Opinion: Preventing Harassment & Discrimination in Esports

By Diane Cafferata Molly Stephens, and Manisha Sheth - March 12, 2021

In this opinion piece, attorneys Manisha Sheth, Diane Cafferata, and Molly Stephens from law firm Quinn Emanuel propose some practical solutions for addressing harassment and discrimination against women in the esports industry.

This past year, harassment in the esports industry garnered national headlines, with the New York Times drawing attention to allegations of harassment shared on Twitter and other platforms in June by more than 70 individuals of the esports community. Every new month seems to bring new revelations of gender, sexual, or racial discrimination by game developers, tournament organizers, team owners, and managers, coaches, casters, streamers, and players. Just last month, widespread harassment in the Brazilian esports community came to light, with a dozen individuals, including players, coaches, team managers, and team owners, being accused of harassment.

Unlike with Gamergate in 2014, there has been widespread recognition that action must be taken, especially in light of court decisions extending liability for harassment and hostile workplace environments. Courts are now willing to impose liability not only on traditional employers, but also on those that control the hostile environment or those that know or have reason to know of the misconduct, yet fail to address it.

The question is what action should be taken. All industry participants—and the industry as a whole—will be well served by proactive efforts to recognize and address all types of harassment. These include overt acts of harassment, along with more subtle harassment, such as unconscious bias or micro-aggressions. Only by being more inclusive will the esports community be able to grow to its potential. Here are a few powerful, proactive steps that industry participants can take to create a more-inclusive community while minimizing their legal risk.

1. Codes of Conduct. Industry participants, including tournament organizers, developers that host tournaments, leagues, teams, and administrators of online forums should institute and abide by meaningfully designed and publicly available codes of conduct. Doing so will likely present a competitive advantage against organizations whose policies are ambiguous or non-existent because industry participants will naturally gravitate towards a safe and inclusive environment, and begin to demand it as a matter of course.

Codes of conduct should clearly and objectively identify the types of misconduct that will not be tolerated, and should set forth specific sanctions that are available for violations. By doing so, the code will deter would-be perpetrators and facilitate reporting by bringing awareness to the community at large about what does and does not constitute harassment or other unwanted Conduct.

An established code of conduct also enables the organization to enforce its standards in a predictable and even-handed way. In addition to setting forth a range of penalties for each type of misconduct, the code will incorporate a procedure for enforcing the rules while comporting with the requirements of due process. While the code should affirm the organization's support for survivors and witnesses of harassment, it must ensure that anyone accused of harassment is treated with fairness and dignity and given a fair opportunity to respond to any allegations against them. Sensible industry participants will not want to be involved with an organization where one may be easily blacklisted by another's false accusation.

The code also facilitates the fair determination of any accusations on the merits by ensuring that survivors, witnesses, the accused, and the organization itself systematically gather and preserve all evidence relevant to the purported violation. Those individuals involved in the incident should be ready to take immediate and effective steps to preserve voicemails, emails, text messages, IMs, and other communications that may bear on the case. Those investigating the incident on behalf of the entity should be aware of their duties to gather and review all the evidence, to create contemporaneous records of witness testimony, and to issue preliminary relief, when appropriate, pending further investigation.

2. Reporting Mechanisms. Acts of harassment and related misconduct must be reported to human resources or the organization's counsel so that they may conduct an investigation. To encourage that reporting to take place, organizations should establish and publicize phone and internet hotlines that are available twenty-four/seven. They should also remind survivors, as well as any witnesses, that the organization encourages the reporting of such incidents and that no one will be subject to retaliation for having reported what they experienced or witnessed. Last summer, one Smash event planner, House of 3000, set up a tip line with an option for anonymous reporting of misbehavior. In addition, organizations that are serious about addressing and preventing harassment should publicize—both internally and to those participating in activities they host or sponsor—information for reporting acts of misconduct. This includes contact information for government agencies like the federal Equal Employment Opportunity Commission (EEOC) and state equivalents, such as the Department of Fair Employment and Housing in

California. There are also reporting apps, such as **JDoe,** which permits the encrypted, anonymous, and immediate reporting of acts of harassment and sexual assault, and refers victims to lawyers who can provide counsel. Finally, the accused, the accuser, and any witnesses should all be made aware that they might want to consult with their own legal counsel.

3. Culture. Creating a culture of tolerance and accountability within an organization can be advanced in many ways. First, awareness training is mandated by law in many jurisdictions and is extremely useful everywhere. It permits everyone in an organization to get on the same page with respect to what conduct is and is not appropriate. For example, unconscious bias is just that: unconscious.

Awareness training helps personnel recognize and avoid actions that might seem innocent to the perpetrator, but could be hurtful to others. Awareness training programs are available from the government and from private third parties.

Second, establishing a code of conduct, setting up robust reporting mechanisms, and creating and abiding by a fair process through which claims of harassment may be investigated and properly dealt with, also help to set clear expectations about the organization's position on harassment and about the need to conduct oneself consistently with the norms set by the organization.

Third, "walking the walk" is important. A key aspect of having a fair enforcement process is ensuring that it is applied consistently throughout the organization, including up and down the hierarchy. Nothing destroys a company culture more swiftly or thoroughly than, for example, treating executives differently from everyone else.

Finally, on a day-to-day basis, the organization should reinforce and act consistently with its policies of welcoming reporting by survivors, encouraging bystander intervention and reporting, and judiciously addressing unwanted conduct whenever it occurs. For example, merely labeling a racist statement during play a "heated gaming moment," and taking no action to stop it, demonstrates to everyone that such statements are actually tolerated and permissible. These minimizing responses tend to encourage this type of misconduct.

Conversely, taking note of inappropriate behavior, and dispassionately applying the rules and expectations set forth by the organization to deal with it, demonstrates to the community that there are real consequences to these actions and that they are not welcome within the organization.

Diane and Manisha are co-chairs of Quinn Emanuel's Sexual Harassment & Employment Discrimination practice. Molly is chair of its esports practice.