supposed to write out right after the call, or soon thereafter, what has happened. They get to use their notes to refresh their memory. And so, it is damning when a police officer puts in their notes something that is a critical piece of evidence. So, when a police officer, for instance, puts an utterance in their notes that the person admitted that they did it, okay, that's proof in the pudding. That is key. That is instrumental in a conviction. Now, of course, you've got to be careful what you write and make sure that it's honest, but putting pen to paper and writing it out is a powerful piece of evidence to be able to go to your bosses and say, "And I wrote them about this." And, it draws their response. So, people should be accountable for their behaviour.

The better response would be to email so everybody is on the same page. You never want a situation

where the employee says, "Well, no one told us this." There is enough of blaming, omitting and forgetting and saying you weren't told. Really, in this day and age a defined contract does not exist? Defined rules? Defined protocol? I'm sorry. In this day and age it has to be clear and on paper for everybody's protection and everybody's safety.

## In Conclusion

**Marcy Segal**

At the risk of having many lawyers angry with me, I would be happier to have less work, and I'd be happier if sexual harassment didn't happen, if sexual assault didn't happen, and assault didn't happen. Prevention is the key. I don't want to come in after the fact to investigate. I want to start a new dialogue where from the start people are warned. It comes down to prevention. I don't want litigation to increase. I don't want sexual assault claims to increase.

I have two daughters that one day will be in the workforce, and even now, I worry about how they are treated outside of the workplace, at school. I want society to be better educated. I want the rules to be defined. I want there to be transparency. The pendulum has swung too far. Men feel completely exposed. They feel that something is going to come up, something from 20, 30 years ago. That has to cause anxiety. That has to cause concern, bitterness, and anger.

You would think today that with all the social media,

The Pendulum has swung to far!

with all the newspapers, with all the books, that everybody understands. But they don't. And here's the other problem, I'm big on immigration. I actually believe that people should be able to live wherever they want in this world and shouldn't be restricted. Our government has allowed in many different cultures. But what they didn't do was explain to these new cultures that the rules and the laws here are different than back in their country. So these people come here with the same ideas, understandings, and utilize the rules and the laws from the countries from which they came from. Some of these countries, as we know, are completely patriarchal. It is unfathomable that in today's world they still undergo female mutilation. It's unbelievable in this world today that women have to wear coverings. Of course if it's religious, I get it. It's unfathomable in this world how wrongly women are treated. How women aren't treated equally to men. It's unfathomable. But, it will always happen. Go back

to the caveman. The men are the doers, they're the hunters. The women are there to be the meal preparers, take care of the children, the nurturers. That's what a woman is to be. We haven't evolved. I mean, just because everyone wants to be either gender neutral, or everybody wants to come out... people don't accept them that, first and foremost, they're people. People shouldn't be characterized as a woman or a man. They should just be characterized as a person. They are human beings.

Now, with that in mind, the problem is that if you don't educate these cultures, then it's like a slow poison that pervades throughout society, throughout the environment, and that's the problem. So, we need to educate these people from the start. There needs to be preventative work done. And that is not being done. It's all of interest only after the fact. I don't want this to be reactionary. I want to be the one that makes change in the first place. I want to be the one that educates these people in the first place. That's the important thing to do.

So, I've spent my career trying to fix things, find solutions. With every problem, there's a solution. This is a problem where can we find a solution. Employees will be happy, employers will be happy. Employers will feel confident that their employees feel safe. Employees will feel confident that they are respected. It should be a mutual satisfying working relationship. And so, I believe that we can work together to try and make safer workplaces, safer environments. It's possible.

If it's done the right way, it is possible. Prevention is the key to a safe workplace. You have to put the time and energy, and money, into a safe workplace. Everyone will benefit from a safer workplace. The key is to try to eliminate sexual assault, sexual harassment, assault, any criminal or inappropriate behaviour in the workplace. That's what we should all be striving for. But companies need help. They need an outsider who's been in the courtroom, who knows exactly what society will tolerate. Because what happens is when there's a problem, when there's an allegation, it goes into the criminal justice system, and then the judges, the crowns, the defense, victim services, police, they're all tasked with dealing with this problem.

I want to expand my experience as a criminal lawyer into the workplace arena, so that I can consult and educate. Education is power. Knowledge is power. Understanding the rules, like any game, like any baseball, or football game, the rules are extensive. They're learned, they're understood, and the referees are right there, at the moment, when there's a breach of the rules, to correct it. I don't want to talk about referees and how sometimes they can be biased, let's leave

that out. But that's the sort of instantaneous reaction we need. Why can't we do that in a workplace? Why can't we have referees that are there at that moment so that the problem doesn't linger? So that it can be addressed right away? It's possible. You just need similar intricate rules in the workplace so that everybody understands them.

People need know that their issues are being ad-

Twenty seven years in  
the Court Room teaches you  
something about people

dressed. People need to be heard. People need to feel that when they voice their views, they're not going to be shunned, criticized or belittled. They need to have the kind of confidence that allows them to contribute to the company. This confidence comes from the top going down. Example has to start at the top. You need to understand these rules yourself, and then it infiltrates throughout the company.

After 27 years in the courtroom, hundreds of trials, thousands of appearances, you learn something. You learn about human behaviour. That's the incite you gain. You learn about what people are prepared to do, and what they can't do. You learn about people's fears, insecurities and egos. You hear a lot about how people are not prepared to live within the law because they can't, or because they haven't been brought up in the right way. We are only as good as our upbringing. It starts at home. And when we go out in the world and we haven't been given the tools, or we've grown up, let's say, in a patriarchal home, or there's prejudice within the home, how are we to learn that things are different outside? Quite frankly, everywhere we work, there should be an educational component. And, if you don't work, there should be other ways that you can be informed.

Now, when you leave work, it's not as if you switch off. By educating in the workplace, you're helping society outside of work, too, because you're teaching these people from the start that there are rules of conduct. Everybody needs rules and guidelines so they know what to work with. They know what is inside and outside of their boundaries. People need boundaries. If you tell them what the boundaries are, if you educate them and make it clear, then hopefully they'll live and work within the boundaries. It's a slow process, but we owe it to each other as leaders of companies, as leaders of businesses, as well as being self-employed. The need to educate our employees, is not just that we want to make money from them, we are looking after them. It is a family.

# workplace sexual harassment & Assault

It's unfortunate that the pendulum has swung so far. in the other direction. We need to bring it back. I don't mean back to where it started, but somewhere in the middle. Somewhere close to fairness so that we all feel comfortable. People love to jump on the bandwagon. I question how many of these MeToo individuals - male, female - are simply looking for attention. That's not helpful.

Transparency and authenticity need to be demonstrated. What has happened is that employees have not felt, that they have their employers in their corner. Imagine the change. Imagine employees knowing that they can talk about their grievances, that they can call people out on their inappropriate behaviour and they won't be fired. Imagine how employees would then feel.

Having been self-employed basically since I started practicing law - I've got enough to worry about. I've got my kids to feed them, clothe and educate. I've got to do my best job for my clients, I've got to perform in court. Like you I have these responsibilities. I don't want to be fearful of calling somebody out? I don't want to live in fear of my work. I don't want to be fearful.

Companies will feel better and confident. Companies will be able to feel proud. Many law firms want to put banners on their website, or they want to say "I'm well-respected or whatever, amongst my peers..." Okay fine...

But how about this: "I'm well-known for advocating for a safe workplace, and I have been, and I have done the work. I walk the walk."