

Why #MeToo Does Not Always Equate to #MeRecoverMoney

By Colleen M Quinn, Esq. and Kelsey Abellⁱ

While #MeToo may appear to be just a hashtag, it has created an avalanche of healing, justice, and change for victims of sexual assault. Through public testimony, worldwide news attention, and personal experience shared on various forms of social media, the #MeToo movement has given a more encouraging platform for both male and female victims to come forward about their experiences that have long been viewed as too taboo to discuss. In addition to strengthening the voices of those who feared the public's reaction to their stories of sexual assault, the #MeToo movement has encouraged victims to seek justice through legal action. Consequently, many trial lawyers that practice in the areas of personal injury, medical malpractice and/or employment law, as I do, have seen a large increase in the number of prospective client calls asking if he or she or they have a case. Unfortunately, the reality is that, other than criminal prosecution, most claims are time barred or, alternatively, if not time barred, pose issues with collecting a monetary recovery. We can only hope that the greater awareness now will push clients to seek recovery much sooner. Further, as companies and institutions put in better policies, and as victims no longer will tolerate improper touching, we also anticipate that societal reform might help to reduce the number of incidents of sexual abuse.

I. The Movement.

#MeToo began as a simple phrase used by civil rights activist Tarana Burke when she shared her story of sexual assault back in 2006.ⁱⁱ A combination of social media attention started by actress Alysa Milano and with backing from celebrity assault victims soon pushed the movement to the global stage, even earning these “Silence Breakers” the honored title of *TIME*'s “Person of the Year” award for 2018.ⁱⁱⁱ Along with the revealing stories of years and

years of hushed assaults that have surfaced through victims of celebrities like Bill Cosby and Harvey Weinstein, #MeToo has opened the doors for men and women of all professions and walks of life to be more willing to share the truth of their attacks through various public mediums. In 2015, the movie “Spotlight” depicted the extensive abuses of children by the Roman Catholic Church and the psychology of coercing children to stay silent. In mid-2017, the Netflix crime documentary “The Keepers” placed more focus on the Catholic Church by featuring the story about a nun in Baltimore, Maryland, who was murdered when she threatened to reveal cases of sexual abuse. In October of 2017, millions of people across 85 countries shared their stories of sexual assault through Facebook and Twitter, all tagging their posts with #MeToo.^{iv} While this brought to light the sheer quantity of people who are victims of sexual assault, it was also a chilling display of how many have been impacted by something so painful, yet have never had the courage to share it with their friends or family. Bringing sexual assault to the forefront of the social justice arena is an indispensable step to addressing the issue, as no crime can be prosecuted if gone undetected. With this rise in willingness to share such private and painful experiences with their friends, family, and social media followers, people are now becoming more inclined to share their stories with listening attorneys.

However, the pursuit for monetary recovery for sexual abuse is riddled with issues. And most clients are not aware of the time limitations, the difficulties in finding sources for collection or the huge evidentiary hurdles present in pursuing a civil case. Put simply, time and money are of the essence with regard to any civil claims, and that is a cold reality to deliver to a prospective client who finally has summoned up the courage to pick up the phone or craft an email to an attorney and open up to share a very painful personal history.

II. Most Are Too Late: When Does the Clock Start Ticking?

Most sexual assault civil claims fall into the following three categories: (1) a tort action – whether that be assault and battery, false imprisonment, negligent hiring, supervision or retention, infliction of emotional distress, and a myriad of other possible tort claims; (2) an employment claim typically brought as sexual harassment under Title VII of the Civil Relief Act of 1964^v, or (3) as a claim against an educational institution under Title IX which was passed as part of the Education Amendments of 1972.^{vi} While there are others causes of action, those are the primary avenues for civil recovery and, without even delving into the procedural hurdles of each, we must first note that they all have very short windows on asserting a claim.

Because of the personal nature of sexual assault or abuse, victims often are hesitant about coming forward and seeking legal counsel. Sadly, feelings of guilt, shame, or fear that they will be discredited often keep victims silent about their experiences. In addition to these emotions, there has long been a social taboo for even addressing the subject or pointing to the perpetrator, particularly in cases involving power dynamics, children, or male victims. While the #MeToo movement undoubtedly has aided in starting the global conversation about sexual assault, it has not arrived in time to beat the statute of limitation in most cases.

A. Time Frame for Tort Claims and Medical Malpractice.

In civil suits for tort claims in Virginia, absent a tolling argument, including the person being a child or incapacitated, the statute of limitations for filing a sexual assault or related tort claim, including medical malpractice, arising out of the assault is only two years.

Although the statute of limitations for adults who are victims of sexual assault is relatively short, child victims in Virginia receive much more leeway. However, the shortfalls of that statute are discussed below. While the expanded window of statute of limitations for adults who were assaulted as children certainly aides those victims in pursuing legal claims, adult

victims must be more proactive in coming forward sooner. #MeToo has acted as a vessel for both the trailblazers and those who found their voice through them, yet time is still a factor of which victims must be aware.

B. Time Frame Under Title VII.

In the pursuit of employer accountability and deeper pockets, a sexual harassment or claim under Title VII against the employer first must be processed through the Equal Employment Opportunity Commission (EEOC). In Virginia, the claim must be filed within 300 days of the purported unlawful activity. Note that the normal time frame is actually 180 days unless the charge is covered under a parallel state or local law.^{vii} The EEOC then has a mandatory 180 days to consider the claim before issuing a right to sue letter (or before the plaintiff can request that the right to sue letter be issued). Thus, there is a limited time frame to file – followed by six months of little, if any, activity or remedial action, while the claim typically languishes at the EEOC. If the employer does not fall under Title VII (generally because they do not have 15 or more employees) then lesser remedies might be sought under the Virginia Human Rights Act.^{viii} However, again the 300 days for filing time frame applies. Even when time frames are met, and the plaintiff survives the administrative “wait,” the hurdles in bringing a successful claim in federal court can sometimes prove insurmountable, with most lawsuits not surviving summary judgement.^{ix} Furthermore, even if a case can make it to trial, there are limited damage remedies under Title VII.

C. Time Frame Under Title IX.

Title IX increasingly is serving as an avenue for students to seek legal remedies regarding sexual assault and sexual harassment issues, but college students age eighteen or over in Virginia still are working against the two year the statute of limitations, as legally they are adults and Title

IX claims fall under each state's statute of limitations.^x Although adults, college students are young and still under the strong power dynamics that often keep child victims from communicating their experiences to others, yet they only have two years to seek legal help. While students more frequently are using Title IX to pursue sexual assault claims, the unique nature of college life and adolescent psychology may demand an expanded statute of limitations to address its many issues. And, even with an expanded statute of limitation, given the difficulty in obtaining any monetary recovery under Title IX, more specific and expanded monetary remedies are needed as well.

III. If Not Too Late, Then Nothing Left to Recover.

For child victims in Virginia, or victims who are incapacitated, the statute of limitations for sexual abuse does not begin running until the victim reaches the age of eighteen, or when the incapacity is removed, and then it potentially continues running for twenty years.^{xi} Arguably, anyone who experienced sexual assault as a minor has until they are thirty-eight to pursue legal action. In a nod to modern psychology, an additional way to trigger the statute of limitations is "when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist."^{xii} Such an extension of the statute addresses the issue of suppressed memories that often occur with children who undergo sexual abuse. If a medical professional is able to help uncover past experiences and connect them with current side-effects or illnesses, victims can still seek legal action for an extended period.

However, the reality is that with a twenty year delay in seeking recovery, the ability to actually collect anything from the assailant, or to overcome evidentiary issues, is enormous. Oftentimes the assailant is deceased or no longer has assets or the institution that employed the

assailant or condoned the behavior is gone. Even if arguments can be made for negligence or can be made that the sexual abuse was not intentional and, therefore, covered by homeowner's or other insurance, tracking down homeowner's policies from twenty years ago is often impossible. In the event that the assailant was wealthy as the time of abuse, their financial situation often has changed when the victim seeks legal help. Alternatively, the assailant is careful enough to move assets into joint marital accounts or hide the assets in other ways. Whether it's a case of child sexual assault and the perpetrator is dead with an estate long settled, or the responsible employer has long shuttered its doors, or the doctor has lost his license and practice, collections can pose a difficult problem in pursuing a civil suit in sexual assault cases – especially those brought much later in time.

IV. The Race to Recovery – Is Being the First and Keeping It Secret Better? Special Considerations in Multiple Victim Claims.

More people coming forward about their experience with sexual assault or abuse certainly helps to legitimize the reports of attacks or abuse, but it also poses a problem in terms of collecting monetary damages. As seen in the Bill Cosby and Harvey Weinstein cases, once one victim comes forward, others begin to gain courage to share their own stories. More victims speaking up regarding assaults from the same perpetrator provides corroboration and converts the “he said-she said” evidentiary dilemma to a much stronger “he said-*they* said.” While this can aid in the evidentiary burden by showing a pattern of abuse and therefore strengthening the victim's credibility, if a civil action is not barred by the statute of limitations, and assuming there is a pot of money from which to recover, claims by multiple victims can lower the total amount that each plaintiff is able to individually collect, as everyone is drawing out of the same pot.

Sometimes collecting any amount of monetary damages is eliminated when multiple victims have already come forward and the assailant has lost his or her income or financial assets. On the

other hand, the first victim who comes forward and agrees to a confidential pay off might be in the best position as far as a monetary recovery is concerned. A few examples from my practice:

- Over a dozen women bring claims against a psychiatrist for improper breast touching. By the time the second half of the dozen come forward, typically Board of Medicine proceedings have taken place, the doctor has lost his license, malpractice insurance no longer will cover the claim (because the acts now are clearly intentional as opposed to accidental or even “therapeutic”). Moreover, all of the doctor’s assets were held jointly with his wife (but who now has left the pervert and taken most of the assets with her as part of the divorce settlement). Thus, while the first claimants typically often obtain a monetary recovery, the later claimants are left out in the cold.
- A doctor confidentially settles his sexual abuse lawsuit brought by an independent medical sales representative. It is not reported to the Board of Medicine as she was not a patient. She obtains a large monetary recovery. If the doctor is sexually abusing sales representatives, why not his patients? However, the patients subsequently file criminal complaints for rape and complaints with the Board of Medicine. The once wealthy doctor (who moved all of his assets to joint ownership with his wife) loses his license, loses his practice, loses his income and ends up incarcerated. Moreover, malpractice insurance will not cover the intentional acts. The sales representative recovers, the victim patients behind her do not.

Once multiple victims come forward, confidentiality is often eliminated as a bargaining tool to gain a recovery. Moreover, most insurance policies (whether homeowners, automobile, malpractice or otherwise) bar any recovery for intentional acts. The more claimants, the more apt the acts are to be deemed intentional and cannot be construed as merely accidental

or negligent. Therefore, tapping into any insurance is not an option and victims then have to pursue the attacker's personal assets, if any remain. The only other option is if there is an employer, a company, or an institution to blame. In the cases of celebrity perpetrators, there might be enough money to provide a sufficient recovery for multiple plaintiffs, but the average sex abuser is not going to be in that kind of financial position. The average assailant may not even have enough to cover the damages of one victim, much less the damages of multiple victims.

V. What Can We Celebrate About #MeToo?

Getting a monetary recovery for a #MeToo victim, especially those victimized in years bygone, may have its hurdles and limits, but what can we celebrate about the movement?

- With the #MeToo movement, employers have become increasingly concerned about liability for sexual abuse or harassment in the workplace. Thus, there has been a marked increase in employee training as well as awareness campaigns initiated by employers and educational institutions.
- Human Resource departments are implementing stronger and more detailed policies to both prohibit but also better recognize sexual abuse and harassment in the workplace.
- #MeToo has resulted in an increased overall awareness as well as less tolerance by society for sexist behavior and improper touching.
- #MeToo has brought a sense of empowerment. Whether finally filing that criminal complaint against the actions of a priest from 20 years ago to posting on Facebook about sexual abuse by one's "uncle" as a child, #MeToo has emboldened folks to come out of the shadows.

In an episode of my radio show, Raising the Bar Law Talk, titled “Sexual Assaults & The Law – with the ‘Me Too’ Movement,” I discuss the complexities of the #MeToo movement with Susheela Varkey and Valerie L’Herrou of the Virginia Poverty Law Center. In discussing the power that victims can impart to each other through coming forward about their experiences, Susheela noted that by listening to others share their story of sexual assault, victims may think “Now I can tell my story. I don’t have to be the first one, the trailblazer.”^{xiii}

VI. Hope For The Future.

The #MeToo movement has empowered many victims of sexual abuse to come forward, but in order to adequately and effectively represent these victims in a legal battle, the victims must be willing to come forward as soon possible after the attack or abuse occurs. We cannot rewind time, nor reverse statutes of limitations, nor bring back deceased assailants, but we can publicize the risks of waiting to relate the abuse and the importance of timely reporting. We also can advocate for more protective and more meaningful laws, and otherwise educate and open our doors to remove some of the roadblocks that keep victims from speaking up, and of course, represent them to the best of our abilities when they finally do.

ⁱ Kelsey Abell is a William and Mary law student and intern with Locke & Quinn for Summer 2018.

ⁱⁱ Christen A. Johnson and KT Hawbaker, *#MeToo: A Timeline of Events*, CHICAGO TRIBUNE, (May 25, 2018)
<http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlstory.html>

ⁱⁱⁱ Jonah Engel Bromwich, *‘The Silence Breakers’ Named Time’s Person of the Year for 2017*, NEW YORK TIMES (Dec. 6, 2017)
<https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html>

^{iv} Andrea Park, *#MeToo Reaches 85 Countries With 1.7M Tweets*, CBS NEWS (Oct. 24, 2017)
<https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/>

^v 42 U.S.C. section 2000e

^{vi} 20 U.S.C. sections 1681-1688

^{vii} <https://www.eeoc.gov/field/richmond/timeliness.cfm>

^{viii} Virginia Code section 2.2-3900, *et. seq.*

^{ix} Stephanie Francis Wald, *Time's Up*, ABA JOURNAL, Vol. 104, No 6 (June 2018)

^x Cory Watson Attorneys, *Title IX, END RAPE ON CAMPUS* (last visited July 19, 2018)
<http://endrapeoncampus.org/title-ix/>

^{xi} Va. Code Ann. § 8.01-243(D)

<https://law.lis.virginia.gov/vacode/title8.01/chapter4/section8.01-243/> which states:

“Every action for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person as set forth in subdivision 6 of § 8.01-249 shall be brought within 20 years after the cause of action accrues.”

^{xii} Va. Code Ann. § 8.01-249(6)

<https://law.lis.virginia.gov/vacode/8.01-249/> which states when the cause of action is deemed to accrue: “In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon the later of the removal of the disability of infancy or incapacity as provided in § 8.01-229 or when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of § 18.2-67.10 and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.”

^{xiii} *Sexual Assaults & The Law – with the “Me Too” Movement*, Raising the Bar Law Talk Radio, LOCKE & QUINN (2018)
<http://www.lockequinn.com/raising-bar-law-talk-radio-show/raising-bar-video/#sexualassault>