Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination

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I. Introduction

This paper is about discrimination in the legal profession, and about the kinds of responses to discrimination that the legal profession should be considering. I begin with a review of the various forms of discrimination which exist in the legal profession. Discrimination in the legal profession ranges from the exclusion of the members of certain groups from parts of the profession, to sexual harassment, to discrimination in our courts, to the exclusion and deprecation of the perspectives and experiences of those who have not traditionally been in positions of power. Discrimination in the legal profession occurs against women, against aboriginal people, against ethnic groups, against homosexuals, and against other groups as well.

Because of the privileged position of the legal profession in Canadian society, the members of the profession have a responsibility to set an example in the way that they govern and regulate their professional affairs. Strategies for the elimination of discrimination in the legal profession must operate on a number of fronts at once. Education of lawyers and judges about discrimination is very important, as are steps to make the legal profession more diverse. It is my argument that the recognition of a professional duty of non-discrimination is just as important.
The idea of a professional duty of non-discrimination is new in Canada, but it has assumed growing force in the U.S. To provide a context in which to assess a duty of non-discrimination, I will review the American experience with the duty of non-discrimination. Many U.S. jurisdictions have interpreted general duties in codes of professional responsibility, such as the duty to uphold and improve the administration of justice, to include a limited duty of non-discrimination. Some U.S. jurisdictions have enacted specific non-discrimination provisions in the ethical codes which bind legal professionals in those jurisdictions. In the final section of the paper, I look at the implications of the American experience for Canada. I conclude by proposing two additions for Canadian codes of professional conduct. Both add a duty of non-discrimination for lawyers, with one being more conservative than the other.

II. Discrimination in the legal profession

Discriminatory practices are deeply embedded in the practice of law. Within law firms, discrimination until recently took the form of the outright exclusion of groups such as women from law practice. Today, discrimination in law offices includes the concentration of women in certain areas of law practice, and discriminating against lawyers, particularly women lawyers, who try to balance their work and family obligations. In courts, both lawyers and judges engage in discriminatory conduct. Discrimination and harassment occurs against counsel, witnesses and jurors.

1. Defining discrimination

A very broad definition of discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination. According to Article 1 of the Convention, discrimination includes:

[a]nny distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The Supreme Court of Canada has considered the meaning of discrimination in its interpretation of the Canadian Human Rights Act, as well as in equality rights cases under the Canadian Charter of Rights and

3. Id., Article 1.1. The definition in the Convention is in fact a definition of specifically "racial discrimination", and is restricted to discrimination based on "race, colour, descent, or national or ethnic origin". However, the substance of the definition can readily be applied in other contexts.
The cases establish that an intention to discriminate is not an element of discrimination: rather, it is "the impact of the discriminatory act or provision upon the person affected which is decisive". In *Canadian National Railway Co. v. Canada Canadian Human Rights Commission*, Dickson C.J. (as he then was) cited the following passage with approval from the Abella Report on equality in employment:

Discrimination... means practices or attitudes that have whether by design or impact the effect of limiting an individual's or group's right to opportunities generally available because of attributes rather than actual characteristics...

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way it is a signal that the practices that lead to this adverse impact may be discriminatory.

The cases in the Supreme Court of Canada also establish that harassment on discriminatory grounds is a form of discrimination. In *Janzen v. Platy Enterprises Ltd.*, Dickson C.J., writing for the court, held that sexual harassment is discrimination on the grounds of sex. The Chief Justice emphasized that sexual harassment creates as much of a barrier to equality of opportunity as do openly discriminatory policies or practices. Although the issue in *Janzen* was harassment on the ground of gender, the reasoning would be equally applicable to harassment on other grounds, such as race or age.

Discrimination is unacceptable because it imputes stereotypical characteristics which are thought to belong to a class of people to the individual member of the class who is the object of the discrimination. Such stereotypes (e.g. "women are emotional") are usually inaccurate in describing

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the class in general, but if such stereotypes have any probative value, it is outweighed by their prejudicial effect. As Wilson J. noted in McKinney v. University of Guelph, stereotypes and prejudice threaten the dignity of the human person, one of the values central to our democratic society:

The purpose of the equality guarantee is the promotion of human dignity. This interest is particularly threatened when stereotype and prejudice inform our interactions with one another, whether on an individual or collective basis. It is for this reason that the central focus of the equality guarantee rests upon those vehicles of discrimination, stereotype and prejudice.9

As I will suggest, discrimination also means the exclusion or devaluation of perspectives and experiences different from one’s own, or from those of one’s cultural, linguistic or ethnic group. As Chief Justice Dickson recognized in R. v. Oakes,10 one of the basic values of our free and democratic society is the accommodation of a plurality of cultural identities and beliefs:

Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society.

2. Discrimination within the legal profession

There is an extensive and rapidly growing literature on discrimination in the legal profession. Although much of the literature is American, there is also a growing body of Canadian scholarship on the subject. My purpose here is to review some of that literature, and to lay the foundation for the later discussion of the potential range of responses to discrimination within the profession. There have been a number of excellent studies of specific aspects of discrimination within the profession, and of discrimination within the profession in particular geographic areas, to which I will be referring in my review.

My focus is on discrimination in the practice of law, and in court. The issue of discrimination in legal education is beyond the scope of this paper. This is not to say that discrimination in legal education does not

exist; clearly such discrimination does exist.\textsuperscript{11} The Special Advisory Committee to the Canadian Association of Law Teachers reports that discrimination, both obvious and subtle, is widespread in Canadian law schools:

There are obvious examples of discrimination and hatred as they are practised in law schools: racist hypotheticals; exam questions that resort to homophobic humour; the graffiti in the washrooms; the skits at variety show; lack of physical access. These instances of outright discrimination are not difficult to identify. It is the subtle practices of discrimination that are more hurtful, and insidious: the assumption that racially identified or disabled students have been admitted on an affirmative action programme; the assumption that students who are admitted through special programmes are academically inferior. . . .\textsuperscript{12}

(i) \textit{Discrimination in the practice of law}

Visible discrimination within the legal profession has taken a variety of forms. Initially, members of certain groups were excluded from the profession entirely. Later, members of those groups were admitted to the profession, but in limited numbers. Today, members of some groups tend to be confined to particular areas of practice.

In providing an overview of discrimination in the practice of law, it is not my intention to lay blame. Much of the discrimination which occurs is unintentional, and is the product of institutional and social habits. What is important is for the legal profession to recognize the extent to which discrimination does exist, and to work together to devise strategies to combat discrimination.\textsuperscript{13}


\textsuperscript{12} Special Advisory Committee to the Canadian Association of Law Teachers, \textit{Equality in Legal Education . . . Sharing a Vision . . .; Creating the Pathways} (June 2, 1991), p. 5.

\textsuperscript{13} In this regard, it is encouraging to note that the Canadian Bar Association has struck a "Gender Equality Task Force", chaired by the Honourable Bertha Wilson. The Task Force is scheduled to report to the Canadian Bar Association in August 1993. J.J. Camp, Q.C., "Gender Equality Deserves Every Member’s Involvement," \textit{The National} (April 1992), p. 2.
a. **Exclusion from the profession**

Groups which have been excluded from the legal profession have included women, aboriginal people, racial and ethnic groups, homosexuals, the disabled, along with others. The exclusion of women in particular has received a great deal of scholarly attention in Canada. However, there is also evidence of the exclusion of aboriginal people and racial and ethnic groups.

Aboriginal people are under-represented in the legal profession. In 1990, aboriginal people represented 2.3% of the total Canadian population, but only 0.8% of lawyers. Female aboriginal people represented 1.2% of the total Canadian population but only 0.3% of lawyers. Discrimination against racial groups in access to the profession has also been documented. In 1990, visible minorities represented 5.9% of the total Canadian population but only 2.8% of lawyers.

The exclusion of women from the practice of law has been well documented. Initially, women were denied admission to the legal profession entirely. The women who tried to enter the profession in the seventeenth, eighteenth and nineteenth centuries were all rebuffed. The first women admitted to the profession in the United States was Arabella Mansfield in 1869. In Canada and the British Commonwealth, the first woman admitted was Clara Brett Martin, who was admitted to the bar in Ontario in 1897. Women were admitted to the bar in other Canadian provinces between 1912 and 1942.

Although women may now legally practice law in every Canadian province and territory, they may still face discrimination in access to the profession. In the United States, women began to consistently receive

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14. B.M. Mazer and M.S.G. Peeris, *Access to Legal Education in Canada: Datebook 1990* (1990). These figures, provided by Employment and Immigration Canada, are suspect because of conflicting definitions of aboriginality. Nonetheless, they do provide a strong indication that aboriginal people are under-represented in the legal profession.
15. *Id.* Comparable figures were apparently not available for women lawyers.
interviews only in the 1970s;\textsuperscript{19} there is no reason to suppose that the experience of Canadian women was much different. Female applicants for legal positions may be asked discriminatory questions about their plans for having children or getting married, about their husband’s job, or about their intentions should their husband be forced to relocate.

b. \textit{Discrimination within the profession}

Studies about discrimination against those who have successfully gained access to the profession have emphasized discrimination against women. This may be because women are by far the largest traditionally excluded group to have gained access to the legal profession. Although the discussion that follows also emphasizes discrimination against women, there is no reason to suppose that analogous forms of discrimination do not occur against members of other groups. For example, a survey of the Ontario legal profession published in 1981 demonstrated that Jews were under-represented in “elite” law firms. While fifteen percent of the lawyers surveyed were Jewish, not one Jewish lawyer was employed in an “elite” law firm. Sixteen percent of lawyers in non-elite law firms were Jewish.\textsuperscript{20} There has undoubtedly been similar discrimination in the practice of law against other excluded groups, such as people of colour, homosexuals and the disabled.

There is evidence that women tend to hold low-status and low-paying positions within the legal profession. A 1988 study of Toronto lawyers found that women were more than three times as likely as men to hold relatively low-status legal positions. When the figures were adjusted to account for the fact that women had on average been called to the Bar more recently than men, women were still just over twice as likely to hold low-status legal positions.\textsuperscript{21} Nonetheless, a 1984 study of Alberta lawyers found that there was no significant difference between the percentages of men and women working in firms of various sizes. The study concluded


\textsuperscript{20} B.D. Adam and K.A. Lahey, “Professional Opportunities: A Survey of the Ontario Legal Profession” (1981), 59 Can. Bar Rev. 674, p. 684. For purposes of the survey, an “elite” law firm was defined as a firm of which one or more members had direct ties with one or more of the 113 largest corporations in Canada.

that women were not underrepresented in larger firms.\textsuperscript{22} However, a study of Canadian lawyers’ earnings found that the earnings of female lawyers were lower than the earnings of male lawyers of the same age.\textsuperscript{23} In the United States, there are remarkable disparities between the earnings of male and female lawyers. A 1989 American Bar Association subscriber survey found the average female lawyer made $57,600 while the average male lawyer earned $132,900.\textsuperscript{24} Some of the disparity is attributable to the fact that women have entered the profession relatively recently and tend to occupy junior positions. Even so, one U.S. survey found that women were paid less than men even for the same year of graduation and job category.\textsuperscript{25}

In the U.S., significantly fewer women enter large law firms than do men. A 1989 survey found that while twenty-two percent of minority men and thirty-four percent of non-minority men entered law firms with 50 or more lawyers, only fifteen percent of minority women and twenty-four percent of non-minority women entered law firms of comparable size. On the other hand, women were more successful than men in obtaining state judicial clerkships, and government positions. Women were more than twice as likely to take public interest positions.\textsuperscript{26}

Within law firms, women are disproportionately represented in certain areas of practice.\textsuperscript{27} Although comprehensive data on this question is not yet available in Canada, initial reports indicate that there is discrimination occurring in areas of practice. A 1984 survey of 461 University of Alberta law school graduates found that women were over-represented in some areas of practice and under-represented in others. After adjusting for the relative number of male and female respondents (382 men and 123 women), just over half as many women as men indicated civil litigation as their primary area of practice. The number of women indicating family law as their primary area of practice was eight times greater than the number of men. Women were three times as likely to indicate wills and trusts as their primary area of practice as men.\textsuperscript{28} A 1988 survey of 209

\textsuperscript{23} M.J. Mossman, \textit{supra}, note 17, pp. 586-87.
\textsuperscript{24} A.W. Thomer, “Gender and the Profession: The Search for Equal Access” (1990), 4 Georgetown J. Leg. Ethics 81, p. 95, n. 97.
\textsuperscript{25} Id., p. 95.
\textsuperscript{26} A.W. Thomer, \textit{supra}, note 24, p. 95.
\textsuperscript{27} The concentration of women in particular areas of practice is apparently a result of a combination of discrimination and personal preference. Of course, the preferences of women for particular areas of practice may in part be driven by the fact that more overt discrimination is occurring in other areas of practice.
women graduates of the Saskatchewan College of Law also indicated that women were found in disproportionate numbers in limited areas of practice. The study included only female graduates. The women were asked to indicate their areas of specialization, and the percentage breakdown of their answers was as follows: family law (23%); civil litigation (21%); real estate, wills and estates (15%), corporate/commercial (15%) and criminal (9%).

To judge by the Alberta figures, the Saskatchewan women graduates would appear to be over-represented in family law and under-represented in civil litigation. The percentage breakdown of areas of practice for the Alberta survey, for men and women together, was civil litigation (26%), real estate (13%), criminal (12%), commercial (10%), corporate (8%), and family (8%).

A 1991 survey of members of the Law Society of British Columbia found significant but smaller differences in the percentages of men and women specializing in particular areas of practice. The survey was relatively large: 697 women and 1117 men responded to the questionnaire. Respondents were asked to indicate the percentage of their time spent practising in particular areas of the law. The differences were as follows:

- Women spent more concentrated time in bankruptcy and realizations (a median of 10% as compared to 5% for men), corporate/commercial law (25% as compared to 20%), family and juvenile law (30% as compared to 20%), immigration and citizenship law (10% as compared to 5%), labour and workers' compensation (41% as compared to 15%), and municipal law (10% as compared to 5%). The men spent more concentrated time in environmental law (a median of 10% as compared to 5% for women) and securities (35% as compared to 28%).

The U.S. experience is similar: women are found in disproportionate numbers in trusts, estates and family law rather than litigation and corporate work. Even where women work in high profile areas such as


30. Supra, note 22, p. 370.


litigation, they are often subordinate to men in those fields, and are assigned to do background work such as research and drafting.\textsuperscript{33}

There is also evidence that women experience sexual harassment within the legal profession. According to the Law Society of B.C. survey, 33.7\% of female respondents and 10.2\% of male respondents "had observed or experienced female lawyers being subjected to unwanted sexual advances by other lawyers."\textsuperscript{34} An even greater number of respondents (68.2\% of women and 34.5\% of men) had observed or personally experienced female lawyers being subjected to "teasing, jokes or comments of a sexual nature by other lawyers."\textsuperscript{35} Six of the respondents in the Saskatchewan study identified sexual harassment as a problem.\textsuperscript{36}

c. Maternity, paternity and child-rearing

Women who have children also face discrimination. This discrimination takes a variety of forms. Female lawyers are much more likely than male lawyers to work part-time, or to work in less demanding areas of the legal profession, in order to accommodate child-rearing responsibilities. This was the conclusion reached by the Saskatchewan survey. The authors summarized the responses as follows:

Some (9) [women] insisted that only some areas of law or some situations within the profession are compatible with the mother role. Within the profession, employment in a small firm might be more conducive, where competition levels are lower. A general practice might be easier than a high-profile, intense litigation practice. . . . The most popular argument . . . was that private practice is the worst area to be in. The area of research and writing, or employment with government were suggested: "a female lawyer needs to be employed in the public sector with the benefits of maternity leave, sick leave, regular holidays and comparatively normal work hours."\textsuperscript{37}

The Alberta survey found that women were somewhat under-represented in private practice (45\% of men were in private practice vs. 39\% of women), and over-represented in government positions (20\% of women were in government positions vs. 8\% of men).\textsuperscript{38} The more recent B.C.

\textsuperscript{34}J. Brockman, \textit{supra}, note 31, p. 40.
\textsuperscript{35}Id., p. 40.
\textsuperscript{36}J. Savarese, M. Keet, K. Sutherland, \textit{supra}, note 29, p. 27.
survey produced similar results, although the differences were less dramatic. More men worked in private practice than women (69.7% of the men vs. 59.9% of the women), and more women worked in government positions, or as government lawyers (14% of the women vs. 8.8% of the men).39

The American experience indicates that female lawyers are more likely to make changes to their careers to accommodate children. One survey was carried out in 1981-86 of graduates of the University of Michigan Law School. Over 1,000 graduates responded to the survey. The survey found that many women, but few men, had made adjustments to the amount of time they spent at work:

Many women, but few men, have made such adjustments.... [A]t the time of the 1984 questionnaire, 28% of women with children were working part time or had ceased working outside the home. In 1986, when the classes we surveyed had been out of law school seven to ten years, nearly 70% of the women with children reported that, at some point since law school, they had, for three or more months, worked part time or stopped working outside the home altogether. A quarter of the women with children had taken much longer periods - at least 18 months - of either full-time parenting or part-time work. Very few men had ever taken leaves of absence or worked part time to care for children, although a few men said they were constrained by the roles expected of men from asking their employers for leaves that women were freely granted.40

The same survey also found that women chose not to work in private practice because they could achieve a better balance between work and family in other settings:

... five years after law school and again in 1984, 70% of men in these classes but only 44% of women worked in private practice. When, in one of our follow-up questionnaires, we asked the respondents whether they had any explanation for this difference in work settings, the most common explanation offered by women and the second most common offered by men was that women avoided private practice because they wanted settings where they could achieve an acceptable balance between work and their family or private lives. Many individual women described leaving a firm for family-related reasons. Many men reported with some remorse that men tolerate conditions that women refuse to accept. As one male expressed it, "Law firms consume 200% of one's time. There is no stability of hours and it is difficult to have a family life, or any other life." The perception that private practice interferes with family life is supported by our consistent finding that those who work in private practice - and especially those who work in large firms - are less satisfied with the


A further form of discrimination experienced by women is that women who have children may experience difficulties in combining work with childcare responsibilities. As M.J. Mossman has said, a woman lawyer can only succeed by becoming “a competent professional without significant family interests or responsibilities.”\footnote{M.J. Mossman, supra, note 18, p. 9.} This point is illustrated by the 1991 survey of members of the Law Society of B.C. The consequences experienced by male and female lawyers who had had children within the last five years were remarkably different. While 23.5% of women indicated they had experienced “loss of seniority”, only 0.6% of the men indicated they had experienced the same consequence of having children. Of women, 32.2% indicated they had experienced a “delay in promotion”; the figure for men was only 1.0%. Women experienced greater consequences than men in a number of other categories as well, including loss of office space (12.8% of women vs. 0% of men), unreasonable work load following parental leave (24.8% of women vs. 3.2% of men), loss of job (11.4% of women vs. 0% of men), and loss of income (62.4% of women vs. 10.7% of men).\footnote{J. Brockman, supra, note 31, p. 46} Interestingly, in a 1987 survey of Canadian lawyers, 87.5% of respondents answered “no” to the question, “Should a woman’s wish to have children be a factor in making her partner?”\footnote{“Gender Discrimination: A Tricky Question” (March 1988), Canadian Lawyer 8.}

Although some law firms and other employers are attempting to address the problems experienced by women who have children, the figures just cited would indicate that these attempts have not so far been very successful. In Canada, maternity leave policies tend not to be favourable to women. The Saskatchewan survey found that for those women whose employers did have maternity leave policies, the policy generally provided only for leave without pay:

The most common policy cited was a leave of up to one year without pay. Several were allowed a leave of 6 months, and others of up to 3 or 4 months. Although only two were offered at least a couple months pay, the occasional policy did include a guarantee of no loss of seniority.\footnote{J. Savarese, M. Keet and K. Sutherland, supra, note 29, p. 7.}
In the more recent B.C. survey, 55.4% of women reported that unpaid maternity leave was available. Paid maternity leave was reported to be available for partners by 12.9% of women, and for associates and employees by 15.5% of women. For both partners and associates, the median length of paid maternity leave was 16 weeks.47

The U.S. figures appear to indicate that American legal employers have policies more favourable to women. In the 1982 Stanford study, 94% of law firms reported at least some paid maternity leave was available, with between six weeks and three months of paid leave being the most common. Interestingly, in the Stanford study, the paid maternity leave policies of government, corporate and public interest employers were much less generous than those provided by law firms.48

Even women who work for employers with generous maternity leave benefits may still experience discrimination. Although firms may publicly proclaim their commitment to such arrangements, “many women who have availed themselves of such plans have quietly acknowledge that they are never again accepted as serious members of their firm.”49 Women who take advantage of maternity leave policies tend to be disadvantaged with respect to work assignments and promotions to partnership.50

While it is women who must bear children, there is no reason why women alone must raise them. Indeed, some employers do provide paternity leave benefits. In the B.C. survey, 14.4% of men reported that unpaid paternity leave was available from their employer. The figures were considerably lower for paid paternity leave: 2.5% of men reported that paid paternity leave was available for partners, and 2.4% of men reported that paid paternity leave was available for associates and employees.51 The American experience appears to be similar. In the Stanford study, paternity leave policies were found to be virtually non-existent:

Paternity policies generally do not exist or are not used. When paternity policies are used, leave is short and often unpaid. Only one-fifth (39/195) of law firms have either paternity policies or individual experience with paternity leave. Moreover, only 43% of law firm paternity leave policies provide paid leave (13/30). Furthermore, the existence of a paternity policy does not mean that the firm expects male lawyers to use it. Desire to make policies formally gender-neutral, rather than male employee demand, may explain some employers’ adoption of paternity policies.

48. Stanford Law Project, supra, note 42, pp. 1269-71. The fact that these figures are employer-reported may be significant.
49. C. Menkel-Meadow, supra, note 33, p. 197.
Only half (9/18) of law firm paternity policies had ever been used [only 18 law firms gave an answer to this survey question] and the paternity leaves taken generally ranged from only a few days to a few weeks. However, where paternity policies were used, they were used regularly.52

The child-rearing experiences of legal professionals indicate that women experience discrimination in this area as well. Male and female lawyers divide child-care responsibilities between themselves, their live-in partner if they have one, and paid child-care workers differently. In the B.C. study, on average women with children reported that they were responsible for 46% of child-care, the person they lived with or the non-resident parent for 25%, and a child-care worker for 26%. On average men with children reported that they were responsible for 24% of child-care, the person they lived with or the non-resident parent for 65% and a child-care worker for 10%.53 Another possible child-care strategy is child-care at work, but few legal employers provide such child-care. In the B.C. study, only 1.1% of women and 0.8% of men reported that their employers provided child care.54

(ii) Discrimination in court

Discrimination in court can take a variety of different forms. It can include harassment of lawyers, witnesses or court personnel, as well as the exclusion of people (particularly jurors) from the court process on discriminatory grounds. While there is a great deal of U.S. material on discrimination in court, there is at present little Canadian material. In the analysis that follows, I rely on the U.S. material. Although there are undoubtedly differences between the U.S. and Canadian experiences, it seems reasonable to assume that at least some of the problems identified in the U.S. also exist in Canada. While much more Canadian research is needed, what evidence there is tends to support the assumption that the Canadian experience is not dramatically different from that in the U.S.

The U.S. literature on discrimination in court is concerned largely with the issue of discrimination on the basis of gender. As of September 1990, more than thirty American states had task forces appointed by state chief justices to examine gender discrimination in their court systems.55 Thirteen of these have published reports: California, Colorado, Florida, Illinois,
Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Rhode Island and Washington State.\textsuperscript{56} In addition, there is a substantial amount of U.S. material on race discrimination. This is paralleled in Canada by a growing literature on discrimination against aboriginal people.

\textbf{a. The role of the judge}

On the basis of the collective conclusions of the U.S. state task force reports on gender discrimination, it is reasonable to conclude that judges frequently engage in discriminatory behaviour. A survey of the U.S. state task force reports on gender discrimination concluded that “male judges and lawyers treat female judges, judicial candidates, attorneys, parties and witnesses differently and worse than they treat males.”\textsuperscript{57} The evidence also indicates that judges seldom intervene to stop discriminatory behaviour by other actors in their courtrooms. The New York task force on gender discrimination found that only twelve percent of female lawyers surveyed and seven percent of men said that they had ever seen a judge intervene to correct gender discrimination. In Massachusetts only four percent of lawyer respondents had seen such intervention.\textsuperscript{58} Of judges who do intervene, the evidence indicates that the majority are female. For example, in Maryland, forty-four percent of female judges but only thirteen percent of male judges indicated they had ever intervened because they observed gender bias in their courtrooms.\textsuperscript{59}

There is some evidence of gender discrimination from the bench in Canada. According to one Canadian study, a number of women reported “negative” reactions from the bench:

Eight women noted negative reactions from the Bench. These occasionally involve an express statement from a judge that law, or litigation specifically, is not an appropriate career for a woman. More often, however, subtle discrimination was described such as body language signalling inattention or hostility, winking, or the use of references such as “dear, girls, sweetheart”. One respondent explained, “to win, I had to have a perfect case, not just a better one than[n] on the other side”.\textsuperscript{60}

There is also anecdotal evidence of sexual harassment by Canadian judges. During a 1989 trial, one Quebec judge remarked that, “Rules, like women, are made to be violated.”\textsuperscript{61} According to a news report, a N.W.T.

\textsuperscript{56} Id., pp. 55-6.
\textsuperscript{58} L.H. Schafran, supra, note 55, p. 66.
\textsuperscript{59} Id., p. 67.
\textsuperscript{60} J. Savarese, M. Keet and K. Sutherland, supra, note 29, p. 27.
\textsuperscript{61} M. Habib, Canadian Press, August 23, 1991.
judge commented that rapes were different in the north because the women is frequently drunk and passed out: "The man comes along, sees a pair of hips and helps himself."62 A Manitoba judge who had fined a man $300 for slapping his wife made the following comments:

How does a person admonish his wife if she goes out on the town with other people, to wit: guys, drinking, and comes home late when she should have been home looking after the children or cooking, or whatever else she is expected to do? . . . Sometimes a slap in the face is all she needs and might not be unreasonable force after all; but here, there was at least a slap in the face to which he [the accused] has pleaded guilty and is prepared to suffer the consequences.63

The U.S. material indicates that the failure of judges to intervene to stop gender discrimination is the result of at least two factors. First, gender discrimination is socially acceptable in many circles. Judges may consider comments on women’s appearance appropriate because women are considered to be displayed for men’s appraisal. One researcher who reviewed a number of studies of judicial attitudes concluded that gender-biased myths and stereotypes are embedded in the attitudes of many male judges.64 While judges may now consider racist remarks off-limits, sexist remarks are more likely to be considered acceptable.65 As the Nevada Supreme Court Gender Bias Task Force concluded, "[t]he types of discourtesies and disrespectful conduct mentioned in this report are insidious principally because of the failure among the offenders to realize their existence."66 The second reason judges fail to intervene to stop gender discrimination is that many judges are concerned that intervention may prejudice the outcome of the case. Judges worry that intervening without waiting for an objection from counsel will make matters worse for the lawyer or witness who is the subject of discrimination or harassment.67

b. Harassment of women lawyers

The harassment experienced by women lawyers in American courts from both judges and counsel is well-documented. In some cases the harassment

64. N. Wikler, "On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts" (1980), 64 Judicature 202.
67. Id., pp. 72-4. The general failure to intervene may also be the result of the paucity of women judges (see below).
is overt; more often it is insidious and subtle. Sexist remarks by judges are damaging because they affect the credibility of women lawyers. When a judge calls a lawyer "honey", he indicates that he sees her as something other than a skilled professional. Such comments may cause the client to lose confidence in the lawyer. In one case, the client was so concerned as a result of sexist remarks about his female lawyer by the judge that he asked to be represented by a male lawyer.68 Such comments also have a wider effect: they lessen the dignity and respect accorded every woman lawyer.69

The evidence is also that sexual trial tactics by lawyers are common in the U.S. Such tactics include using terms of endearment, making comments about looks and clothing, and any remarks that call attention to the lawyer as a woman instead of as a lawyer.70 Tactics directly attacking a female lawyer's credibility are also common. Opposing counsel may imply that the possible range of knowledge of a female lawyer is limited. According to a member of the Washington Public Defenders' Association, "I have seen attorneys attack the credibility of a witness or litigant on a sex basis because the area of testimony was beyond the stereotypical knowledge of a female — or that 'her emotions' have clouded her perception."71 Jill Wine-Banks, the former Watergate prosecutor, recounts how at one trial the opposing counsel sniffed the air over her shoulder while saying "nice perfume" to the jury. Whenever there was a bench conference, he would pull out her chair and take her elbow to help her up the stairs to the bench. Wine-Banks was able to put a stop to these tactics:

At the next bench conference, when my opponent put his hand on my elbow, I turned to him and said loudly enough for the judge to hear, "Get your hands off me and don't ever touch me again." The judge almost fell off his chair but the lawyer never touched me again.72

Such trial tactics have traditionally been considered to be an acceptable part of the trial lawyer's arsenal. However, advocacy on the basis of stereotypes and "imputed characteristics which, if not purely imaginary, are nonetheless inapplicable to many members of the group"73 is

69. Id.
73. J.D. Johnston, Jr. and C.L. Knapp, supra, note 65, p. 738.
increasingly understood to be prejudicial to the administration of justice, even within an adversarial context. This may be part of a larger trend towards the recognition of the adverse effects of gender stereotypes within the legal system.\textsuperscript{74} One American court used strong language to underline the unacceptability of harassment, including sexual harassment, in court:

\begin{quote}

[T]his kind of harassment is particularly intolerable. Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, 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 the profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.\textsuperscript{75}
\end{quote}

Moreover, not only are such tactics prejudicial to the administration of justice, they put women lawyers in an impossible position. If a woman lawyer draws attention to the discriminatory conduct by objecting, she may alienate the judge or jury, whether or not her objection succeeds. On the other hand, if she ignores the discriminatory conduct, she may be perceived as weak and the tactics may consequently succeed in undermining her credibility. In the result, her client's interests may suffer.\textsuperscript{76}

\section{c. Discrimination against witnesses}

The treatment of witnesses by the judicial system is central to the administration of justice. Discrimination against a witness will affect her or his credibility. It is not only humiliating to the witness but is likely to have an impact on the outcome of the case.\textsuperscript{77} One tactic is to attack the credibility of a female witness by making her appear to be promiscuous. In the New York trial of the man who hired thugs to slash the face of Marla Hanson because she had refused his advances, the defense attorney addressed the jury with these words: "I will tell you about a woman named Marla Hanson, who was after every man in this city who had a woman, who preyed on men and their relationships with women."\textsuperscript{78} The reports of the U.S. state task forces on gender discrimination confirm that gender

\textsuperscript{74} See for example Lavallee v. The Queen, [1990] 1 S.C.R. 852.
\textsuperscript{75} In re Vincenti, 554 A.2d 470 (N.J. 1989), p. 474.
\textsuperscript{76} K. Koustensis, supra, note 70, p. 157.
\textsuperscript{78} A. Smith, "How Many Times Does a Victim Have to Pay", Esquire, November 1987, p. 83.
stereotypes are used to undermine the credibility of female witnesses. The Minnesota task force asked this question of lawyers and judges: "[d]o defense attorneys appeal to gender stereotypes (for example, 'women say no when they mean yes'; 'provocative dress is an invitation') in order to discredit the victim in criminal sexual conduct cases[?]" Seventy-seven percent of female lawyers and seventy-two percent of male lawyers answered "sometimes," "often" or "always." The Maryland task force asked whether judges in rape cases "control the court so as to protect the complaining witness from improper questioning." Fifty-eight percent of judges who expressed an opinion answered "never."

Court personnel may also discriminate against female witnesses. The U.S. state gender discrimination reports found that in some cases court personnel ridicule battered women seeking protective orders. According to one witness, "[i]ntake officers, often the first court personnel to see the victim, are not taking this crime seriously unless the physical signs are too obvious to ignore."

d. **Discrimination against clients and accused**

Discrimination may also occur against clients and accused. The consequences of this form of discrimination can be severe, as the result can be an unjust conviction. There is evidence that such discrimination occurs against aboriginal people in Canada. The best-known example is that of Donald Marshall Jr., a Mi’kmaq who spent eleven years in prison for a murder he did not commit. The Royal Commission on the Donald Marshall Jr. Prosecution acknowledged in its Report that racism had played a part in Marshall’s wrongful conviction. The Report found a pattern of incompetence in the handling of Marshall’s case. It found that the lawyers and judges involved in the case had failed to discharge their professional obligations. The original prosecutor failed to disclose contradictory statements by witnesses, and Marshall’s lawyer failed to argue a complete defence. On appeal, both the Crown and the defence failed to recognize serious evidentiary errors made at trial. When Marshall’s conviction was finally overturned after a reference to the Nova Scotia Court of Appeal, the Court minimized any injustice, calling any miscarriage of justice "more apparent than real." The Court also stated that ‘Donald Marshall’s untruthfulness through this whole affair contributed in large

79. Data from L.H. Schafran, id.
80. Quoted in L.H. Schafran, id., p. 63, n. 43.
measure to his conviction. The Royal Commission Report implies that the pattern of incompetence and misconduct was in part the result of the fact that Marshall was Mi'kmaq.

As a result of the Report of the Royal Commission, an Inquiry Committee was established under the Judges Act to determine whether the judges of the Court of Appeal who heard the reference should be removed from office. The Committee determined that the judges should not be removed from office, but nonetheless severely criticized them for their handling of the case:

We would go so far as to suggest that the Court, in seeming to attribute to Marshall exclusive responsibility for the wrongful conviction, and thereby inferentially exculpating the other persons and factors demonstrated in the record to have played a key role in that conviction, so seriously mischaracterized the evidence before it as to commit legal error...

Although the Royal Commission report acknowledged the existence of discrimination against Donald Marshall Jr., the report has been criticized for being excessively timid. Others have argued that the Nova Scotia justice system is characterized by systemic racism against Mi'kmaqs. Like women, Mi'kmaqs are the victims of stereotypes and "imputed characteristics which, if not purely imaginary, are nonetheless inapplicable to many members of the group." Mi'kmaqs are seriously disadvantaged in court by these imputed characteristics; to be a Mi'kmaq means:

... being presumed to be inferior, unworthy, untrustworthy, savage, a liar and a thief. It means being a member of a sub-class which is, by implication, responsible for any official perfidy.

The Report of the Aboriginal Justice Inquiry of Manitoba, The Justice System and Aboriginal People, went further than the Nova Scotia Royal Commission in identifying systemic racism against aboriginal people. The Aboriginal Justice Inquiry concluded that the extraordinary over-representation of aboriginal people in Manitoba prisons was the

83. Id., p. 322.
87. See text accompanying note 73, supra. The Nova Scotia justice system certainly discriminates against blacks as well.
88. M.E. Turpel, supra, note 84, p. 43.
result both of the "long history of discrimination" against aboriginal people, and of continuing "overt racism":

... Aboriginal people constitute approximately 12% of the Manitoba population. Yet, Aboriginal people account for over one-half of the 1,600 people incarcerated on any given day of the year in Manitoba's correctional institutions.

This is a shocking fact. Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system. We believe that both answers are correct, but not in the simplistic terms that some people might interpret them. We do not believe, for instance, that there is anything about Aboriginal people or their culture that predisposes them to criminal behaviour. Instead, we believe that the causes of Aboriginal criminal behaviour are rooted in a long history of discrimination and social inequality that has impoverished Aboriginal people and consigned them to the margins of Manitoban society.

Since racism exists throughout Manitoban and Canadian Society, we have found that overt racism also exists in the administration of Manitoba's justice system.90

e. Jury selection

Discrimination may also occur in the selection of the jury for a civil or criminal trial. Such discrimination may take the form of mandatory or permissive exemption by law, or of the selection of jury members on discriminatory criteria. Women constitute one group which has been excluded from jury duty by law.91 Their exclusion has generally been supported by discriminatory stereotypes. A modest catalog of such stereotypes is found in a New York case which found that the New York statute granting women a permissive exemption from jury duty was constitutional:

Granted that some women pursue business careers, the great majority constitute the heart of the home, where they are busy engaged in the 24-hour day task [sic] of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demands their full energies. Although some women now question this arrangement, the state legislature has permitted the exemption in order not to risk disruption of this basic family unit. Its action was far from arbitrary.92

90. Id., p. 85.
Discrimination in the selection of jurors by litigants has received little attention in Canada. In civil and criminal trials, lawyers may exercise peremptory challenges without cause to exclude potential members of the jury. In criminal trials, the process of jury selection is governed by ss. 629-641 of the Criminal Code.\(^9\) Parties in criminal proceedings are entitled to any number of challenges for cause.\(^9\) Depending on the seriousness of the offence charged, the accused is entitled under s. 633 to challenge four, twelve or twenty jurors peremptorily. While the prosecutor is only entitled to challenge four jurors peremptorily, her power under s. 634 to direct up to forty-eight jurors to "stand aside" effectively increases the number of peremptory challenges to which she is entitled to fifty-two.\(^9\) Peremptory challenges may also be permitted in civil trials.\(^9\)

The use of peremptory challenges to affect the racial composition of the jury is common in the United States, whether or not race is a substantive issue in the case.\(^9\) Commentators "... have traditionally claimed that Blacks, Jews and Irish side with civil plaintiffs and criminal defendants while Germans, Scandinavians and English favor prosecutors and civil defendants."\(^9\) Lawyers also consider racial factors in deciding where to file their case, considering for example whether the case should be filed in a predominantly white or black neighbourhood.\(^9\)

Jury selection by counsel may also occur on the basis of gender. In one New York case the prosecutor used his peremptory challenges to strike three black women from the jury. The prosecutor assured the judge that the women were struck on the basis of sex and not race: "The challenge[s] ... are challenges based upon gender and not challenges based upon race. What I mean by that is it is my position that men tend to be less sympathetic than women..."\(^10\) The New York Supreme Court held that the standards for systematic exclusion based on race should apply equally to exclusion based on gender, because of the abhorrent nature of gender discrimination. Referring to the New York report on gender discrimination in the courts, the Supreme Court stated that it was:

94. Id., s. 638.
95. Id., s. 634 ("stand by"). Section 634 of the Criminal Code was struck down by the Supreme Court of Canada in R. v. Bain, [1992] 1 S.C.R. 91.
96. See for example Nova Scotia Civil Procedure Rule 34.07.
97. T. Kaine, "Race, Trial Strategy and Legal Ethics" (1990), 24 U. Richmond L. Rev. 361.
98. Id., pp. 363-4.
... acutely aware that women, as a group, are often not treated in the same way as men by our Courts, both as attorneys and litigants and participants within the legal system. This Court considers discrimination based on gender, as well as discrimination based on race, "... the basest kind of misbehaviour." 101

Another jury selection practice which amounts to gender discrimination is asking prospective female jurors about their marital status and what their husbands do without asking similar questions of male jurors. 102 In one Canadian case, the Crown used its stand-asides for the admitted purpose of excluding male jurors and selecting an entirely female jury. 103

Discrimination in the selection of juries by lawyers is undesirable not only because it depends on stereotypes which rest on dubious factual grounds, but also because such stereotypes have an adverse effect on public confidence in the administration of justice. This point was recognized by the United States Supreme Court in Batson v. Kentucky. 104

In that case, the prosecutor had used the peremptory challenges which were available to him to eliminate all four prospective black jurors (the accused was black). In holding that peremptory challenges cannot be exercised on the basis of racial assumptions, the court focused on the possible prejudicial effect on the administration of justice:

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. 105

The Aboriginal Justice Inquiry of Manitoba concluded that there was overwhelming evidence of discrimination against aboriginal people in the selection of Manitoba juries. Before 1983, aboriginal people were excluded from lists of potential jurors in the province:

101. Id., p. 866.
102. L.H. Schafran, supra, note 55, p. 62.
103. The accused’s appeal was allowed by the Ontario Court of Appeal, on the ground that the manner in which Crown counsel exercised the stand-asides gave the appearance that the prosecution had obtained a favourable jury: R. v. Pizzacalla (unreported, Ont. C.A., November 12, 1991). Some recent U.S. cases have found that the equal protection clause of the 14th Amendment prohibits gender discrimination in the use of peremptory challenges. See J.W. Morehead, "Exploring the Frontiers of Batson v. Kentucky: Should the Safeguards of Equal Protection Extend to Gender" (1990), 14 Am. J. Trial Advocacy 289.
From its inception, the legal system in Manitoba has systematically excluded Aboriginal people from juries. This discrimination has taken many forms. Jurors have traditionally been drawn from lists of voters. Since Indians or persons of Indian blood were denied the vote in Manitoba from 1886 until 1952, they were effectively excluded from sitting on juries because reserve officials, unlike the mayors and reeves of municipalities, were not required to submit the names of potential jurors to the chief County Court judge. This policy was changed in 1971 and reserves were obliged to submit names drawn from their electoral lists. As was the case with lists from non-Aboriginal communities, these lists suffered from a lack of attention and were not regularly updated. It was not until 1983, when the province began using the computerized records of the Manitoba Health Services Commission, that Aboriginal people began to be properly represented on the lists of potential jurors. For a century the legal system made it clear that it did not want or need Aboriginal jurors. It is a message Aboriginal people have not forgotten.106

While aboriginal people are now properly represented in lists of potential jurors, discrimination against aboriginal jurors continues in Manitoba. The Inquiry found that such discrimination takes a number of forms. On the one hand, the manner in which jurors are summoned tends to discourage aboriginal participation in the jury system: aboriginal people are less likely to have adequate mail service to receive their summons, are less likely to have full phone service, and may be excused from jury duty on the grounds that the trial will be conducted in a language they cannot understand. Because it is the practice of sheriffs to send out more summons than the number of prospective jurors that are actually required, the sheriff will stop pressing jurors to attend once the number set for the panel has been reached. The latecomers are often aboriginal.107 Moreover, peremptory challenges and stand asides are frequently used to exclude aboriginal people.108 The Report gives a startling but apparently representative example of such discrimination:

On one day of the Thompson assizes in January 1989, 35 of 41 Aboriginal people who were called to serve on three juries were rejected. In one case, the Crown rejected 16 Aboriginal jurors; in another, the defence rejected two and the Crown rejected 10; in the third and final case, the defence accepted all the proposed Aboriginal jurors, while the Crown rejected nine. Two jurors were rejected twice.109

106. Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, supra, note 89, pp. 378-79.
107. Id., pp. 382-83.
108. The Inquiry concluded that, “it is common practice for some Crown attorneys and defence counsel to exclude aboriginal jurors through the use of stand-asides and peremptory challenges.” Id., p. 384.
3. The exclusion of different voices

It is my contention that discrimination can not only take the form of limits on access and of harassment, but that it can also take the form of the exclusion and devaluation of the perspectives of groups such as women, aboriginal people, persons of colour, homosexuals, the disabled and other historically excluded groups. I would argue that the exclusion of perspectives, or “voices”, from the legal profession and the legal system is insidious and pervasive. This argument is not novel: the argument that certain voices have been excluded has been made eloquently by women,\textsuperscript{110} aboriginal people,\textsuperscript{111} and persons of colour.\textsuperscript{112} The exclusion of such voices is harmful to every member of the legal profession. Not only does devaluing the perspectives and experiences of excluded groups make the legal profession a less hospitable environment for members of those groups, it impoverishes legal culture generally. The failure of traditional legal approaches in the face of a wide spectrum of difficult issues, from childcare to recidivism to the quality of life of practitioners is evident. The legal profession will be much better able to address these issues if it can call upon the widest possible range of perspectives and experiences.

This is not to say that there is a single “women’s perspective”, or a single “aboriginal voice”. There is not. As Angela Harris has eloquently pointed out, if anyone has a single identity, it is because he or she wills it, not because of a particular cultural or biological origin. The self contains many perspectives and many voices:

\ldots we are not born with a “self,” but rather are comprised of a welter of partial, sometimes contradictory, or even antithetical “selves.” A unified


identity, if such can ever exist, is a product of will, not a common destiny or a natural birthright. Thus, consciousness is "never fixed, never attained once and for all"; it is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.\textsuperscript{113}

Or as Joan Williams put it, "[s]ometimes I feel like a white, sometimes a heterosexual, sometimes a Jew, sometimes a lawyer, sometimes an Episcopalian. Often I feel simply like my mother's daughter."\textsuperscript{114} This is not to say that there is nothing but difference. If the self is a "territorial or chronological site for cultural interaction",\textsuperscript{115} traditional legal culture is much narrower than the range of cultural interaction that women, aboriginal people, minorities, and others can potentially bring to the legal system.

(i) \textit{Excluded voices and perspectives}

In the discussion that follows, the exclusion of the voices of women and aboriginal people is emphasized. This is not to say that the voices of other groups have not been excluded. Menkel-Meadow has speculated about some other voices that have also been excluded and about the contributions which such voices might make. For example, the economically disadvantaged might have stories to tell about law in small claims courts and about disputes with employers and merchants. The handicapped and elderly might bring an ethic of helping and interdependence to our legal system. Homosexuals might bring a welcome challenge to neat legal categories of human relationships.\textsuperscript{116}

Aboriginal people have many voices and many perspectives. As Mary Ellen Turpel points out, the differences between Aboriginal and European cultures are in turn dependent on the varied artifacts, stories and customs of particular aboriginal peoples.\textsuperscript{117} Turpel is willing to make some generalizations: the individual ownership of property is antithetical to the widely-accepted stewardship responsibilities of aboriginal peoples for Mother Earth, aboriginal cultures are oral, and social life is based on responsibilities to creation and the Creator. At least some First Nations pattern their social life on the Four Directions, or responsibilities: trust, kindness, sharing and strength.\textsuperscript{118} The Manitoba Aboriginal Justice

\begin{footnotes}
\item[113] A.P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990), 42 Stanford L. Rev. 581, p. 584.
\item[115] D. Kennedy, "Comments on Jamie Boyle's Postmodern Subject in Legal Theory" (1991), 62 U. Colo. L. Rev. 597, p. 597.
\item[117] M.E. Turpel, "Interpretive Monopolies", \textit{supra}, note 111, p. 29.
\item[118] \textit{Ib}.
\end{footnotes}
Inquiry also recognized the diversity of aboriginal cultures, but identified four major ethics or rules of behaviour which form the basis for daily interaction in aboriginal communities: the ethic of non-interference, the rule of non-competitiveness, emotional restraint and sharing.\(^{119}\)

The argument has been made that women collectively speak with a different voice.\(^{120}\) Others have argued that women speak with many different voices, and that any uniformity is often an illusion imposed by white feminists:

If we [white feminists] now attempt to maintain the appearance of uniformity and universality for strategic reasons at the expense of ignoring our own hegemonic position and the challenges of, among others, women of color, we risk irreparable fragmentation. While we should work toward building solidarity, we cannot pretend union when it does not exist... Pluralism, however, will not be sufficient... It is also important that our diverse voices be understood to affect one another, to intersect and interact.\(^{121}\)

Much of the argument about a different voice for women begins with Carol Gilligan’s book, *In a Different Voice*.\(^ {122}\) Gilligan suggests that men and women respond differently to ethical problems. Gilligan found that boys dealt with a hypothetical ethical dilemma according to a “logic of justice”, while girls dealt with the same dilemma according to an “ethic of care”. “Jake” reasoned abstractly and considered individuals to be separated; “Amy” reasoned in terms of relationships.\(^{123}\) Jake has the reasoning skill traditionally associated with being a lawyer; Amy does not. Women’s reasoning is devalued because in a world defined by gender inequality, the male standard is the standard.\(^{124}\)

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119. Aboriginal Justice Inquiry of Manitoba, *supra*, note 89, pp. 29-33. The four ethics or rules of behaviour were identified by the Mohawk psychiatrist Dr. Clare Brant. *Id.*
120. See for example C. Menkel-Meadow, *supra*, note 16.
123. *Id.*, pp. 24-63. Gilligan’s idea that women have an “ethic of care” goes back at least to Shakespeare. In *The Merchant of Venice*, Portia, disguised as a man, pleads eloquently for mercy where the others ask only for justice. See C. Menkel-Meadow, “Portia in a Different Voice: Speculations on a Women’s Lawyering Process” (1985), 1 Berkeley Women’s L.J. 39, p. 42, n. 23.
124. Catharine MacKinnon makes the same point about the maleness of the state:

If objectivity is the epistemological stance of which women’s sexual objectification is the social process, its imposition the paradigm of power in the male form, then the state appears most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity. When it is most ruthlessly neutral, it is most male; when it is most sex blind, it is most blind to the sex of the standard being applied. When it most closely conforms to precedent, to “facts,” to legislative intent, it most closely enforces socially male norms and most thoroughly precludes questioning their content as having a point of view at all.

*Supra*, note 110, p. 248.
Although Gilligan herself is careful to point out that the identities of Amy and Jake are not tied exclusively to their genders, some feminist legal scholars argue that female lawyers speak with Amy's voice and have her perspective. However, the experiences of Gilligan's "Amy" can be challenged for not reflecting the differences in culture, class, ethnicity, sexual orientation and so on that characterize women in real life. Gilligan's work has also been attacked on scientific grounds: one analysis of sixty separate empirical studies of moral reasoning concluded that there is in fact no significant difference between the moral reasoning of men and women. The lack of strong empirical support for Gilligan's theory need not impair Amy's usefulness as one example of an excluded voice. But there are other women's voices which must also be recognized: "... we need to acknowledge the importance of 'the woman's ... point of view' without homogenizing or essentializing its content."

(ii) The exclusion of the perspectives of women and aboriginal people

It is possible to document some of the ways in which the perspectives of women and of aboriginal people have been excluded from the legal system. There is a considerable literature on the exclusion of women's voices, and significant evidence from decided Canadian cases of the exclusion of aboriginal perspectives.

a. The perspectives of women

The experiences of women have traditionally been devalued and excluded in at least three areas of the legal system. First, some judges have difficulty overcoming stereotypes about women to understand what women are saying. One striking example comes from the Maryland state report on gender bias in the courts. A woman was seeking protection from continuing domestic violence at the hands of her husband. At the hearing before the judge she had testified that her husband had threatened to kill her with a gun. The woman paraphrased the judge's response to her application for protection as follows:

I don't believe anything you're saying... The reason I don't believe it is because I don't believe that anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I

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125. For example, M.J. Mossman, supra, note 18, pp. 13-14.
127. Id.
128. Id., p. 46.
129. K. Czapanskiy, supra, note 57, p. 3.
would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can’t believe that it happened to you.  

The difficulty male judges have in understanding women’s experiences is discussed below in connection with the importance of appointing more women judges.  

The voices of women are also excluded and devalued in the practice of law. The argument has been made that the different experiences of women not only give some women qualities which are stereotypically associated with being female, such as caring and peacemaking, but also other important qualities such as concern for the indigent and underrepresented, or an awareness of the importance of social protest. Some writers have argued that the special experiences of women have the potential to challenge central tenets of our legal system, including the adversary system. These writers argue that women’s experiences are conducive to such values as consensus, mediation, contextualization, and negotiation.  

Some women may initially adapt to “male” modes of practice, but later realize that they are uncomfortable with them, or that these modes of practice are not necessarily the most effective. Menkel-Meadow recounts how the environment in which she had worked as a trial lawyer for legal services was a “macho trial” culture. Although she initially felt uncomfortable with this culture, by the time she left legal services she had managed to fit in:  

I felt excluded by this culture in several ways. First, it was predominantly male. Second, I found it difficult to be aggressive and confrontational when I frequently saw some of the other side’s problems, such as lack of funding. Third, I knew that “paper victories” did not solve the underlying problem. . . . By apprenticing myself to some hard-hitting lawyers who taught me the tricks of the trade, I am able to report that when I left legal services I was regarded by many as a “tough cookie”.  

Menkel-Meadow later realized that the dominant culture of trial practice was not necessarily the most effective: “the conventions of the club I was trying to enter were remarkably narrow, short sighted, and could in fact be demonstrated to be economically and mathematically inefficient.” Menkel-Meadow argues that previously excluded voices such as women’s voices can provide new ideas to counteract the “stagnation and bankruptcy of the status quo.”

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130. Id., p. 4.
131. See text at note 183, infra, and following.
133. Id., p. 32.
134. C. Menkel-Meadow, supra, note 16, p. 33.
135. Id., p. 34.
A similar argument is made by Naomi Cahn. She argues that the adversarial system and the ethical standards associated with it are gendered and have a male bias. Cahn suggests that the increasing numbers of women lawyers of different races, classes and sexual orientations may inspire alternative visions of the practice of law and of legal ethics. Cahn argues that feminist models of practice see the lawyer, the client and the larger social background as linked together in a single context. Feminist legal practice emphasizes more than the legal problem: it considers how a legal resolution will affect the client’s other relationships. For example, in a child abuse situation where the mother is seeking custody, Cahn suggests that a feminist lawyer would discuss with the client the effect her actions will have on the lawyer, on herself and on her children. Such a contextual approach respects the integrity of both the lawyer and the client.

The third area in which women’s perspectives have been excluded is in the development of substantive law. The potentially positive benefits of women’s experiences on the development of the law has been demonstrated by the work of the Women’s Legal Education and Action Fund (LEAF). Perhaps the most remarkable example of the benefits of including women’s voices in the process of developing the law is the case of Andrews v. Law Society of British Columbia, an important Charter equality rights case. LEAF was an intervenor in the appeal before the Supreme Court of Canada. LEAF argued that the protection of the equality rights in s. 15 should only be extended to disadvantaged groups, in order to prevent powerful groups from using s. 15 to strike down legislation intended to protect the disadvantaged. LEAF argued that disadvantage should be measured in terms of “dignity, respect, access to resources, physical security, credibility, membership in community, or power.” A similar argument was advanced by the Coalition of Provincial Organizations for the Handicapped. The LEAF position was different from those of both the applicant and the respondent. In the result, McIntyre J. (writing for the majority on this point) substantially adopted

137. Id., pp. 30, 34-5.
140. Id., p. 150.
142. Id.
the LEAF position. McIntyre J. held that s. 15 rights will generally only
be available to disadvantaged groups; equality rights are available only
in those cases where distinctions involve "prejudice or disadvantage."143
A good case can be made that the intervention of LEAF at the earliest
stages of the judicial interpretation of s. 15 of the Charter played a
significant part in defining constitutional equality rights in Canada.

b. Aboriginal perspectives
The record of the Canadian judiciary in recognizing the significance of
aboriginal culture is mixed but is arguably improving. Growing public
awareness of aboriginal issues, the entrenchment of aboriginal rights in
s. 35 of the Constitution Act, 1982, and increasing numbers of aboriginal
lawyers and judges have all contributed to making the judiciary more
sensitive to aboriginal perspectives. Nonetheless, there remain judges
unwilling or unable to recognize the existence or significance of aboriginal
voices.

Recent examples of willingness on the part of the judiciary to recognize
aboriginal perspectives include the judgment of the Supreme Court of
Canada in R. v. Sparrow.144 Writing for the Court, Dickson C.J. (as he then
was) and La Forest J. expressly recognized the importance of aboriginal
perspectives in defining the content of aboriginal rights entrenched by s.
35(1) of the Constitution Act, 1982. In their words, "it is possible, and,
indeed, crucial, to be sensitive to the aboriginal perspective itself on the
meaning of the rights at stake."145

Associate Chief Judge Murray Sinclair, of the Provincial Court of
Manitoba, recently delivered a speech in which he emphasized the
importance of avoiding cultural or ethnic bias against aboriginal accused.146
Judge Sinclair linked cultural bias to gender bias, but noted that very little
has been written on cultural bias:

It is rather surprising to note that there has been little attention given to the
role of cultural or ethnic bias in the justice system. . . . Gender bias we are
told is bias which arises from our upbringing and develops subliminally -
almost unconsciously. The predominance of men among the judiciary has
fostered continued gender bias we are told and unless we make an effort
to recognize it gender bias can go undetected . . . The same is true for
cultural or ethnic bias as well. We must begin to question whether we are

145. Id., p. 1112.
146. Associate Chief Judge Murray Sinclair, "Dealing with the Aboriginal Offender: Indians
and the Criminal Law" (1990), 14 Prov. Judges J. No. 2, 14. The speech was delivered to new
Provincial Court Judges at Val Morin, Québec, on April 5, 1990.
able to deliver ourselves to the judicial process free from influences which are culturally in conflict with the aboriginal accused with whom we deal. Very little has been written in this area, but what little exists, suggests that we judges need to do more work.147

R. v. Naqitarvik148 was a Crown appeal from a sentence of 90 days imprisonment to be served intermittently and two years’ probation imposed on an Inuit man found guilty of sexual assault. Belzil J.A., dissenting, would have upheld the sentence. Belzil J.A. noted that the trial judge had given “weight to the concerns of the community expressed to him by its elders . . . and he took into account the unquestioned effectiveness of its traditional treatment of offenders.”149 Belzil J.A. discussed the importance of traditional Inuit methods of handling offenders:

... the primary concern of the community had been and still is to maintain its harmony and cohesiveness, a concern undoubtedly traditionally considered crucial to the very survival of a small group in a harsh and isolated environment and now considered crucial to the survival of its cultural identity in the face of intrusion by a civilization foreign to it. Imprisonment, even banishment, were historically unknown as forms of punishment. Imprisonment is viewed not only as destructive of the accused himself but as containing the seed of disharmony and division and hence destructive of the community itself. The traditional method of handling an offender is forced confrontation by the elders even to the point of denying him food or other amenities until a willingness to change for the better is manifested, and this is followed by relentless counselling until the offender is considered rehabilitated. The treatment is shown by the evidence to have achieved what must be the ultimate purpose of all punishment for crime, that is to say, protection of the community and rehabilitation of the offender. It has had the added benefit of effecting reconciliation between victim and offender, a concept only now being advanced in our society by some criminologists.150

Under the circumstances, Belzil J.A. held that the sentence imposed by the trial judge was appropriate:

The trial judge properly took into account the special circumstances disclosed in evidence of a small isolated group striving to preserve its cultural heritage by maintaining its cultural unity, not for the purpose of blocking the imposition of criminal law but by gradually introducing it by bridging the gap between traditional law and the new law.151

149. Id., p. 199.
150. Id., pp. 199-200.
151. Id., p. 206.
In spite of encouraging signs that judges are willing to recognize the cultural difference of aboriginal people, there remain many instances where judges have ignored or devalued the fact of cultural difference. A notable recent example is the judgment of McEachern C.J.S.C. (as he then was) in *Delgamuukw v. British Columbia*. In giving his reasons for rejecting the claims of the Gitksan and Wet’suwet’en peoples, McEachern C.J.S.C. failed to recognize Gitksan and Wet’suwet’en culture as a culture different from his own. The Chief Justice chose instead to characterize the aboriginal culture as an instance of an earlier stage of his own Western culture:

>... it would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs’ ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were common, and there is no doubt, to quote Hobbs [sic], that aboriginal life in the territory was, at best, “nasty, brutish and short.”

The words of McEachern C.J.S.C. are a remarkable echo of the words of an earlier B.C. Chief Justice, Davey C.J.B.C., in *Calder v. British Columbia (A.G.*)*. In that case, Davey C.J.B.C. characterized the aboriginal Nishga people at the time of settlement as “a very primitive people with few of the institutions of civilized society.”

Another instance of judicial inability to appreciate the cultural difference of aboriginal society is found in the judgments of Forsyth J. and of Kierans J.A. in *Ominayak v. Norcen Energy Resources Ltd.*, refusing an application for an interim injunction by the Lubicon Lake Cree to halt oil and gas exploration. One commentary on the judgments emphasized the unwillingness of the judicial system to come to terms with aboriginal culture:

> I believe the courts failed to understand the nature of hunting and trapping societies and lacked the will to accept the evidence put forth by the Cree. For the judges, and the defendant lawyers, it was the first time they had had direct contact with native people. The language barriers were considerable since not only was English used entirely but it was used in a legalistic way. The Cree elders spoke no English and it fell to the chief to interpret not only what was said but what it meant. The differential views of justice, of truth, of morality were painfully clear in this cross-cultural situation.

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153. Id., p. 208.
155. Id., p. 66.
III. *Towards a response*

If discrimination is endemic in the legal profession, what measures can be taken to reduce discrimination? A successful strategy will operate on a number of fronts simultaneously. Education of judges and lawyers, in continuing education programs and in law school, will be an important aspect of such a strategy. Equally important will be an effort by the legal profession to increase the participation of historically excluded groups in all aspects of the legal system, and to recognize the existence and value of the experiences and perspectives of such groups. As I will argue, a strategy to reduce discrimination in the legal profession should also include the recognition of a duty of non-discrimination for legal professionals.

1. *Education*

Educational initiatives will be crucial to reducing discrimination. To be effective, educational programs should begin in law schools and be an integral part of bar admission and continuing education curricula. Such programs should teach law students, lawyers and judges about discrimination and sensitize them to different perspectives. Over the long term, education will reduce the need for other initiatives, such as affirmative measures to increase diversity within the legal profession, or disciplinary action against legal professionals who discriminate.

Integral to educational programs will be a commitment to opening the legal profession to people with different perspectives, because neither the effects of discrimination, nor the benefits that come from diversity, can be appreciated and understood without the active participation of those who have previously been excluded. Difference is something which must be experienced to be understood: as one writer phrases it, difference is the "irreconcilable or irreducible elements of human relationships".  

Education will help lawyers and judges to recognize difference. Understanding cultural difference is necessarily dialogic. Judge Sinclair suggests one example of such a dialogue, in the context of the treatment of aboriginal people by the criminal justice system. Judge Sinclair argues that aboriginal communities must be included as actors in the criminal justice system. There should be aboriginal sentencing advisory panels, and court sittings in aboriginal communities. There should be a devolution of some of the functions currently performed by the courts on aboriginal

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There will doubtless be other circumstances where such a partnership between the legal profession and a cultural community will be appropriate.

Law schools should make discrimination, and analysis of the disadvantages facing women, aboriginal persons and minorities a central issue in their curricula. Alternate voices belonging to traditionally excluded groups must be allowed to take their place in shaping a diverse and pluralistic legal culture. Innovative teaching methods, including the use of simulations to explore the issues, are called for. The Special Advisory Committee to the Canadian Association of Law Teachers suggested that the elimination of discrimination should be seen as:

...a long term project that is central to the legitimacy of the very enterprise of legal education. It is about the social relevance of law. And it is about the moral and professional legitimacy of lawyers and the legal profession in society.

Dalhousie Law School recently implemented a program for indigenous and black students: the "Indigenous Blacks and Micmacs" program. In this respect, Dalhousie Law School joins other Canadian law schools with similar programs, including the University of British Columbia Faculty of Law and the College of Law at the University of Saskatchewan.

Law firms should also have programs to educate lawyers and support staff about discrimination. Issues of sexual harassment should figure prominently in such programs. Firms should develop specific policies on sexual harassment clearly stating that sexual misconduct is not permissible. Law firms should also consider cross-cultural education programs to develop a critical awareness of cultural difference. Similar initiatives should be considered in continuing legal education programs.

Judicial education programs are of equal importance. The Canadian judiciary has been active in establishing educational programs to eliminate discrimination by judges, although these programs have tended to emphasize gender discrimination. In 1989, the Canadian Judicial Council

163. Special Advisory Committee to the Canadian Association of Law Teachers, *supra*, note 12, p. 7.
165. J. Meier, "Sexual Harassment in Law Firms: Should Attorneys be Disciplined under the Lawyer Codes" (1990), 4 Georgetown J. Leg. Ethics 169, p. 188.
held seminars for judges on “Judicial Discretion: Eliminating Gender Myths in the Courtroom” in Nova Scotia and Alberta. The background paper to the Alberta seminar described the seminar’s objectives as follows:

We have decided to put on the agenda a variety of gender based myths which affect the way women are treated under our legal system. Each of these myths relates to a discreet area of the law and would deserve fuller analysis than is possible in a short seminar session. However, we have chosen to explore a wider range of issues in the hope that we can draw on the varied experience of the participants who are confronted with sexual stereotypes in many different ways.166

Gender issues were also included in the 1990 summer seminars for judges organized by the Canadian Judicial Council; there are plans to present the same program in more locations across the country and to make the materials available to all Canadian judges.167

The Judicial Independence Committee of the Canadian Judicial Council has produced a book, Commentaries on Judicial Conduct,168 which examines ethical issues faced by judges, including the issue of “gender neutrality”. In the foreword to the book, Chief Justice Lamer, the Chairman [sic] of the Canadian Judicial Council, describes the purpose of the book as being to, “help judges to think about how their actions and reactions might be perceived by their fellow judges, by the parties before them in court, and by the public generally.”169 The Judicial Independence Committee recognizes that discrimination against women still occurs within court systems: “Judicial attitudes and values derived from the past, which denigrate the role of women in society are still present in the court systems and in the law which they administer.”170 Unfortunately, the discussion of discrimination on the basis of gender is largely confined to the appropriateness of addressing counsel and witnesses in gender-neutral language.171

166. Canadian Judicial Council, Judicial Discretion: Eliminating Gender Myths in the Courts (1989 Superior Court Judges Seminar, Calgary, Alberta), [preface].
169. Id., p. VIII. Lamer C.J.C. is identified as the “Chairman” of the Judicial Council: id., p. IX.
170. Id., p. 90.
171. Id., pp. 88-91.
Apart from the work of the Canadian Judicial Council, there have been several other recent judicial education initiatives in the area of gender equality. The Western Judicial Education Centre has sponsored seminars on gender bias and on aboriginal issues.\footnote{172}{M.G. Brown, \textit{Gender Equality in the Courts: Criminal Law} (Ottawa: National Association of Women and the Law, 1991), p. 1-19.} In May 1990, Federal/Provincial/Territorial working groups were established on gender equality issues. A working symposium on gender equality and the Canadian justice system was sponsored by the Federal Department of Justice in June of 1991.\footnote{173}{Id., p. (ii)-(iii).}

In the United States, there is a national program to educate the judiciary about discrimination on the basis of gender. The National Judicial Education Program (NJEP) not only teaches judges to be aware of their own behaviour, but teaches them strategies for ensuring that no person in their courtrooms discriminates on the basis of gender.\footnote{174}{The program does not deal with issues of discrimination on grounds other than gender. N.J. Wikler, \textit{supra}, note 64, p. 208.} The goal of the course is "to make judges aware of what kind of conduct expresses bias, what the consequences of this conduct are, and how intervention can be accomplished without prejudicing the case."\footnote{175}{L.H. Schafran, \textit{supra}, note 55, p. 76.} The course has been well-received by judges; a common evaluation received from judges is that "your presentation made us focus on a problem that most of us assumed to be nonexistent."\footnote{176}{L.H. Schafran, director of NJEP, quoted in J.A. Levine, \textit{supra}, note 68.} Other American judicial education programs have made innovative use of role-playing exercises and videotapes.\footnote{177}{L.H. Schafran, \textit{supra}, note 55, pp. 75-76.}

Although educational programs for judges focusing on gender discrimination are important, educational programs for judges should be expanded in scope, to cover discrimination on grounds other than gender. Such programs might cover discrimination on grounds of race, economic class, handicap, and sexual orientation. Equally important, educational programs should sensitize judges to cultural difference. Judge Sinclair suggests that judges should sensitize themselves to aboriginal cultures:

\begin{quote}
\ldots let us establish and maintain ongoing cross-cultural awareness that benefit[s] both our judges and the aboriginal communities where our judges have influence. This means going to the land of the aboriginal people, seeing how their communities function and how we influence what goes on. In addition, we should attend where possible, tribal gatherings and functions.\footnote{178}{Sinclair, A.C.J.M., "Presentation" (May 14, 1990), on file with the author.}
\end{quote}
The importance of cross-cultural educational programs was emphasized by the Manitoba Aboriginal Justice Inquiry. The Inquiry found that some of the discrimination experienced by aboriginal people in Manitoba resulted from "widespread misconceptions about Aboriginal people and about their perception of the law and the legal system." The Report of the Inquiry recommended cross-cultural training for all in the justice system who come into contact with aboriginal people:

We recommend that: Federal, provincial and municipal governments, individually or in concert, with the assistance and involvement of Aboriginal people, establish formal cross-cultural educational programs for all those working in any part of the justice system who have even occasional contact with Aboriginal people.

2. A commitment to diversity in the legal community

A commitment to ending discrimination must also include a commitment to recognize and to value perspectives which have previously been excluded. Such a commitment should extend to the perspectives of traditionally excluded groups. The legal profession should celebrate difference and diversity:

... our common exclusions may enable us to see that there is a vision of equality that does not require sameness, that there is a glory in diversity and difference, and that there are ways for the law to include, accommodate, and rejoice in the social and cultural differences that both enrich our society as well as threaten to divide it.

Different perspectives will come into the legal profession as more lawyers and judges come from previously excluded groups. The presence of previously excluded groups in the profession will bring about some welcome changes. Lawyers will be less likely to discriminate against women, aboriginal persons, homosexuals, or other historically disadvantaged groups if they regularly deal with members of these groups in a professional context. Increasing the representation of excluded groups in the judiciary will reduce discrimination by judges, and may also result in positive changes to the substance of the law.

179. Aboriginal Justice Inquiry of Manitoba, supra, note 89, p. 660.
180. Id., p. 661.
181. C. Menkel-Meadow, supra, note 16, p. 50.
182. One American study apparently confirmed this principle. The study found that reading about successful women in a particular occupation made participants in the study more likely to hire a woman in a related occupation. K. Donovan, supra, note 32, p. 140.
The issue of diversity in the legal profession has received considerable attention in the context of the desirability of having more female judges. There are a number of reasons to favour a bench with greater female representation. According to the U.S. state task forces, women judges are more likely to intervene to stop discrimination, at least if the discrimination is on the basis of sex.¹⁸³ The argument that there should be more female judges has also been made by female judges themselves. Former Justice Wilson of the Supreme Court of Canada suggests that “the mere fact that women are judges serves an educative function and helps to shatter stereotypes about the role of women in society that are held by male judges and lawyers as well as by litigants, jurors and witnesses.”¹⁸⁴

Christine Boyle takes the argument further by calling for more specifically feminist judges.¹⁸⁵ Feminist judges could utilize their knowledge about ways in which women and men experience the world to ensure that their decisions did not only protect male interests. Boyle argues that feminist judges would be better able to try cases of sexual assault against women. Feminist judges (including male judges capable of adopting a feminist perspective) would take women’s interests into account. They “would actively incorporate a different world view into [their] decision making.”¹⁸⁶ A feminist judge would arrive at a different understanding of sexual assault. Because many feminists understand mainstream sexuality as the eroticization of male dominance, such a judge would better understand that a man beating a woman commits a sexual assault. Because judges must finally rely on their own intuitions and experience of what is sexual, a “feminist judge would have the best sense possible of when a woman would experience . . . touching . . . to be sexual.”¹⁸⁷

Like Boyle, former Justice Wilson argues that the presence of more female judges will result in substantive changes to the law. Women judges may be more willing to delve into the circumstances of a case, to broaden the context of the dispute, “to show the issue in a larger

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¹⁸³. See text accompanying note 59, supra.
¹⁸⁵. C. Boyle, “Sexual Assault and the Feminist Judge” (1985), 1 Can. J. Women & L. 93. Boyle argues that feminist judges, whether male or female, would be better able to try cases of sexual assault. However, Boyle relies in her argument on the affinity in life experience between the judge and the victim, effectively conceding that a female judge will have access to insights unavailable to a male judge.
¹⁸⁶. Id., p. 103.
¹⁸⁷. Id., pp. 105-6.
perspective or as impacting on other groups not directly involved in the litigation at all." As a result, there are areas where the perspective that women judges bring will result in changes to substantive law:

In some . . . areas of the law, however, a distinctively male perspective is clearly discernible. It has resulted in legal principles that are not fundamentally sound and should be revisited when the opportunity presents itself. . . . Some aspects of the criminal law in particular cry out for change since they are based on presuppositions about the nature of women and women’s sexuality that in this day and age, are little short of ludicrous.

The recent case of Lavallee v. The Queen provides some support for former Justice Wilson’s contention that women judges will be more receptive to women’s voices and that substantive changes to the law may result. Angelique Lyn Lavallee was charged with murder after shooting her common-law husband in the back of the head. Writing for the majority of the Supreme Court, Wilson J. held that expert testimony as to the effect of the “battered wife syndrome” on the accused was admissible. In holding such evidence admissible, Wilson J. emphasized the importance of dispelling stereotypes about abused women held by members of the public:

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called “battered wife syndrome.”

Justice Wilson goes on to note that the standard of the “ordinary man”, so well known to the law, is inappropriate in the case of battered women:

If it strains credibility to imagine what the “ordinary man” would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical “reasonable man”.

188. The Honourable B. Wilson, supra, note 167, p. 521.
189. Id., p. 515.
190. Supra, note 74.
192. Id., p. 874.
The legal community is beginning to experience some of the changes that greater numbers of women lawyers will bring to the profession. I discussed the contribution which the perspectives of women might make to the practice of law above.\textsuperscript{193} Some indication of the kinds of changes which might come to law firms through incorporating women’s perspectives can be found in the practice of all-women law firms. In general, such firms are organized in egalitarian and non-hierarchical ways, and emphasize participatory decision making.\textsuperscript{194} We can expect that the impact of women’s perspectives on law practice will be positive:

What are the ways in which women might affect the practice and content of the law? Let me suggest a few: Women may force us to have a more sincere concern for the quality of our work, our personal lives, and our relationship to each other so that unnecessary hard work will not interfere with important human relationships. . . . Women may help us to appreciate the purpose, meaning, and effects of the product of our work and to become sincerely committed to work toward what we think is best in our work and world. Women lawyers may provide us with ways of practising law that are less combative and dehumanizing, less damaging to others and ourselves.\textsuperscript{195}

Increasing numbers of women practising law may force law firms to develop more innovative programs for lawyers and support staff wishing to raise children. Successful policies will permit accommodation of work and family demands by both men and women. The details of such policies are beyond the scope of this paper, but one likely element will be greater opportunities for part-time work for lawyers. Allowing lawyers to work at home is another option. Greater support for childcare and other back-up services by law firms will also be an essential element of any successful policy.\textsuperscript{196}

The importance of greater numbers of aboriginal lawyers, judges, police officers and court workers in the criminal justice system was recognized by the Manitoba Aboriginal Justice Inquiry. In its Report, the Inquiry concluded that one result of greater aboriginal representation would be a better understanding of the problems faced by aboriginal accused:

One of the problems is that there are almost no Aboriginal people in the system to whom [Aboriginal accused] can turn for assistance or advice. Other than some police officers or band constables, there are few, if any, Aboriginal people employed by the legal system resident in Aboriginal

\textsuperscript{193} See text accompanying note 132, \textit{supra}, and following.
\textsuperscript{194} C. Menkel-Meadow, \textit{supra}, note 33, pp. 199-200.
\textsuperscript{195} \textit{Id.}, p. 202.
\textsuperscript{196} D.L. Rhode, \textit{supra}, note 126, p. 1206.
communities. . . . We are satisfied that if there were Aboriginal people working in the legal system, there would be a greater understanding of the problems faced by Aboriginal accused, victims, witnesses and their families, and higher levels of assistance and advice. Aboriginal communities would benefit economically and socially from having people within their community who hold positions of importance within the justice system.\(^{197}\)

3. **Codes of professional conduct**

Codes of professional conduct can play a variety of roles in any strategy to reduce discrimination in the legal profession. One possibility is to leave the promotion of non-discrimination to the private ethical standards of legal professionals, and to provincial, federal and constitutional human rights standards that affect lawyers and non-lawyers equally. Such an approach is unsatisfactory for two reasons. First, given the weight of the evidence that discrimination does exist in the legal profession, it is evident that the ethical standards of individual lawyers are not presently sufficient to remove discrimination from the legal profession. Second, and perhaps more important, as the curators of the administration of justice, the legal profession should be taking a leading role in reducing discrimination. The legal profession enjoys the privilege of being autonomous and self-regulating; with that privilege comes the responsibility to set a high standard of professional conduct for its members. As the Canadian Bar Association has recognized in its *Code of Professional Conduct*, a lawyer has, as a result of his or her professional position, a responsibility to encourage respect for the administration of justice:

>[A] lawyer should encourage public respect for and try to improve the administration of justice. . . . The obligation . . . is not restricted to the lawyer’s professional activities but is a general responsibility resulting from the lawyer’s position in the community. The lawyer’s responsibilities are greater than those of a private citizen.\(^{198}\)

Incorporating a duty of non-discrimination into codes of professional conduct addresses both of these concerns.

To be effective, a professional duty of non-discrimination must be specific enough to be enforceable, but general enough to be applicable in a wide range of contexts. At a minimum, a duty of non-discrimination should include a duty not to discriminate against other legal professionals, witnesses, jurors, or employees. Such a duty should also extend to

\(^{197}\) Aboriginal Justice Inquiry of Manitoba, *supra*, note 89, p. 663.

recognizing and valuing other perspectives and experiences. The focus of the duty should not be on mere discourtesy; the duty must be directed to the underlying stereotypes which are ingrained in the profession.\footnote{199}{K. Koustensis, supra, note 70.}

A professional duty of non-discrimination should also extend to judges. Judges should be required, as a matter of professional ethics, to intervene actively to stop discrimination and harassment in their courtrooms. The purpose of such interventions is not only to protect the victim, whether lawyer or witness, but also to protect the dignity of the court and the administration of justice.\footnote{200}{See L.H. Schafran, supra, note 55, p. 73. Schafran gives an example of one such effective intervention, by Judge Clarice Jobes. Despite a previous warning, a male lawyer said to a female witness, in a demeaning tone, “You don’t mind if I call you by your first name, do you Margaret?” Schafran continues the story: Judge Jobes immediately said to the witness, “Don’t even answer that,” and to the lawyer, “I mind. I’ve told you before not to do this. Call her by her last name, as you do with all the male witnesses.” Id., p. 74 (from an interview by Schafran on Apr. 4, 1984).} The duty of non-discrimination should extend to discriminatory behaviour by judges themselves. And where judges discriminate or harass, those who are the subjects of the discrimination should have effective remedies available to them. A person who has been treated in a discriminatory fashion by judge should be able to initiate disciplinary action against the judge.

I will begin by reviewing the American case law which reads a limited duty of non-discrimination into general provisions in codes of professional responsibility. This duty of non-discrimination is essentially a duty of non-harassment. Many of the provisions that are being interpreted in this way in the U.S. are similar to provisions found in many Canadian codes of professional responsibility. I will go on to look at examples of specific American code provisions that create a professional duty of non-discrimination. Finally, I will consider the implications of the American experience for Canadian codes of professional conduct.

\begin{enumerate}
\item \textit{Interpreting general code of professional conduct provisions}
\end{enumerate}

The potential exists to interpret general professional code provisions to include a duty of non-discrimination. What follows is a survey of those Canadian and American professional code provisions which have been interpreted to include a duty of non-discrimination.\footnote{201}{It should be noted that while more recent codes of professional conduct use gender-neutral language, the older codes do not.} These provisions fall into three categories: duties to act with integrity, duties to uphold the
administration of justice, and duties of courtesy and good faith towards other lawyers.

The American Bar Association has produced two professional conduct codes: the ABA Model Code of Professional Responsibility ("ABA Model Code"),202 and the ABA Model Rules of Professional Conduct ("ABA Model Rules").203 In August 1983, the ABA replaced the Model Code with the Model Rules, and most American states now have ethical codes based on the ABA Model Rules. However, because the Model Code contains provisions similar to those in Canadian codes of professional conduct, the cases which have interpreted the provisions of the ABA Model Code remain relevant in Canada.

a. The duty to act with integrity

Chapter I of the Canadian Bar Association Code of Professional Conduct ("CBA Code") provides that "[t]he lawyer must discharge with integrity all duties owed to clients, the court, other members of the profession and the public."204 Chapter 2 of the proposed new British Columbia Professional Conduct Handbook ("proposed B.C. Handbook")205 is identical to Chapter I of the CBA Code. Section 3.02.01 of the Quebec Code of ethics of advocates ("Quebec Code") has a similar provision: "[t]he advocate must carry out his professional duties with integrity."206 The provision in the Nova Scotia Legal Ethics and Professional Conduct Handbook ("N.S. Handbook") is more specific. Chapter 1 provides that:

A lawyer has a duty to discharge with integrity (a) every duty the lawyer owes to (i) a client, (ii) another lawyer, (iii) a court, (iv) the profession, or (v) the general public; and (b) every duty the lawyer has to uphold justice and to uphold and improve the administration of justice.207

203. ABA Model Rules, id., pp. 01:101-175.
204. CBA Code, supra, note 198, p. 1.
206. Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1, s. 3.02.01. The section includes a list of 12 specific instances of conduct which violates the advocates obligation to carry out her duties with integrity. None have any obvious direct bearing on a duty not to discriminate.
There is no exact equivalent to these duties of integrity in the ABA Model Code. Canon 1 of the ABA Model Code provides that “a lawyer should assist in maintaining the integrity and competence of the legal profession.” Two disciplinary rules are relevant. Disciplinary Rule (“DR”) 1-102(A)(3) provides that “[a] lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude.” At least one U.S. court has found that sexual harassment is a violation of DR 1-102(A)(3). In one case, a lawyer was disciplined for sexually harassing a client. The lawyer “grabbed [the client], kissing her and raising her blouse.” In approving the agreement between the Disciplinary Commission and the lawyer that he should be publicly reprimanded, the Indiana Supreme Court emphasized the fact that the lawyer had sought to exploit the lawyer-client relationship:

It should be obvious that [he] sought to exploit the attorney-client relationship for his own personal physical pleasure. Conduct of this ilk is particularly repugnant while the client is dependent upon the attorney for guidance and assistance.

Although the issue was not raised in the short judgment in Adams, it would appear that the lawyer’s conduct was “illegal conduct”, as required by DR 1-102(A)(3), because of Title VII of the Civil Rights Act of 1964. Title VII is a remedial statute prohibiting disparate treatment of men and women in employment. In a similar case, the Supreme Court of Missouri, en banc, held that an attorney who made sexual advances toward his client violated DR 10-102(A)(3). The court emphasized that the attorney had exploited the professional relationship for personal ends:

Respondent [the attorney] and Weibel [the client] entered into a professional relationship. Weibel had a right to expect that respondent would conduct himself in that relationship in a manner consistent with the honourable tradition of the legal profession - a tradition founded on service, integrity, vigorous commitment to the client’s best interests, and an allegiance to the rule of law. Instead of remaining true to that tradition, however, respondent chose to exploit it, seeking to turn the professional relationship into a personal one. We find the respondent’s conduct violated DR 1-102(A)(3).

208. ABA Model Code, supra, note 202, p. 01:302.
209. Id., p. 01:303.
211. Id. See also G.G Sarno, “Sexual Misconduct as a Ground for Disciplining Attorney or Judge” (1986), 43 ALR4th 1062.
213. J. Meier, supra, note 165, p. 171.
DR 1-102(A)(6) of the ABA Model Code states that: "[a] lawyer shall not... [e]ngage in any other conduct that adversely reflects on his fitness to practice law." Lawyers have been disciplined under DR 1-102(A)(6) for sexually harassing female clients and employees. DR 1-102(A)(6) was interpreted by the Minnesota Supreme Court in In re Peters. Geoffrey Peters, the dean of William Mitchell College of Law, was found to have repeatedly sexually harassed four women employees, two of whom were law students. Peters rubbed his body against the four women, and made sexual comments to them. The court found that Peters' actions were unlawful under Title VII, and publicly reprimanded him. The court adopted a wide view of the scope of the circumstances under which lawyers could be disciplined by the court:

[Peter's assertion that] the conduct did not occur while [he] was acting in a professional capacity because it did not arise out of an attorney-client relationship... demonstrate[s] [his] lack of appreciation of his broader responsibilities as an attorney/law school dean and of this court's supervisory function with regard to all aspects of the practice of law.

b. Administration of justice

Chapter XIII of the CBA Code provides that "[t]he lawyer should encourage public respect for and try to improve the administration of justice." Chapter 14 of the proposed B.C. Handbook uses identical language. Chapter 21 of the N.S. Handbook has a similar requirement, but makes it a lawyer's duty to encourage respect for the administration of justice. The guiding principles explain that "[t]he admission to and continuance in the practice of law imply a basic commitment by the lawyer to the concept of equal justice for all within an open, ordered and impartial system." Canon 1 of the ABA Model Code contains a similar provision. DR 1-102(A)(5) provides that "[a] lawyer shall not... [e]ngage in conduct that is prejudicial to the administration of justice..." Rule 8.4(d) of the ABA Model Rules provides that "[i]t is professional misconduct for a lawyer to... engage in conduct that is

215. ABA Model Code, supra, note 202, p. 01:303.
216. J. Meier, supra, note 165, pp. 183-86.
218. Id., p. 382.
221. N.S. Handbook, supra, note 207, p. 93: "The lawyer has a duty to encourage public respect for justice and to uphold and try to improve the administration of justice."
222. Id.
223. ABA Model Code, supra, note 202, p. 01:303.
prejudicial to the administration of justice. . .”

The Quebec Code contains a somewhat narrower requirement in s. 2.05: “[t]he advocate must avoid any procedure of a purely dilatory nature and co-operate with his colleagues to ensure the proper administration of justice.”

There is U.S. case law interpreting the obligation to uphold the administration of justice as including an obligation not to sexually harass a client. In In re Liebowitz, a New Jersey court held that a lawyer who forced an indigent client to touch his genital area violated DR 1-102(A)(5) of the ABA Model Code. The findings of the disciplinary board, which were approved by the Court, were that the lawyer’s conduct was prejudicial to the administration of justice:

... the board concludes that Respondent violated DR 1-102(A)(5) by engaging in conduct that was prejudicial to the administration of justice.

By taking sexual advantage of an assigned client, Respondent brought the pro bono matrimonial counsel program into disrepute.

More generally, interpreting the equal protection clause of the fourteenth amendment of the U.S. Constitution, the U.S. Supreme Court held that discriminatory practices in jury selection had the effect of undermining “public confidence in the fairness of our system of justice.” The provision in the ABA Model Rules parallel to that in the Model Code has been held to prohibit invidious discrimination by lawyers, including racial harassment by lawyers of opposing counsel in court. In one case, the court found that Rule 8.4(d) prohibited invidious discrimination on the basis of race or gender:

[T]his kind of harassment is particularly intolerable. Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, 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 the profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.

224. ABA Model Rules, supra, note 203, p. 01:174.
225. Quebec Code, supra, note 206.
227. Id., p. 249.
The lawyer was suspended for three months.\textsuperscript{230}

In \textit{Gonzalez v. Commission on Judicial Performance},\textsuperscript{231} the Supreme Court of California (In Bank) interpreted a provision of the California Rules of Court making it an offence for a judge to engage in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."\textsuperscript{232} The Court found that ethnic slurs by Judge Gonzalez were such as to constitute a violation of the Rules:

As a judge he is charged with the obligation to conduct himself at all times in a manner that promotes public confidence and esteem for the judiciary. . . . [S]uch facially blatant ethnic slurs as those Judge Gonzalez uttered from the bench are apt to offend minority members . . . and may be construed by the public at large as highly demeaning to minorities. . . . The ethnic slurs uttered from the bench constitute unjudicial conduct by a judge acting in his personal capacity and are therefore sanctionable as willful misconduct.\textsuperscript{233}

In \textit{Kennick v. Com'n on Judicial Performance},\textsuperscript{234} the Supreme Court of California (In Bank) held that conduct prejudicial to the administration of justice included addressing female attorneys as "sweetheart". The court also found that such conduct violated Canon 3 A(3) of the California Code of Judicial Conduct, which requires judges to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity":

Three attorneys, plus a deputy clerk and a police detective, all women, testified that petitioner had addressed them as "sweetheart," "sweetie," or "baby"; three of these witnesses stated that petitioner had also addressed female defendants as "sweetheart" or "sweetie." . . . We agree with the commission that petitioner's use of these terms in addressing women under these circumstances was unprofessional, demeaning and sexist, and violated Canon 3 A(3) of the California Code of Judicial Conduct . . . We therefore adopt the conclusions of the masters and the commission that these acts constituted prejudicial conduct.\textsuperscript{235}

There has been no U.S. case law extending the obligation of a lawyer not to engage in conduct prejudicial to the administration of justice to cover non-discrimination in the selection of jurors, in spite of the obvious ethical implications, and in spite of years of constitutional litigation over the issue. EC 7-10 of the ABA Model Code, which obliges a lawyer to

\textsuperscript{230} Id., p. 476.
\textsuperscript{231} 188 Cal.Rptr.880 (Sup. 1983)
\textsuperscript{232} Id., p. 881.
\textsuperscript{233} Id., p. 890.
\textsuperscript{234} 267 Cal.Rptr. 293 (Cal. 1990).
\textsuperscript{235} Id., p. 307.
treat jurors with respect, would appear on its face to be relevant to the issue.\textsuperscript{236} EC 7-10 provides that "[t]he duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."\textsuperscript{237} One commentator has suggested that the explanation for the silence of the codes concerning racial strategy choices is the unwillingness of the profession to admit that lawyers rely on racial stereotypes:

By remaining silent, our profession’s ethical codes downplay the significance of the practice. Lawyers can quietly acknowledge the practice, but the public is not privy to this trade secret.\textsuperscript{238}

c. \textit{Courtesy and good faith towards other lawyers}

Chapter XVI of the CBA Code provides that "[t]he lawyer’s conduct towards other lawyers should be characterized by courtesy and good faith."\textsuperscript{239} Chapter 17 of the proposed B.C. Handbook is in essence identical to the CBA Code provision.\textsuperscript{240} Chapter 13 of the N.S. Handbook similarly provides that "[a] lawyer has a duty to treat and deal with other lawyers courteously and in good faith."\textsuperscript{241} The Quebec Code includes in s. 4.03.03 the requirement that "an advocate shall not abuse a colleague’s good faith or be guilty of breach of trust or disloyal practices towards him."\textsuperscript{242} Although there are no specific provisions in the ABA Model Code or Model Rules regulating behaviour between opposing counsel at trial, there are general provisions which courts have interpreted as governing relations between lawyers. DR 7-106(C)(5) of the Model Code reads: "[i]n appearing in his, professional capacity before a tribunal a lawyer shall not . . . [f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply."\textsuperscript{243} DR 7-106(C)(6) reads: "[i]n appearing in his professional capacity before a tribunal, a lawyer shall not . . . [e]ngage in undignified or discourteous conduct which is degrading to a tribunal."\textsuperscript{244} The ABA Model Code also contains

\textsuperscript{236} T. Kaine, \textit{supra}, note 97.
\textsuperscript{237} ABA Model Code, \textit{supra}, note 202, p. 01:333.
\textsuperscript{238} T. Kaine, \textit{supra}, note 97, p. 382.
\textsuperscript{239} CBA Code, \textit{supra}, note 198, p. 69.
\textsuperscript{240} Proposed B.C. Handbook, \textit{supra}, note 205, p. 94. The only difference is that in the proposed B.C. Handbook, the word "member" is used in place of the word "lawyer".
\textsuperscript{242} Quebec Code, \textit{supra}, note 206, s. 4.03.03.
\textsuperscript{243} ABA Model Code, \textit{supra}, note 206, p. 01:340.
\textsuperscript{244} Id., p. 01:340.
non-binding ethical consideration EC 7-38: "[a] lawyer should be courteous to opposing counsel. . .".

Although the ABA Model Rules contain a preambular statement that lawyers "should demonstrate respect for . . . other lawyers," there is no substantive provision to the same effect.

American courts have read the provisions of the ABA Model Code jointly to require a standard of good faith and fair dealing between lawyers. The U.S. Court of Appeals, 2nd Circuit, found that the effect of the provisions was that "the open forum which our courts provide for conflict resolution is not, nor can it ever be, a license to slander and abuse one's adversary. . . . Lawyers, as officers of the court, must always be alert to the rule that zealous advocacy on behalf of the client can never excuse contumacious or disrespectful conduct". The conduct in question in that case included a comment by one lawyer to another that "[y]ou couldn't shine my father's shoes, you Goddamn bootblack." American courts have also read provisions requiring lawyers not to engage in conduct prejudicial to the administration of justice as creating a duty of respect between opposing counsel. In one case a court applying the ABA Model Code read DR 1-102(A)(5) (duty not to engage in conduct "prejudicial to the administration of justice") together with DR 1-102(A)(6) (duty not to engage in "other conduct that adversely reflects on his fitness to practice law") and EC 7-37 (no "unfair or derogatory personal references to opposing counsel") to discipline a lawyer who attempted to intimidate his opponents. In that case, the lawyer called another attorney, "a little yellow son-of-a-bitch" during the course of taking a deposition. While that conduct was not actionable because it occurred before the Code of Professional Responsibility became effective, the lawyer made "direct, personal, insulting references directed towards opposing counsel", and so violated rules 7-105(C)(6), 1-102(A)(1), (5), (6). Rule 8.4(d) of the ABA Model Rules, requiring a lawyer not to engage in conduct prejudicial to the administration of justice, has also been held to create a duty of respect between opposing counsel.

245. Id., p. 01:338.
246. ABA Model Rules, supra, note 203, p. 01:101.
249. Id., p. 459.
250. ABA Model Code, supra, note 202, p. 01:338.
253. See text accompanying note 229, supra.
(ii) **Express non-discrimination provisions**

There are significant advantages to express non-discrimination provisions. One advantage is that discriminatory conduct is clearly identifiable. This is especially important in cases where discriminatory conduct would otherwise be considered unobjectionable. It is also easier for those who are the objects of discriminatory behaviour to file complaints without being stigmatized if they can show that the conduct is plainly prohibited. Referring to a specific provision is preferable to being forced to make an interpretive argument about a vague and general provision.254

There are American state ethics code provisions which expressly impose a duty of non-discrimination on both lawyers and judges. At present, the only analogous Canadian are to be found in Quebec and Ontario. Although there is as yet no specific non-discrimination provision in the ABA Model Code or Model Rules, the state non-discrimination provisions are generally variations on ABA Model Code or Model Rules provisions. Some non-discrimination provisions are variations on Rule 8.4 of the ABA Model Rules, although most states have adopted Rule 8.4 of the Model Rules without adding a duty of non-discrimination. Rule 8.4(d) of the Model Rules provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct which is prejudicial to the administration of justice...”255 The Rhode Island Supreme Court adopted *Rules of Professional Conduct*, effective November 15, 1988, including a Rule 8.4(d) modelled on Rule 8.4(d) of the Model Rules but including a duty of non-discrimination. Rule 8.4(d) provides that:

> It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice, including but not limited to harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, nationality or sex.256

The *Minnesota Rules of Professional Conduct* were recently amended to add Rule 8.4(g) (which is absent from the ABA Model Rules). The Minnesota Rule defines professional misconduct to include harassment: “[i]t is professional misconduct for a lawyer to: . . . (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer’s

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254. The need for specific professional conduct provisions prohibiting discriminatory conduct has been accepted by writers in the field. See for example, K. Koustensis, *supra*, note 70, p. 167.


professional activities." 257 The comment accompanying Rule 8.4 states that a lawyer will be "professionally answerable" for discrimination or harassment:

Many kinds of illegal conduct reflect adversely on fitness to practice law. . . . However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offences involving "moral turpitude." That concept can be construed to include criminal and civil offences concerning some matters of personal morality, such as adultery and discrimination or harassment on the basis of sex, race, creed, religion, color, national origin, disability, sexual preference or marital status that have no specific connection to fitness for the practice of law. 258

A proposed revision to the New Jersey Rules of Professional Conduct would define professional misconduct to include engaging in "conduct involving discrimination because of race, color, religion, age, sex, national origin, marital status, or handicap." 259 The District of Columbia Court of Appeals adopted amended Rules of Professional Conduct effective January 1, 1991, which include Rule 9.1 (which is not present in the ABA Model Rules). Rule 9.1 prohibits discrimination in employment by lawyers, including discrimination because of an individual's "family responsibility":

A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility or physical handicap. 260

The New York State Bar Association has amended its Code of Professional Responsibility, which is based on the ABA Model Code, to include a duty of non-discrimination. DR 1-102(A)(6) was amended, and EC 1-7 was added. DR 1-102(A)(6) defines misconduct to include unlawful discrimination in the practice of law:

258. *Id.*, p. 265. The comment accompanying Rule 8.4 of the ABA Model Rules does not expressly or impliedly include harassment as a kind of illegal conduct reflecting adversely on fitness to practice law:

Many kinds of illegal conduct reflect adversely on fitness to practice law . . . However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offences involving "moral turpitude." That concept can be construed to include offences concerning some matters of personal morality, such as adultery or comparable offenses, that have no specific connection to fitness for the practice of law. [my emphasis]

A lawyer shall not . . . unlawfully discriminate in the practice of law, including in hiring, promoting, or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability or marital status.\textsuperscript{261}

EC 1-7 directs lawyers to avoid bias and condescension: "[a] lawyer should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees, and other persons involved in the legal process."\textsuperscript{262}

The most comprehensive U.S. non-discrimination provision is contained in proposed revisions to the Michigan Rules of Professional Conduct. The revisions were ordered by the Michigan Supreme Court, which directed:

That the State Bar of Michigan make recommendations to this Court with regard to the proposals by the task forces [on race and gender bias] that the Rules of Professional Conduct and the Code of Judicial Conduct be amended to specifically prohibit sexual harassment and invidious discrimination.\textsuperscript{263}

The proposed new Rule 5.7, which awaits approval by the Michigan Supreme Court states:

(a) A lawyer shall not engage in invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin, and shall prohibit staff and agents subject to the lawyer's direction and control from doing so.

(b) A lawyer shall not hold membership in any organization which the lawyer knows invidiously discriminates on the basis of gender, race, religion, disability, age, sexual orientation or ethnic origin.

(c) A lawyer serving as an adjudicative officer shall prohibit invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin against parties, witnesses, counsel, or others on the part of lawyers in proceedings before the adjudicative officer.\textsuperscript{264}

In Canada, s. 57 of the Quebec Professional Code provides that "[n]o professional may refuse to provide services to any person because of race, colour, sex, age, religion, national extraction or social origin of such

\textsuperscript{262} Id., EC 1-7, p. 21.
\textsuperscript{263} Michigan Supreme Court, Administrative Order 1990-3 [entered June 12, 1990].
\textsuperscript{264} Michigan Rules of Professional Conduct, Rule 5.7. Rule 8.4, which deals with misconduct, is also amended to include discrimination. Quoted in Bar Leader (Nov/Dec 1990), p. 4. The new rules had not been adopted as of April, 1992.
person.” Section 43 of the same code provides that “[n]o corporation [including the Barreau du Quebec] shall refuse to issue a permit or specialist’s certificate or to grant a special authorization for reasons of race, colour, sex, religion, national extraction or social origin.” In January of 1990, the Law Society of Upper Canada amended its Professional Conduct Handbook to include a duty of non-discrimination. Rule 13 of the Professional Conduct Handbook, entitled “Responsibility to the Profession Generally”, provides that “The lawyer should assist in maintaining the integrity of the profession and should participate in its activities.” Paragraph 5 of the “Commentary” to Rule 13, entitled “Non-Discrimination”, imposes a duty of non-discrimination on lawyers:

5. The lawyer shall not discriminate on the grounds of race, ancestry, place of origin, colour, ethic origin, citizenship, religion, creed, sex, sexual orientation, age, marital status, family status, or handicap in the employment of other lawyers or articled students, or in dealings with other members of the profession or any other persons.

Non-discrimination provisions applicable to judges are contained in Canon 3B of the American Bar Association Code of Judicial Conduct (“ABA Judicial Code”). Not only does the Canon contain provisions requiring a judge to refrain from discrimination, but a judge is required to ensure that lawyers appearing before her also refrain from discrimination:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This

266. Id.
268. Id., p. 61. The text of Rule 13 is identical to that of Chapter XV of the CBA Code, supra, note 198, p. 67.
269. Id., p. 62.
Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceedings.271

The previous version of the Judicial Code required judges to observe high standards of conduct so as to preserve the integrity and independence of the judiciary, and to be dignified and courteous to lawyers.272 Judges were routinely disciplined under the previous Judicial Code for sexual harassment, sexual misconduct and improper sexual advances. In one case, a Minnesota District Court judge was publicly reprimanded and suspended without pay for one year after making unwelcome sexual advances to his court reporter.273 Judge Miera also said to a number of female court employees, “Do you people eat bananas for the vitamins or for the phallic symbol?”274 In suspending the judge, the court emphasized the high standard of personal and professional conduct to which judges are bound:

We find public censure and a one-year suspension from office adequately convey the importance of the ethical violation. It should be understood from this sanction that we, and the citizens of this state, will not tolerate improper sexual advances by judges bound to “the highest standard of personal conduct.”275

In another case, a female lawyer successfully took legal action against a judge after he told her in open court, “I will tell you what, little girl, you

271. ABA Judicial Code, id., pp. 01:3006-3007. The asterisk after “require” indicates that it is a defined term. “Require” is defined as follows:

The rules prescribing that a judge “require” certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term “require” in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control. . . . (Id., p. 01:3003).

The Judicial Code contains the following commentary on Canon 3B(5):

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expressions and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial. (Id., p. 01:3007)


273. In re Miera, 426 N.W.2d 850 (Minn. 1988).
274. Id., p. 853.
275. Id., p. 859.
lose.” In another case, the judge said to a buxom prosecutor, “My clerk and I have a bet on whether you wear weights on your ankles to keep you from tipping over.” It is likely that judges will continue to be disciplined under the more specific provisions in the new ABA Judicial Code.

A provision to the same effect as the ABA Judicial Code is contained in proposed changes to the Michigan Code of Judicial Conduct. The proposed new rule provides:

A judge shall not engage in invidious discrimination on the basis of race, religion, disability, age, sexual orientation, gender or ethnic origin and shall prohibit staff, court officials and others subject to the judge’s direction from doing so. A judge shall prohibit such invidious discrimination against parties, witnesses, counsel or others on the part of lawyers in proceedings before the judge.

(iii) Proposed Canadian code provisions

If there is to be a professional duty of non-discrimination in Canada, the American experience indicates that there are at least two ways of arriving at such a duty. On the one hand, it would be possible to interpret general duties that already exist in Canadian codes of professional responsibility to include a duty of non-discrimination. The American experience indicates that at least the duties to act with integrity, to uphold the administration of justice, and to treat other lawyers with courtesy and good faith are capable of such an interpretation. There are advantages to such an approach. No changes to existing codes of professional responsibility are required. Broadening the scope of the legal notions of integrity, the administration of justice, and of courtesy and good faith will have potentially beneficial effects throughout the legal system, by exporting the concept of non-discrimination to other legal contexts. However, there are also disadvantages. If the American case-law provides any indication, then the duty of non-discrimination that will be read into these provisions will be limited. Such a duty will likely be confined to a duty of non-harassment. While this is important, harassment is far from the only form of discrimination which exists in the legal profession.

The second possible approach is to draft specific provisions defining a duty of non-discrimination for Canadian codes of professional responsibility. There are disadvantages to this approach. Amending existing codes of professional conduct will take time. The experience in U.S. jurisdictions indicates that the impetus for such amendments generally
comes from studies of discrimination, and particularly gender
discrimination, in the legal system. Several Canadian jurisdictions have
already embarked on such studies, and it seems probable that pressure
from within the legal profession for specific non-discrimination provisions
will grow. There are also definite advantages to specific non-discrimination
provisions. The various forms of discrimination can be directly targeted
through clear drafting. Such provisions can be aimed at discrimination in
employment, as well as at the exclusion or deprecation of the perspectives
of the excluded.

It is likely that the approach that will develop in Canada will combine
the interpretation of existing general code provisions with the eventual
adoption of specific non-discrimination provisions. With the American
provisions in mind, I propose two possible non-discrimination provisions
for inclusion in Canadian codes of professional conduct. The first
provision is conservative:

A lawyer shall discharge all of his or her professional duties without
discrimination, including discrimination on the basis of gender, race,
religion, disability, age, sexual orientation or ethnic origin. A lawyer shall
also ensure that those under his or her direction and control carry out their
duties without discrimination.

It is also possible to envision a more ambitious non-discrimination
provision, such as the following:

The duty of non-discrimination

A. Definitions

The following terms are defined terms in this section:

(1) “Discrimination” means the making of a distinction, exclusion,
restriction or preference on the basis of a stereotype to the detriment
of the dignity of any person.
(a) Any ground of distinction, exclusion, restriction or preference
may be discriminatory.
(b) Examples of distinctions which may be discriminatory include
sex, race, sexual orientation, national or ethnic origin, colour,
handicap, nationality, income, and religion.

(2) A “stereotype” is a generalization about a class of persons that does
not further the dignity of that class of persons.
(3) "Discrimination" includes harassment on discriminatory grounds.
   (a) Without limiting the generality of the foregoing, harassment on the grounds of gender includes being described in familiar terms, being subject to comments about personal appearance, being subject to remarks and conduct that degrade women, as well as being subject to verbal or physical advances.
   (b) Harassment on grounds other than gender may also include the specific examples listed in the previous section.

B. Statement of principle
The members of the legal profession are committed to the elimination of discrimination in and by the profession, and to welcoming into the profession groups and perspectives which may previously have been excluded from the profession.

C. Duties of lawyers
It is the duty of the partners and associates of law firms:

(1) to develop a policy for the elimination of discrimination in the work environment.
   (a) The policy should be updated as needed.
   (b) All members of the firm, including support staff, should be consulted in the development and revision of the policy. Where appropriate, members of the community should also be consulted.

(2) to develop a policy on parenting consistent with the duty not to discriminate and with the principle that members of the firm should be free to find fulfilment in their family lives while remaining, so far as is possible, fully-participating members of the firm.
   (a) Where possible, the policy should allow for flexible work arrangements for both male and female members of the firm.
   (b) Where reasonably appropriate, the firm should arrange for daycare for the children of both male and female members.
   (c) The policy should be revised when appropriate. All members of the firm, including support staff, should be consulted in the development and revision of the policy. Where appropriate, members of the community should also be consulted.
   (d) Any policy should apply equally to support staff.
(3) not to discriminate against or harass lawyers, judges, employees, witnesses, jurors or other participants in the legal system.

D. Judicial conduct

It is the duty of every judge:

(1) to perform his or her judicial duties without discrimination, whether real or apparent, against parties, witnesses, counsel, jurors or any other person.

(2) to require all those under his or her control, including lawyers, staff, court officials and others, to refrain from discrimination, whether real or apparent, against parties, witnesses, counsel, jurors, or any other person.

(3) to inform himself or herself the perspectives and experiences of those who may appear before him or her.
   (a) Where possible, a judge should learn about these perspectives and experiences in consultations with the appropriate groups or communities.
   (b) A judge should make every effort to understand and to value perspectives which may be different from his or her own.

IV. Conclusion

The evidence of discrimination in the legal profession is overwhelming. It is incumbent upon the legal profession to respond to the growing evidence of discrimination with strategies to reduce and eventually eliminate discrimination in the profession. An important aspect of any such strategy will be a professional duty of non-discrimination. Such a duty can be implemented both through the interpretation of provisions that already exist in Canadian codes of professional conduct, and through the adoption of specific non-discrimination provisions.

279. These provisions could be included in a Canadian Code of Judicial Conduct.