

# Need for Expansion of Forensic Psychiatrists' Role in Sexual Harassment Cases

Sara Feldman-Schorrig, MD

Apparently intimidated by the current climate of political correctness, forensic psychiatrists in sexual harassment cases often limit themselves to a determination of damages. Yet they are in a unique position to help in the resolution of more complex issues: they need not merely accept plaintiffs' allegations at face value, as treating psychiatrists generally do, but can assess credibility and identify psychodynamics that could be crucial in the clarification of legal questions such as "welcomeness." This article discusses the significance of pertinent data, such as a history of childhood sexual abuse, but emphasizes that such information does not necessarily invalidate the plaintiffs' allegations. It also reviews the obstacles that can stand in the way of a complete psychiatric examination and thereby limit the forensic psychiatrist's ability to help the courts. Increased involvement by forensic psychiatrists could contribute to a more impartial evaluation of sexual harassment cases and help establish the distinction between valid claims and frivolous ones.

Sexual harassment is an area of the law that could benefit greatly from increased participation by forensic psychiatrists. In 1980, the Federal Equal Employment Opportunity Commission defined sexual harassment, in part, as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>1</sup> Then, in 1986, the U.S. Supreme Court drew a distinction between two types of sexual harassment<sup>2</sup>: (1) *quid pro quo* harassment (also known as "this for that")

that forces an employee to choose between submission to sexual demands or the loss of job benefits, promotions, or employment, as opposed to (2) an offensive or "hostile environment" in which the harassment is "sufficiently severe or pervasive" to "alter the conditions of [the victim's] employment and create an abusive working environment." Hostile-work-environment harassment that does not involve sexual assault or other criminal behavior is by far the more commonly seen in sexual harassment lawsuits; it is also the more difficult type to define and to prove or disprove. Instead of bringing much needed clarification, forensic psychiatrists have been remarkably silent on these issues and have usually limited

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Dr. Feldman-Schorrig is Assistant Clinical Professor of Psychiatry, UCLA School of Medicine, Los Angeles, CA. Address correspondence to: Sara Feldman-Schorrig, MD, 1100 Glendon Ave., Suite 1201, Los Angeles, CA 90024. E-mail address: schorrig@ucla.edu

themselves to a determination of whether and how much psychic injury has occurred; upon finding that the plaintiff has been injured, they give opinions about prognosis and treatment.

As pointed out by Weinstock *et al.*<sup>3</sup> while controversy persists regarding the proper role of forensic psychiatrists, there exists a general consensus that they should “focus their examinations so that the data they provide can be relevant to the legal issue to be decided by the trier of fact.” Implicit in that statement is a fundamental difference between the forensic psychiatrist and the general or treating psychiatrist: The former is concerned with objective evidence and functions in part as an investigator,<sup>4</sup> while the latter deals primarily with the patient’s inner reality.

Many authors have discussed the various aspects of sexual harassment from the standpoint of general psychiatry. Charney and Russell,<sup>5</sup> in particular, wrote a noteworthy review on that topic; I commended this article’s thoroughness but noted that it had failed to address those aspects of sexual harassment that were highly significant in a forensic context.<sup>6</sup> Indeed, surprisingly little has been written by forensic psychiatrists on the topic of sexual harassment. The topic was cautiously approached by Binder<sup>7</sup> in 1992. While she delineated the psychological and legal issues about which forensic psychiatrists could be consulted, she only partially addressed credibility and, more importantly, failed to address those psychodynamics that are particularly relevant to sexual harassment law.

More recently, Long<sup>8</sup> compared the di-

agnoses that she, as an expert for the defense, had given to sexual harassment plaintiffs with those made by experts for the plaintiff. In addition, Long is presently collaborating with James Butcher, PhD, in a promising study that explores how the use of the Minnesota Multiphasic Personality Inventory-2 could add objectivity to the evaluation of sexual harassment plaintiffs (B. Long, personal communication, April 1995).

It is this author’s belief that forensic psychiatrists who work in the area of sexual harassment are intimidated by the current climate of political correctness, thereby leading to a dearth of impartial opinions. Instead of remedying the situation, psychiatrists such as Jensvold<sup>9</sup> have apparently attempted to exclude forensic psychiatrists from functioning as experts (other than for the plaintiff) in sexual harassment cases. She lists the following three functions as “appropriate” roles for mental health professionals in sexual harassment cases: “(1) as therapists, (2) as expert witnesses in lawsuits, providing expertise on issues *other than the plaintiff’s mental status* [italics mine], and (3) performing psychological evaluations of plaintiffs for court purposes in sexual harassment lawsuits claiming emotional damages.” Jensvold implies that the third role is fraught with the risk of misusing psychiatry because “[g]athering information about the victim’s current psychological state and any history of psychopathology, trauma, or victimization plays into and reinforces the harasser’s argument that the harassed employee is flawed and therefore ‘deserved,’ ‘caused’ or ‘imagined’ the behavior about which he or she is complaining.” She also declares, “One of

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the myths about sexual harassment is that many women lie, falsely claiming that they were sexually harassed for their own personal gain"; and later proclaims, "The most basic tenet of psychiatry is responsibility to the needs of the patient above all else": is Jensvold suggesting that all sexual harassment plaintiffs be granted privileged status and *ipso facto* declared "patients" with their allegations being accepted at face value? Such a stance would be irreconcilable with the objectivity that is essential to forensic psychiatry.

This article will concentrate on outlining the major legal issues (including two concepts unique to sexual harassment) that need to be resolved in all sexual harassment cases and will then suggest how forensic psychiatrists could not only facilitate the dialogue between opposing attorneys, but sometimes provide valuable data to the court. A brief discussion of how the analogy between rape and sexual harassment is usually inaccurate and can impede the effectiveness of the forensic psychiatrist's proposed role will follow. Finally, the author will present the admittedly controversial view that, even when a sexual harassment plaintiff does not claim psychological damages, a forensic psychiatric examination will result in improved recognition of substantive sexual harassment claims as distinct from trivial ones.

### Legal Issues in Sexual Harassment Cases

**Credibility** Since the burden of proof rests on the plaintiff, her claims are usually examined in the light of available objective information such as witnesses' testimony. When objective evidence is

lacking and the attorneys are dealing with a "she said/he said" situation, the plaintiff's credibility becomes of the utmost importance.

While credibility is ultimately decided by the fact finder in the case, forensic psychiatrists should not hesitate to explore the possibility that the plaintiff's claim is partially or entirely false. There is no reason for sexual harassment accusations to be handled differently than any other misconduct claim. The concern that close scrutiny of claims will act as a deterrent to the filing of future claims becomes inconsequential when one considers the importance of ensuring the impartiality of our judicial system.

One can turn to Gutheil's writings<sup>10</sup> concerning therapist-patient sexual misconduct for valuable guidance. In his discussion of false claims, Gutheil speaks of the need to identify an alternative scenario before one can diagnose such a claim: "If the accusation is false, the expert must identify the motivational basis for the claim if not truth." He proceeds with a description of typical alternative scenarios and outlines a series of clinical/forensic approaches that he has found useful in the detection of false claims.

In contrast to therapist-patient sex allegations, the recognition of false sexual harassment claims is more difficult because less information about the plaintiff's past history is readily accessible. For example, it is not unusual for the accused therapist to be aware of his patient's psychopathology, which may include borderline and antisocial personality traits. Despite the paucity of immediately available evidence, the forensic psychiatrist in sexual harassment cases

must strive to rule out malingering, just as in any other forensic interview.

In addition to considering the possibility of a false claim, the forensic psychiatrist must also determine whether the plaintiff could be engaging in a form of malingering known as *false imputation*,<sup>11</sup> that is, the attribution of real symptoms to a cause consciously recognized by the plaintiff to have no relationship to those symptoms. This requires thorough history-taking as well as access to all medical records, including psychiatric ones. A case example that involves false imputation is outlined below.\*

Ms. A had worked for about five years as the secretary to an advertising executive. Their relationship was cordial and often included some light bantering and mutual joke-telling. Suddenly, Ms. A's attitude seemed to change. She began to look anxious and no longer laughed at her boss's jokes. A few weeks later, Ms. A did not show up for work. The following day, the Human Resources Department was advised that she had claimed disability secondary to sexual harassment and, although she wished to come back to the same company in the indefinite future, would only do so if transferred to another branch. Ms. A could only be reached through her attorney.

When interviewed by Human Resources, her boss admitted that he had told Ms. A some risqué jokes and pointed out that she had never seemed bothered by them in the past. He conceded that his behavior could be construed as sexual harassment.

An investigation uncovered that Ms. A had filed a restraining order against an ex-husband. Furthermore, her family physician's records show that Ms. A had described her job as a haven; she was quoted as expressing much regret about having to leave it because of her ex-husband's stalking. During her depositions,

Ms. A admitted that she had been forced to move because she was afraid that her ex-husband would find out where she and a new boyfriend were living. When asked how her boss had harassed her, Ms. A only complained about his jokes and claimed that, on occasion, he had been staring at her breasts.

Upon being interviewed by the forensic psychiatrist who had been named as the employer's expert, Ms. A refused to discuss the nature of her boss's alleged harassment and would only say that she had already spoken about it in her deposition. She also avoided answering any questions about her personal life. When asked whether she knew that her boss had recently suffered a stroke, Ms. A burst into tears. After some gentle coaxing, she admitted that she had not "felt" sexually harassed, but had been inspired by a talk show to file for sexual harassment so as to be able to leave her job and ensure a continuing source of income.

It must be noted that the finding of a significant personal stressor in the plaintiff's life does not necessarily signify that she did not additionally suffer emotional injury because of sexual harassment, as shown in the following example:

Ms. B was a divorced woman who had worked as an assistant in a small photography studio. The job had allowed her to support herself and her two small children. For the first three years, her boss, Mr. L, had treated her with respect. His attitude seemed to change almost overnight after his long-time girlfriend left him for another man. At first, Mr. L. seemed despondent; Ms. B did her best to cheer him up, but to no avail. Around the same time, her mother suddenly died and Ms. B decided that she would benefit from psychotherapy.

A few weeks later, Mr. L announced that he now realized that he and Ms. B were really meant for one another, and began to court her. In addition to sending her flowers, he would bring small gifts for her children. Even though, on several occasions, Ms. B clearly informed Mr. L that she liked him but had no romantic interest in him, Mr. L. refused to take "no" for an answer. Ms. B felt harassed and began to dread going to work.

\* All case examples outlined in this article merely serve as illustrations. They are based, however, in large part on real cases that have been disguised.

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Finally, Ms. B warned Mr. L that he was upsetting her and that, if he did not accept that they had no future together, she would be forced to look for another job. Mr. L responded by telling Ms. B that he would try to "behave" but could not help himself. For the next month, Mr. L continued to pursue Ms. B while she tried to find another job but was unable to. Feeling overwhelmed by the situation, Ms. B complained to the EEOC and eventually filed a sexual harassment suit. Both her medical and psychiatric records showed that Ms. B had appropriately mourned her mother but had been very distressed by Mr. L's unrelenting amorous advances.

**Welcomeness** The plaintiff may be truthful and still not have suffered actionable sexual harassment. The possibility that she may be responsible for the events that she complains of has been recognized by the legal profession and led to the qualifier "unwelcome" in the definition of sexual harassment. For sexual conduct in the workplace to be unwelcome and thus constitute actionable sexual harassment, the plaintiff cannot have "solicited or incited"<sup>12</sup> that conduct. Conversely, to the extent that a plaintiff has solicited or incited the conduct she complains of, the plaintiff can be said to have welcomed it.

Most sexual harassment cases of the "hostile environment" type involve a complex relationship between two individuals, the plaintiff and the defendant; that relationship must of necessity be carefully analyzed. The issue of welcomeness is one of responsibility that, psychodynamically, extends to involve conscious, preconscious, and unconscious processes; its determination logically belongs, at least in part, to the realm of psychiatry. How much, if at all, the plaintiff offered encouragement because of personality psychopathology and/or some

other factor(s) can be tentatively assessed as part of the independent medical examination.

Encountering a history of childhood sexual abuse in a plaintiff should constitute a red flag for the forensic psychiatrist: the possibility that the plaintiff has been instrumental in the events of which she complains must be carefully considered. There exists a large body of literature describing the after-effects of childhood sexual abuse.<sup>13, 14</sup> No only does a history of childhood sexual abuse make a woman particularly vulnerable to various forms of revictimization such as sexual harassment in adult life, but it may also affect her personality so that she *provokes* behavior that, in retrospect, she will probably perceive as abusive. Forensic psychiatrists who are retained by either side of a sexual harassment case should be thoroughly familiar with phenomena such as repetition compulsion, projective identification, and identification with the victim and/or aggressor, that can be a consequence of childhood sexual abuse.<sup>15</sup> To the extent that the plaintiff with such a history identified with the aggressor rather than, or in addition to, feeling victimized, she is more likely to have taken an active part in bringing about events that she will later label as sexual harassment.

A history of childhood sexual abuse does not, in and of itself, signify that the woman should be held responsible for the sexual harassment. The following are two examples of sexual harassment cases that include repetition compulsion. It is the author's belief that only the first one would have been actionable.

Ms. C had been raised in a large household dominated by a violent alcoholic father who regularly beat his children and his wife. As they grew up, Ms. C's brothers and sisters learned to keep out of their father's way. However, he sexually abused Ms. C from the time she was 10 years old until she left home at 18. Although Ms. C often wanted to, she never complained to her mother for fear of upsetting the latter even more.

When Ms. C turned 16, she was ordered by her father to find a job. She went to work on an assembly line for a company that manufactured athletic shoes. Ms. C was perceived as a shy, but hard worker. Unlike the other female workers, she ignored attempts by the few male co-workers to engage her in flirtatious exchanges but concentrated on her tasks. She soon came to be valued by her employer.

Five years after she had joined the company, a new supervisor, Mr. M took over the night shift. Ms. C surprised everyone by requesting a transfer to Mr. M's team. He was an unattractive older man who was unpopular because of his temper; there were rumors that he was "playing around" and that his marriage was failing. Following Ms. C's transfer, she quickly became the target of her new boss's abusive behavior. In addition to barking orders at her, Mr. M often brushed against her in an obviously intentional manner and, on three occasions, forced her to submit to his sexual advances in the locker room while no one was around. For two long years, Ms. C continued to work for him. She had grown to hate her job, but it never occurred to her to complain, request another transfer, or leave the company. Ms. C also refused to join two female co-workers who had united to file a sexual harassment claim against Mr. M. The latter was eventually fired from his job. Ms. C was surprised to find that she was not as happy as she thought she would be at his departure.

In the following case, it is evident that Ms. D identified with her uncle, the aggressor.

Between the ages of 6 and 15, Ms. D had been sexually molested by an uncle; he was eight years older than she and had also been the only one to provide her with the attention she craved

and had never received from either her mother or stepfather. Ms. D's uncle had repeatedly told her that she was "too cute," thereby making her feel responsible for their sexual activities. Ms. D's relationship with her uncle ended when her parents caught them in bed having sexual intercourse: Ms. D was severely chastised and her uncle left town.

Ms. D dropped out of school. She had grown into an attractive young woman but had remained a loner because she felt "different." For the next couple of years, she worked as a waitress in a fast-food restaurant. When she was promoted to cashier, Ms. D moved out of her house into a small apartment she shared with a female co-worker. Ms. D was very reserved and perceived as standoffish. Yet her male co-workers felt attracted to her and had nicknamed her the "Ice Queen."

Shortly after Ms. D was promoted to checker, a new manager, Mr. R, came to work. He was a happily married man, a few years older than Ms. D, and had a comfortable relationship with the women he supervised. Ms. D immediately transferred to Mr. R her unresolved feelings for her uncle and, for the first time, was observed flirting, albeit somewhat awkwardly. Ms. D would tell her supervisor that he was very sexy and that his wife must be having a hard time keeping him at home. Mr. R felt confused, but flattered, and although he was careful to maintain only a supervisor-subordinate relationship, found himself unusually aware of Ms. D. To make matters worse, the other workers constantly teased him about his effect on the "Ice Queen."

Recognizing that the special attention he was paying to Ms. D was distracting and demoralizing to the rest of the staff, Mr. R decided to call in Ms. D for a private conference. He advised her that they had to maintain a more professional relationship and could no longer "kid around." Ms. D promised to mend her ways. However, Mr. R soon realized that she was only becoming more openly provocative. Feeling very uncomfortable, but also increasingly attracted to Ms. D, Mr. R called her in for another private conference. After telling Ms. D that she was a very good worker, Mr. R announced that he was transferring her to another location where she would receive a raise. Ms. D burst into tears. When Mr. R attempted to hug

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her in a consoling manner, she pushed him away and ran out of his office screaming. She then drove straight to the police station and filed a complaint for sexual assault.

**Recognition of Hypersensitivity** A relatively new legal concept, that of the "reasonable woman,"<sup>16</sup> was devised to take into account women's experiences as distinct from those of men. It also ensures that the plaintiff's concerns are not those "of the rare hypersensitive employee";<sup>17</sup> the "reasonable person"<sup>18</sup> standard, still used by some courts, implicitly serves the same latter function. Forensic psychiatrists have the training to help determine whether a plaintiff's background has caused her to become hypersensitive.

It has been well documented that a history of childhood sexual abuse can, but does not always, produce a chronic post-traumatic stress disorder-like syndrome that renders its victim hypersensitive to sexual stimuli.<sup>19</sup> As Gabbard<sup>20</sup> succinctly stated, "The most benign touch to someone who has been sexually abused can be experienced as sexual assault."

In addition, a history of one or more rapes in adult life can have the same effect as a history of childhood sexual abuse, albeit for shorter periods of time.<sup>21</sup> Thus, a woman who has been recently raped can read threatening messages into innocent situations. This is illustrated in the following case example:

Ms. E was a 32-year-old divorced sales representative who had enjoyed her work for many years. While on vacation in an unfamiliar area, she was forced to drive to a deserted area and became the victim of a rape at knife point. Ms. E spent the last two weeks of her vacation alone at home, and did not seek psychotherapy, although it had been suggested to her.

Even though she was still experiencing

nightmares and flashbacks, Ms. E went back to work as expected and did not tell anyone of her traumatic experience. However, she became increasingly tense as she realized that the scheduled annual company convention was only one month away. For several years, Ms. E and a male co-worker, Mr. S, had made the 400-mile trip to the convention together, sharing the driving. Ms. E considered telling Mr. S that she did not want to go to the convention that particular year but could not bring herself to do so.

Ms. E and Mr. S drove to the convention in her two-seater sports car. Although Mr. S gave her no reason to think so, Ms. E began to suspect early on that, this time, his agenda was to seduce her. Much to Mr. S's surprise, Ms. E exhibited a violent startle reaction on those few occasions when his hand accidentally brushed her leg while operating the gear shift knob. When Mr. S, without warning Ms. E, turned into a road that was not part of their regular itinerary, she became hysterical; she only calmed down after Mr. E had explained to her that the road they usually took was closed for construction. The rest of their trip was uneventful. Ms. E recognized that she had been mistaken about Mr. S's intentions and decided that it was high time she seek psychotherapy for her reactions to the rape.

Again, a recent history of rape does not preclude additional emotional injury due to sexual harassment:

Ms. G was a 25-year-old fashion illustrator who had recently divorced. She was violently raped by an intruder while temporarily residing in a rented house. Thereafter, she was taken to an emergency room where a rape counselor advised her to obtain psychotherapy.

Ms. G only took off a couple of days from work because she quickly recognized that she would rather be among familiar people. Following the rape counselor's advice, she went to the Director of Personnel, to whom she confided her experience. The latter was very sympathetic and arranged for Ms. G to leave work early twice a week so that she could attend psychotherapy. With time, Ms. G felt that she was recovering.

Six weeks later, a new supervisor, Mr. T, arrived. Ms. G became immediately aware that,

for some reason, he reminded her of the rapist. Even though he behaved in an appropriate manner, she found herself tensing up in his presence. Within a few days, Ms. G acquired the distinct impression that Mr. T was staring at her too intently whenever they spoke. Then, on one occasion, she thought—but was not sure—that Mr. T had followed her home. Ms. G discussed her impressions with her therapist and they agreed that she was probably overreacting.

Not long thereafter, Mr. T asked Ms. G to meet with him after hours so that they could discuss one of her projects. Ms. G made up an excuse not to do so and, the next day, went to discuss her concerns with the Personnel Director. She, too, told Ms. G that she was probably misinterpreting Mr. T's intentions because of her recent rape experience. For the next few days, Ms. G had difficulty sleeping. Another brief meeting with Mr. T, in which he briefly placed his arm around her shoulders, led to a return of flashbacks. Ms. G was in a quandary, not knowing what to do.

It was not until one week later, when Mr. T complimented her on her dress and asked her to accompany him to dinner that Ms. G was able to return to the Director of Personnel for help. Mr. T, who had only been at his new job for two months, was fired. It was discovered that he had been similarly terminated for sexual harassment from his previous job.

### **Obstacles to Complete Psychiatric Examinations**

Rape far surpasses sexual harassment (excluding sexual assault or *quid pro quo*) in the severity of its emotional consequences. Additionally, sexual harassment is most commonly of the hostile environment type (i.e., consisting of verbal remarks and, at worst, very limited physical contact). Nonetheless, an analogy between rape and sexual harassment has repeatedly appeared in courts of law, with parallels being drawn between welcome-ness and consent; the result has been entirely inappropriate extensions of rape

shield laws to sexual harassment cases.<sup>22</sup> Consequently, forensic psychiatrists are often limited in their inquiry of the sexual harassment plaintiff's background and in their access to her medical and psychiatric records. Redacted medical records are usually an indication that significant information about the plaintiff probably exists but is being withheld.

**Limitations to History Taking** While it is understandable that the rape victim's sexual history is irrelevant, that same history can be of the utmost importance in a sexual harassment case. As discussed above, a history of childhood sexual abuse should act as a red flag and prompt the forensic psychiatrist to investigate whether the alleged objectionable conduct has been partially, or even entirely, provoked (i.e., to what extent, if any, was it welcomed?). Similarly, a history of one or more recent rapes may have rendered the sexual harassment plaintiff temporarily hypersensitive; a plaintiff's history of an earlier rape is of no consequence in a rape case, since hypersensitivity is not an issue in criminal wrongdoing. Being prevented from taking the plaintiff's sexual history can, at times, significantly impede the forensic psychiatrist in the exploration of those very issues that are essential to the resolution of a sexual harassment claim.

**Limited Access to Records** Medical records and, in particular, psychiatric records can be most helpful in the assessment of the plaintiff's psychological make-up; they can point to problem areas that need to be explored. As in the case example presented above, it is not uncommon for records to document severe

personal problems that could be, at least partially, responsible for the plaintiff's symptoms of anxiety and depression.

To deny access to medical records is justifiable in rape cases but not in sexual harassment cases in which plaintiffs have placed their mental state at issue. However, it stands to reason that access to such records should not be abused. The forensic psychiatrist should respect the plaintiff's right to privacy; personal information that has no bearing on the plaintiff's sexual harassment claim but that could be a source of embarrassment should not be disclosed.

### When The Plaintiff Does Not Claim Psychological Injury

In *Harris v. Forklift Systems*,<sup>23</sup> the Supreme Court held that a plaintiff need not prove that she suffered a psychological injury to succeed on a claim of unlawful harassment. It also reiterated that harassment will be actionable if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."<sup>24</sup> The *Harris* court admitted, however, that the elements of a hostile working environment are difficult to define with precision.

Thus, it is the writer's opinion that forensic psychiatrists can also be helpful to the trier of fact in those cases in which the plaintiff has not claimed psychological injury. Welcomeness and the reasonable person or reasonable woman standard remain legal concepts that can bring a measure of objectivity to any sexual harassment case. As discussed above, the forensic psychiatrist can assist the court

by providing information that can resolve these issues.

### Summary

In the absence of an objective test of sexual harassment, meaningful discussions of individual cases are difficult at best. It is suggested that a translation of clinical constructs into legal concepts such as welcomeness, and the reasonable woman or reasonable person standard would allow forensic psychiatrists to be of greater assistance in such cases—regardless of whether there has been a claim of psychological injury; not only could forensic psychiatrists facilitate the dialogue between opposing attorneys but they could provide valuable data to juries.

Like all psychiatrists, forensic psychiatrists are uniquely trained to understand psychodynamics. Thus, in a forensic situation, they have the skills to recognize the multiple determinants of hypersensitivity and welcomeness. However, their ability to do so is limited by the completeness of the psychiatric examination that must, as a matter of course, include gathering personal information about the plaintiff's background. Unfortunately, as described above, the inappropriate extension of rape shield laws to sexual harassment cases that do not include *quid pro quo* or sexual assault can severely limit the forensic psychiatrist's ability to assist the court.

This article has been written with the belief that increased participation by forensic psychiatrists would help the courts to distinguish between valid and frivolous sexual harassment claims.

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