Young Lawyers Division (Reports No. 116C)

Resolved, That the American Bar Association:

a) condemns the manifestation by lawyers in the course of their professional activities, by words or conduct, of bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors and others, based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, unless such words or conduct are otherwise permissible as legitimate advocacy on behalf of a client or a cause;

b) opposes unlawful discrimination by lawyers in the management or operation of a law practice in hiring, promoting, discharging or otherwise determining the conditions of employment, or accepting or terminating representation of a client;

c) condemns any conduct by lawyers that would threaten, harass, intimidate or denigrate any other person on the basis of the aforementioned categories and characteristics;

d) discourages members from belonging to any organization that practices invidious discrimination on the basis of the aforementioned categories and characteristics;

e) encourages affirmative steps such as continuing education, studies, and conferences to discourage the speech and conduct described above.
REPORT

I. Introduction

When the American Bar Association promulgated its new Model Code of Judicial Conduct in 1990, it recognized the need to address the problem of bias and harassment in the judicial system by including strong new canons and commentary prohibiting biased conduct by judges and lawyers. In promulgating these new canons and commentary, the ABA responded to nationwide reports from state supreme court and bar association task forces on gender, race, and ethnic bias in the courts and the profession. Five years hence, the number of reports has increased dramatically, including the first report from a federal circuit. It is time for the ABA to take as strong a position against this conduct as it does in its Model Code of Judicial Conduct. This time, however, the ABA must exercise its leadership to directly influence the actions of attorney in all aspects of their practice.

II. The Need for a Policy

The immediate impetus for the proposed policy is the continuing debate over proposals to modify the Model Code of Professional Responsibility to prohibit discrimination or harassment by lawyers in the course of their professional activities against individuals based on their sex, race or ethnicity. While such proposals have passed in several states and while some courts have taken the lead to prohibit such

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2These reports are listed in an Appendix available upon request to the ABA Young Lawyers Division.

3For example, in 1993 Washington State modified Rule 8.4 of its Rules of Professional Conduct, adding the following section:

It is professional misconduct for a lawyer to:

(g) Commit a discriminatory act prohibited by law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities.
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conduct, the ABA has not been able to reach agreement that such a change is necessary, and if so, what form a modification should take.

After passing a resolution supporting the modification of RPC 8.4, the ABA-YLD has worked closely with various other ABA Sections and Committees, including the Standing Committee on Ethics and Professional Responsibility in an effort to resolve these differences. While these discussions have not led to an agreement on a possible modification to RPC 8.4, they have reinforced an understanding that it remains critical for the ABA to voice its heartfelt disapproval of conduct by attorneys directed against individuals because of their sex, race, ethnicity or other similar categories. As a result, the ABA-YLD recommends passage of an ABA policy denouncing such action and urging the ABA and its members in the strongest possible terms to condemn and discourage such acts of discrimination and harassment.

The need for a policy has been apparent since the first task force on gender or ethnic bias published its report nearly a decade ago. Many of these task forces have included a recommendation for such a rule in their reports.

Despite the fact that every lawyer is an officer of the court, and expected to live up to a high standard of conduct, every task force report presents a litany of instances in which lawyers' behavior has fallen far below the expected standard. Manifestations of bias and harassment have been expressed by lawyers against other lawyers, as well as litigants, court employees, employees in the lawyers' workplace and bar associations, and even against judges. Lawyers, as compared to judges and court personnel, are

*E.g., on September 30, 1994, the United States District Court for the Western District of Washington created Local General Rule 9 which states:

Prohibition of Bias

Litigation, inside and outside the courtroom in the United States District Court for the Western District of Washington, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.


consistently cited as the greatest source of biased conduct. As the Ninth Circuit Gender Bias Task Force wrote:

"Women attorneys experience a variety of interactions that subtly and overtly undercut their own sense of professional worth. Some of these interactions take place in the courtroom during formal proceedings. But more occur "off the record," for example, in the judge's chambers, out of the judge's hearing, and in the corridors and law offices of the Ninth Circuit. Importantly, women single out their male colleagues and opponents as the source of much of the gender bias that affects interactions within the Circuit."^3

Instances of racial bias as documented by task force reports are no less compelling and reflect a problem that is as widespread and insidious as gender bias."^4 In a disciplinary case involving repeated verbal attacks, including racial remarks, the Supreme Court of New Jersey stated:

"Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinction, be it based on race or color, as in this case, or, in other contexts, on gender, or ethnic or national background or handicap, is especially offensive. In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions."^5

The task force studies consistently substantiate that biased behavior in the courtroom is only a small part of the problem. A larger problem is the prevalence of biased conduct committed outside the judge's view and in settings less formal than the courtroom, e.g., depositions, pre- and post-trial negotiations, and employment situations. To properly address this problem, the ABA must enact a policy that covers a broader arena of behavior than does the Code of Judicial Conduct, which by logical limitation applies to conduct manifested before a judge or judicial officer. In every circumstance where a lawyer is present by reason, in whole or in part, of the lawyer's professional training, status, or expertise, the proposed policy should govern, for lawyers cannot, in those instances, shed the obligations of the high standards of conduct which accompany the granting of the privilege to practice law. The public expects as much, and we should require no less of ourselves.


^5In the matter of Lester T. Vincelli, 554 A.2d 474 (N.J. 1989).
Consequently, this resolution targets perhaps the most egregious and harmful form of bias: harassment and unlawful discrimination instigated by attorneys, in connection with professional activities, which target the victim's personal characteristics, some of which are immutable.

III. Scope of Proposed Policy

The policy is designed to impact conduct in all manifestations of a lawyer's professional activities, and thereby avoid allowing reprehensible behavior to go unchecked merely because it is calculatedly inflicted outside the courtroom or after a case is concluded. Encompassing the all-too-common courtroom antics, the proposed policy will also reach to each situation where a lawyer is engaged in endeavors associated with professional activities.

The policy will apply to professional activities regardless of whether the lawyer is representing a client. Implicit therein is the notion that the administration of justice must be protected from offensive conduct committed by officers of the court in all instances where a lawyer is called upon by virtue of the distinction of being a member of our profession. To do otherwise makes a mockery of the concept of fair and impartial administration of justice for all, and enhances the perception that lawyers are somehow outside or above the law. To do otherwise fuels the notion that honoring the spirit of the law is less important than knowing how to violate a law or rule in a manner where one will not be caught, or in which the offensive activity will fall between the cracks. The victim is left shaken and helpless, without recourse and protection how our system of justice knowingly permits such shameless behavior to go unpunished.

The proposal must regulate a lawyer's conduct both inside and outside the courtroom because all lawyers represent the judicial system each time they act within their professional capacity. A public perception of fairness and equality within the judicial system is essential to maintaining the integrity of the system. The proposed policy goes no further than existing model rules that prohibit lawyers from "engaging in conduct that is prejudicial to the administration of justice." Indeed, because it is merely a policy, and not a rule of professional conduct, it goes considerably less far than such rules.

Both state and federal discrimination laws can serve as models for the interpretation of the proposed policy. The language of the Title VII suggests a similar goal and purpose: the elimination of discriminatory or harassing behavior in certain particularly sensitive environments. There is no more sensitive environment than the judicial system. To discriminate unfairly or harass on the basis of personal characteristics, rather than the merits of the case, would violate the fundamental constitutional right to equal protection under the law. Such behavior blunts case outcomes, cheapens the integrity of the legal profession, and prevents women and minority lawyers from effectively engaging in professional activities.

Harassing behavior that would not rise to the level of protection under Title VII can pose a significant threat to the fairness of a particular proceeding and cause irreparable harm to the integrity of the legal profession. In a trial setting, a few well-timed comments designed to engender bias that harasses or prejudices a litigant or witness, or reduces the credibility of the opposing counsel, jeopardizes the fairness of the entire proceeding.
The proposed policy does not constitute an absolute ban on discriminatory or harassing conduct. Instead, the proposed policy carefully balances the needs of the advocate against the rights of individuals to be free from discrimination and harassment in legal proceedings. The policy expressly exempts words or conduct which are "otherwise permissible as legitimate advocacy on behalf of a client or a cause." This protects the need of the advocate to zealously defend his or her client in those extremely rare instances where discriminatory or harassing conduct might arguably play some legitimate role.

Moreover, the proposed policy places no overreaching limitations on an attorney's First Amendment rights. Rather, the policy recognizes the need to balance free-speech concerns against the right to participate in a justice system which is free from inappropriate bias. This balancing will be fact-specific. It will not preclude a jurisdiction from concluding that discriminatory and harassing speech should be banned in a fashion similar to the ban on speech which prejudices the administration of justice. On the other hand, where an advocate must advance harassing or discriminatory speech in order to zealously protect his or her client's interests, the policy allows such conduct. This avoids an all or nothing position which has created conflict and misunderstanding in the past.

IV. Effect of Proposed Amendment

The proposed policy recognizes the universal finding by minority and gender justice task forces that harassing and discriminatory behavior is prevalent throughout the legal system. The proposed resolution states a strong message that the ABA decries such conduct and will work to ensure its swift demise.

Passage of the proposed policy will be a clear statement, not only to lawyers, but to all Americans, that the American Bar Association recognizes that this problem warrants strong action because of its serious nature and extent. It will recognize and reaffirm the ABA's belief in the importance of protecting the integrity of the judicial system and the profession. It will encourage women and people of color to seek careers in the field, and will enhance the credibility of the American judicial system.

It is just such an all or nothing position which advocates on both sides of the debate have been unable to reconcile in the context of the debate on a possible amendment to RPC 8.4. Arguments supporting First Amendment freedoms ignore the fact that the rules of professional conduct for attorneys and judges already incorporate limitations on free-speech by limiting speech prejudicial to the administration of justice and by requiring attorneys to keep secret client confidences. Proponents of model rule changes have often ignored efforts to balance First Amendment concerns even in those rare instances where offensive speech or conduct may be required by the requirements of zealous advocacy. This proposed policy walks the narrow line between these two positions, recognizing that First Amendment concerns are present, but recognizing also that they must be balanced against the need to create and maintain a justice system free from unnecessary bias.
V. Summary

Racial and gender bias pervade the legal profession as evidenced by findings of the many states which have investigated this shortcoming in our legal system. The proposed policy addresses this discrimination and harassment directly and fairly, and promotes equal protection under the law. The compelling interest of eliminating the unjust discrimination and harassment that prevent the fair and equal administration of justice far outweighs any constitutional limitations on a lawyer's rights. Even so, the policy specifically requires a balancing of such constitutional concerns where it is argued that discriminatory or harassing advocacy is required. Perhaps most significantly, the policy embodies the ABA's commitment to eradicate such conduct within the profession, and is a logical and necessary extension of the statement made by the ABA in amending the Model Code of Judicial Conduct in 1990.

Respectfully submitted,

Michael A. Bedke
Chair, Young Lawyers Division
August 1995
1. **Summary of Recommendation(s)**

   This recommendation condemns the manifestation by lawyers in the course of their professional activities, by words or conduct, of bias or prejudice against clients, and others, based upon enumerated categories and characteristics; it opposes unlawful discrimination by lawyers in the management or operation of a law practice; it condemns threatening, harassing, intimidating or denigrating conduct by lawyers on the basis of enumerated categories and characteristics; it discourages members from belonging to organizations that practice invidious discrimination; and it encourages affirmative steps to discourage harassing or discriminatory speech or conduct.

2. **Approval by Submitting Entity**

   This recommendation was approved by the Young Lawyers Division Assembly on August 7, 1993 at the ABA Annual Meeting in New York.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

   Recommendations proposing amendments to the Model Rules of Professional Conduct were submitted to the ABA House of Delegates at the 1994 Midyear Meeting in Kansas City by the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility, respectively, but both resolutions were withdrawn prior to debate.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

   At the Midyear Meeting in February 1992, the ABA adopted policy that recognized the serious problem of sexual harassment in all types of workplace settings, including the legal profession. The policy further recognized that such harassment constitutes a discriminatory and unprofessional practice that must not be tolerated in any work environment. This recommendation is not inconsistent with that policy, but broadens it to include acts of discrimination and harassment committed in connection with a lawyer's professional activities.

5. **What urgency exists which requires action at this meeting of the House?**

   The problem of discrimination and harassment by members of the legal profession must no longer be tolerated by the American Bar Association. Such acts are well-documented in minority and gender justice task force reports. The judicial system is impaired by discriminatory and harassing acts committed by lawyers, and the integrity and perceived integrity of the system is seriously compromised. The Association must take action at its earliest opportunity.
6. Status of Legislation. (If applicable.)

No legislation is pending that addresses threatening or harassing conduct by lawyers in connection with their professional activities.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

Referrals will be made to the appropriate Association entities.

10. Contact Person. (Prior to the meeting.)

Be Landrum, Staff Director, ABA Young Lawyers Division
750 N. Lake Shore Drive
Chicago, IL 60611
312/988-5608
FAX: 312/988-6231

11. Contact Person. (Who will present the report to the House.)

Mark G. Sessions
1800 Frost Bank Tower
100 W. Houston Street
San Antonio, TX
210/548-5636
FAX: 210/548-5939

12. Contact Person Regarding Amendments to This Recommendation. (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

No proposed amendments are known at this time.