Bias in the Washington Courts: 
A Call For Reform

Melisa D. Evangelos*

[In a] case involving complex accounting [the] judge indicated that as a woman attorney, I knew or understood less about numbers. [The judge] also addressed me as “young lady” in front of the jury. I won, but some jurors indicated it affected the amount I won.¹

—Member of the Trial Practice Section of the Washington State Bar Association

Incidents like the one noted above prompted the Washington Supreme Court to establish two task forces to study gender and racial bias in the judicial system.² More than thirty states, and the federal government, have established similar groups, and many have reported their findings.³ The reports, including

* B.A. 1985, Wellesley College; J.D. Candidate 1993, University of Puget Sound School of Law.


The Ninth Circuit also established a gender bias study committee to study gender bias in the federal courts, and its findings were presented at the Ninth Circuit Annual Conference in mid-1992. Christene E. Sherry, Ninth Circuit Undertakes Pioneering
the Washington reports, universally conclude that gender and racial bias is pervasive in the legal profession, that bias deters and sometimes prohibits the effective delivery of justice, and that affirmative steps are needed to address and eliminate the effects of gender and racial bias.4

Because of the documented threat that racial and gender bias pose to the effective administration of justice in Washington, this Comment advocates amending the Washington Rules of Professional Conduct to explicitly make intentional gender and racial bias an act of attorney misconduct and to discipline any attorney who engages in such behavior.5 Section I of this Comment identifies and describes instances of attorney behavior that result in gender and racial bias and explains the impact of such bias on attorneys, clients, and the judicial system. Section II explores similar anti-bias rules proposed or in place in other states. Section III introduces the rule advocated in this Comment, compares this proposal to the approaches taken by other states, and explains the operation of the rule. Section IV examines the constitutionality of the proposed rule


5. Members of Washington Women Lawyers and the Washington State Bar Association Committee on Opportunities for Minorities in the Legal Profession drafted the proposed rule advocated in this Comment. The proposed rule adds the following Section (g) to Washington RPC 8.4 governing misconduct:

It is professional misconduct for a lawyer to engage in harassment or invidious discrimination on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status in connection with a lawyer’s professional activities.

See infra part III.

The Washington State Bar Association (WSBA) adopted this proposed rule in principle and sent the rule to the Rules of Professional Conduct Committee for further consideration. After lengthy debate, the Rules Committee recommended passage of the proposed rule as modified by the Committee. The revised rule read as follows:

It is professional misconduct for a lawyer to . . . commit a discriminatory act prohibited by law or harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination or harassment is committed in connection with the lawyer’s professional activities.

The modified rule eliminated reference to the term “invidious” and thus significantly limited the scope of the proposed rule’s application to harassment and unlawful discrimination.

On March 28, 1992, the WSBA Board of Governors sent the modified proposed rule (WSBA proposal) to the Washington State Supreme Court with an overwhelming “do pass” recommendation. The court will act on the proposed rule in the spring of 1993.
of professional conduct (RPC), concluding that the rule would withstand First Amendment scrutiny. Finally, Section V argues that the proposed RPC would be an effective and necessary tool in combating racial and gender bias in the Washington court system and concludes that the Washington State Supreme Court should adopt the proposed amendment to the Washington Rules of Professional Conduct.

I. GENDER AND RACIAL BIAS IMPAIR THE FAIR AND EFFECTIVE ADMINISTRATION OF JUSTICE

The Gender and Justice and Minority Task Forces undertook studies to identify bias in Washington court proceedings, and to explore its effect on the fairness and effectiveness of the judicial system. Part A briefly explains the use of the word “bias” in the two Task Force reports and in this Comment. Part B then explores the bias found in the Washington court system and demonstrates that the fair and effective administration of justice is threatened when such bias is used as a tactical device. 6

A. What Is Bias?

Bias is an inclination, bent, predisposition, or preconceived opinion. 7 Bias includes “any action or attitude that interferes with impartial judgment.” 8 The Gender and Justice Report explains that “gender bias . . . is evident in society’s perception of the value of women’s and men’s work, and the myths and misconceptions about the social and economic realities of women’s and men’s lives.” 9 The Minority and Justice Report characterizes minority bias, including racial, ethnic, cultural and linguistic bias as a conscious or unconscious act or decision,

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6. This Comment advocates amending the Washington Rules of Professional Conduct in order to reduce the amount of gender and minority bias in the judicial system. However, in an effort to limit the scope of this section, and because the effects of gender bias by attorneys and on attorneys is better documented, this section focuses primarily on the effect of gender bias in Washington courts. In addition, although certain types of harassing and discriminatory behavior are uniquely directed against gender or minority groups, many forms of such behavior can be employed against any of the groups that the rule protects. Therefore, for the purpose of analysis, the terms “gender” and “race” are used in this Comment to represent all of the characteristics that traditionally form the basis for impermissible discrimination. See Ellen E. Lange, Note, Racist Speech on Campus: A Title VII Solution to a First Amendment Problem, 64 S. CAL. L. REV. 105, 105 n.2 (1990).


8. GENDER AND JUSTICE REPORT, supra note 1, at xiii.

9. Id.
which may or may not result in disparate treatment.10

B. How Does Bias Affect the Judicial System?

The Washington Task Forces studied the effect of gender and racial bias on the delivery of justice in the Washington Court system and found that lawyers commonly pander to such bias in judges and juries in litigation and negotiation tactics.11 Such tactics most severely impair the judicial system when they alter case outcomes. Even when the ultimate outcomes of cases are not affected, however, these tactics impair the integrity of the legal profession, cause participants to lose faith in the judicial process, and prevent women and minority lawyers from effectively carrying out their duties.

The Gender and Justice Task Force found that a substantial number of lawyers and judges believe that gender bias exists in the Washington courts.12 More significantly, over one third of the lawyers who participated in a task force survey believed that gender bias occasionally affected case outcome.13 Gender-biased behavior by attorneys falls into three categories: disrespectful behavior, sexual trial tactics, and sexual advances.

1. Disrespectful Behavior

The most common form of gender-biased behavior by attorneys is disrespectful behavior, including inappropriate use of first names, demeaning remarks, familiar terms, comments about personal appearance, and even facial expressions.14 This

10. MINORITY AND JUSTICE TASK REPORT, supra note 3, at xx, 3.
11. See GENDER AND JUSTICE REPORT, supra note 1, at 125-33.
12. Seventy-four percent of the lawyers and 54 percent of the judges participating in a Task Force survey "believe[d that] gender-based discrimination exists to some degree in the Washington Courts." Id. at 112.
13. Id. at 130.
14. The GENDER AND JUSTICE REPORT summarized the following disrespectful behavior patterns reported in a survey of Washington judges and attorneys:
   • Opposing counsel (45 percent) and court personnel (37 percent) addressed female lawyers by first name when lawyers of the opposite gender were addressed by surname;
   • Judges (26 percent) and opposing counsel (38 percent) addressed female lawyers by familiar terms (e.g., "dear," "young lady," "girls");
   • Judges (26 percent) and lawyers (49 percent) complimented female lawyers on their appearance;
   • Opposing counsel (39 percent) and court personnel (38 percent) asked female attorneys if they were lawyers when lawyers of the opposite gender were not asked;
subtle form of bias can have a dramatic effect on courtroom atmosphere. When opposing counsel, judges, or court personnel address a female lawyer by her first name, while male lawyers are addressed by surnames, the professional status of the female attorney is immediately reduced. The impact is even greater when female attorneys are addressed by familiar names such as "dear" or "young lady." Addressing female attorneys in this manner suggests to a jury that female lawyers are held in lower esteem, that they are less professional, and that they are not taken seriously. As a consequence of this gender-biased behavior, women attorneys become less effective advocates.

The excerpt noted at the beginning of this Comment illustrates how bias affects the credibility of a litigator and can affect the outcome of a case. The judge reduced the credibility of the female attorney by communicating to the jury the stereotyped idea that this attorney, like all women, has inferior mathematical abilities, and he further diminished her stature by addressing her as "young lady."

Demeaning remarks, as well as racial and sexist jokes, have a significant impact on the judicial system. Such remarks reflect a systemic sexist and racist tolerance. Gender- or race-biased behavior takes the judge or jury's mind off of the merits of a case and onto the immutable characteristics of a litigant or witness. Even compliments about personal appearance can have the effect of drawing emphasis toward appearance and away from the professional role of a female

- Lawyers (43 percent) addressed female litigants and witnesses by first name when those of the opposite gender were addressed by surnames;
- Female litigants and witnesses were addressed in familiar terms by judges (25 percent) and lawyers (31 percent);
- Female litigants were regarded as less credible because of their gender by judges of the opposite gender (29 percent) and lawyers of the opposite gender (36 percent);
- Women judges were addressed by first name by other judges (42 percent) and by lawyers (35 percent);
- Affidavits of prejudice were used to disqualify a woman judge primarily because of her gender (29 percent);
- Remarks or jokes demeaning to women were made either in court or in chambers by judges (38 percent) and lawyers (58 percent).

Id.

15. Id. at 119.
16. In Washington, 71 percent of female attorneys and 46 percent of male attorneys, responding to the Task Force survey, reported that they were aware of counsel making sexist jokes and remarks. GENDER AND JUSTICE REPORT, supra note 1, at 163.
attorney.\textsuperscript{17} When jurors observe judges or attorneys treating other attorneys or witnesses with disrespect, "the litigants stand less of a chance of prevailing on the merits of a case."\textsuperscript{18}

2. Sexual Trial Tactics

Ours is an adversarial system of justice. With this system comes a "sporting theory of justice"—a belief that a lawyer must do whatever it takes to fully and aggressively represent his or her client.\textsuperscript{19} Thus, some lawyers justify sexual trial tactics as an appropriate technique of client advocacy. Kandis Koustenis identifies sexual trial tactics as "deliberate efforts by opposing counsel to undermine women litigators on the basis of their gender."\textsuperscript{20} Demeaning remarks, comments suggesting stereotyped behavior, even compliments become sexual trial tactics when they are used by attorneys to distract, intimidate,

\textsuperscript{17} Id. at 129.

In the GENDER AND JUSTICE REPORT, a member of the Washington Association of Prosecuting Attorneys described the following instance in which a purported compliment made about a woman attorney was, in fact, a demeaning sexual trial tactic:

In voir dire, a male attorney asked a juror if the decision would be based on/affected by the fact that [the opposing counsel] was "young and prettier." This happened repeatedly. When [the woman attorney] objected [repeatedly], the judge compounded the problem first by smiling and saying that [she] was younger and prettier, then by laughing and finally frowning at [the] objection

\textsuperscript{18} Id. at 123.

\textsuperscript{19} See Kandis Koustenis, Note, Sexual Trial Tactics: The Ability of the Model Code and Model Rules to Discipline Discriminatory Conflicts Between Adversaries, 4 GEO. J. LEGAL ETHICS 153, 157-59 (1990). To illustrate the attitude of some attorneys toward sexual trial tactics, Koustenis described a case in which a male attorney defended his gender discriminatory tactics as "guerrilla warfare." Ironically, the case involved a claim that the FBI had discriminated against Hispanic agents. Id. at 155.

\textsuperscript{20} Id. at 153 (attributing the definition of "sexual trial tactics" to Jill Wine-Banks of the Chicago firm of Jenner & Block).

In her Note, Koustenis provides an example of sexual trial tactics in which a litigator described the following scene from a deposition with six male opposing attorneys:

They treated me very courteously while they were doing the questioning. But when I asked my first question, one attorney lurched across the table and shouted, "Objection!" I responded, "I would like the record to reflect counsel just jumped across the table and screamed his objection." He was subdued after that, but the other five took up the tactic. It continued for eight hours on every question, and was obviously contrived to intimidate me.

\textsuperscript{17} Id. at 156 (quoting Sherrill Kushner & Valerie Lezin, Bias in the Courtroom, 14 BAR-RISTER 9, 11 (1987)).

It is important to note that the use of degrading behavior as a "sexual trial tactic" may be used against any individual perceived by the lawyer to be less powerful, regardless of gender. See GENDER AND JUSTICE REPORT, supra note 1, at 117.
or frustrate opposing counsel, or to play to a judge or jury's inherent biases.

The sexual trial tactics that can be employed against attorneys, litigants, and witnesses generally fall into two categories: tactics designed to intimidate and tactics designed to reduce the credibility of those attorneys, litigants, and witnesses. Intimidation tactics often include overly aggressive or abusive behavior by male attorneys, but can even include compliments by male attorneys to younger female attorneys. These seemingly harmless comments directed at an "attorney's physical appearance . . . [suggest] that looks matter more than brains or competence. Attention is diverted from counsel's professional expertise and shifted instead to her looks."23

Tactics designed to reduce credibility often include attempts to reinforce stereotypes that a woman is less believable because the subject matter is beyond the stereotypical knowledge of a woman or that her emotions have clouded her perception.24 The excerpt noted at the beginning of this Comment is an example of precisely this type of stereotyping: women are not mathematically inclined.

Sexual stereotyping can also defeat attempts by a woman to defend herself against sexist or derogatory remarks. The Gender and Justice Report describes an incident where a woman attorney waiting for a trial assignment was called a "feisty young thing" by the opposing counsel.25 Opposing counsel then requested that they not be assigned to a woman judge at trial because she and the woman attorney would "gang up on him."26 When the female attorney complained about the incident, the assigning judge dismissed the incident, treating it as a joke.27 The opposing counsel characterized the female attorney as a "humorless feminist."28

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21. Aggressive or abusive behavior is described here as a sexual trial tactic. It should be noted, however, that aggressive or abusive behavior is perceived by some attorneys to be a legitimate tactic in any proceeding against any opposing counsel. In In re Vincenti, discussed infra notes 37-43 and accompanying text, Vincenti was disciplined for abusive behavior directed toward a male opposing counsel and a female law clerk. In re Vincenti, 554 A.2d 470, 473 (N.J. 1988).
22. Gender and Justice Report, supra note 1, at 120.
23. Id.
24. Id. at 125.
25. Id. at 119.
26. Id.
27. Gender and Justice Report, supra note 1, at 119.
28. Id.
Male participants in the legal system are also victimized by stereotyping. The Gender and Justice Task Force notes instances "where men were accorded less credibility vis-a-vis parenting of young children." 29

Another notable use of stereotyping affecting both men and women is the use of affidavits of prejudice to disqualify both male and female judges based solely on gender. The Gender and Justice Report indicates that nearly half of the judges that responded to the Task Force survey "believed [that] affidavits of prejudice had been used to disqualify a woman judge because of her gender," 30 and almost a quarter of the responding judges "believed [that] affidavits of prejudice had been used against male judges because of gender." 31

The problem with this theory of advocacy is that discriminatory trial tactics are typically unrelated to the merits of the case and do not further the truth-seeking process. Such tactics can be analogized to irrelevant testimony—unequivocally inadmissible at trial. 32 "Just as physical combat in the 11th century did not lead to the truth but to the better warrior, [sexual trial] tactics today do not help to discover the truth but merely the willer litigator." 33

Behavior that is intentionally demeaning and discriminatory has a further effect: it erodes the participants' "confidence in the integrity and the impartiality of the judicial process." 34 Concern for preserving the fairness in judicial proceedings precipitated the passage of a professional conduct rule barring the use of such tactics in New Jersey. 35 In comments following a recently adopted anti-discrimination rule of professional conduct, 36 the court cited to In re Vincenti, 37 an attorney disciplinary case, in which the New Jersey State Supreme Court sanctioned an attorney for violations of the New Jersey Rules of Professional Conduct. 38 During the course of an earlier trial Vincenti made numerous threatening, offensive, and

29. Id. at 125.
30. Id. at 128.
31. Id.
33. Koustenis, supra note 19, at 158.
34. GENDER AND JUSTICE REPORT, supra note 1, at 123.
35. NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 8.4(g) (1992). See discussion infra part II.A.
obscene remarks and gestures to the opposing counsel and directed abusive language at the judge's law clerk. 39

The court found that by his conduct Vincenti was guilty of violating the New Jersey Rules of Professional Conduct prohibiting conduct prejudicial to the administration of justice. 40 The Vincenti court was particularly sensitive to the effect of offensive conduct on the judicial system as a whole, commenting that such conduct is intolerable "because it has an effect that tends to undermine the proper administration of justice." 41 The court further noted that "undue and extraneous oppression and harassment of participants involved in litigation can impair their effectiveness, not only as advocates for their clients, but also as officers of the court." 42

Additionally, the court found Vincenti's remarks containing invidious racial connotations to be particularly intolerable. The court stressed that "[i]n the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions." 43

Unequal access to the arsenal of sexual and racial tactics poses a further problem to this theory of advocacy. Because lawyers engaging in sexual or racial trial tactics are often playing to a judge or jury's deeply rooted biases, opposing counsel, or in some instances witnesses or litigants, cannot simply employ a reverse strategy to counter the effect of the bias.

Finally, bullying and insults should not be part of a lawyer's trial tactics whether or not such conduct can be deployed equally by all parties. Such behavior draws attention away from the merits of the case and onto the sideshow performed

39. Vincenti, 554 A.2d at 471.
40. Id. at 473.
41. Id.
42. Id. at 473-74.
43. Id. at 474. See also Gonzalez v. Commission on Judicial Performance, 657 P.2d 372 (Cal. 1983) (facially blatant ethnic slurs by judges constituted "unjudicial conduct" and "conduct prejudicial to the administration of justice"); In re Stevens, 645 P.2d 99 (Cal. 1982) (repeated use by judge of racial and ethnic epithets warrants public censure, even if judge otherwise performed judicial duties fairly and equitably and free from actual bias); In re Williams, 414 N.W.2d 394 (Minn. 1987) (attorney's use of racial slur to opposing counsel violates the MINNESOTA CODE OF PROFESSIONAL RESPONSIBILITY).
by overly aggressive attorneys at the expense of the standing of the profession and the rights of the litigants.

3. Verbal and Physical Sexual Advances

"Sexual harassment is a significant obstacle to a woman's advancement in the legal profession," and it further demeans the integrity of the profession. Like disrespectful behavior and sexual and racial trial tactics, physical and verbal harassment can prevent attorneys from effectively representing their clients. An attorney is often unable to adequately retaliate because her client's interests are at stake, or because she fears she will jeopardize her career. As one commentator explains, a woman attorney who has been sexually harassed at her place of employment often chooses "to resign or suffer silently due to the fear of being black-balled or black-listed from other reputable law firms." Outside the employment setting, a woman attorney may have similar fears that reporting incidents of sexual harassment by opposing counsel, judges, or other court personnel may jeopardize her career. Harassment laws do not provide adequate redress for instances of sexual harassment because existing laws do not govern many of the settings in which harassment is likely to occur.

Verbal and physical sexual advances toward female lawyers were reported by both attorneys and judges in the Gender and Justice Report. One respondent described an incident in which a judge made a verbal sexual advance on an attorney "and when ignored proceeded to be very hard on [that attorney's client], assess[ing] an enormous award against [that] cli-

45. See, e.g., id.
46. The Author recognizes that women could be sexual harassers as well as men. However, she has not discovered any reported incidents of this behavior by female lawyers.
47. Meier, supra note 44, at 170 (citing Nina Burleigh & Stephanie B. Goldberg, Breaking the Silence: Sexual Harassment in Law Firms, 75 A.B.A. J. 46, 51 (1989)).
48. Title VII of the Civil Rights Act of 1964 only protects individuals from harassment in the workplace. It does not cover harassment of a female attorney by a male opposing counsel, or harassment of a litigant, witness, or even a client. See discussion infra parts III.B. and IV.B.
49. GENDER AND JUSTICE REPORT, supra note 1, at 121. Verbal sexual advances toward female lawyers were reported by 16 percent of attorneys and by 4 percent of judges. Id. Physical sexual advances toward female attorneys by male attorneys were reported by 5 percent of attorneys and two percent of judges. Id.
ent contrary to law." The survey respondent then noted that "[t]he Supreme Court reversed and granted a directed verdict to [the client]."

Florida's Gender Bias Task Force reported several incidents of verbal and physical harassment occurring in law firms. "The Florida Task Force report describes incidents where one female associate was told that her employment depended upon her attractiveness, where another was told to sit on a partner's lap during a meeting, and . . . where another was told by a partner that he chose not to settle a case so that they could go on a business trip together." In sum, the Washington Task Force reports, and reports from across the country, indicate that women and minority attorneys, litigants, and witnesses are routinely subjected to "inappropriate or demeaning forms of address, argument or examination." Such behavior impairs an attorney's ability to do his or her job effectively, impairs a litigant's ability to receive a fair hearing, and demeans the profession. Additionally, demeaning, harassing, and discriminatory behavior extracts a high emotional toll on all who fall victim to such attacks. Every study has found a need for reform in order to eliminate the impact of bias on the judicial system. The following section describes certain states' attempts to combat the effect of bias on the judicial system and to curb attorneys' use of bias as a litigation tool.

II. CURRENT EFFORTS TO CURB DISCRIMINATORY AND HARASSING BEHAVIOR

In response to recommendations by state task forces, supreme courts in Minnesota, New Jersey, New York, Rhode Island, and Vermont have adopted professional conduct rules that address discriminatory or harassing behavior. Florida and Michigan are currently considering similar proposals. Additionally, while the Model Code of Professional Responsibility and the Model Rules of Professional Conduct do not include

50. Id. (emphasis in original).
51. Id.
52. Meier, supra note 44, at 170 n.12 (citing Nina Burleigh & Stephanie B. Goldberg, Breaking the Silence: Sexual Harassment in Law Firms, 75 A.B.A. J. 46, 51 (1989)).
53. Czapanskiy, supra note 4, at 3.
54. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).
55. MODEL RULES OF PROFESSIONAL CONDUCT (1983).
specific provisions governing harassment or discriminatory behavior, drafters of the *Model Judicial Code*\(^56\) made amendments that make discriminatory behavior by judges sanctionable. While the spirit and purpose of each of the rules is generally the same—the reduction of bias in the judicial system—each of the rules differ in form\(^57\) and scope.\(^58\) This section sets out the various approaches taken by the states and by the *Model Judicial Code*.

A. Attorney Conduct Rules

The New Jersey Rule adds the following section to Rule 8.4 governing misconduct:

(g) It is professional misconduct for a lawyer to engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.\(^59\)

Like Washington, the New Jersey professional conduct rules for attorneys fairly track the *Model Rules of Professional Conduct*. The New Jersey rule is intended to cover attorneys’ professional activities, including courtroom behavior, treatment of other attorneys, their staffs, and court personnel. It covers conduct in a lawyer’s office and activities of professional organizations.\(^60\) The New Jersey rule does not, however, cover conduct outside of a lawyer’s professional activities.

The New Jersey rule explicitly excludes employment discrimination in hiring, firing, or promotion, unless that behavior has resulted in formal agency or judicial determination of discriminatory behavior.\(^61\) In comments following the New Jersey rule, the New Jersey State Supreme Court stated that


\(^{57}\) "Form" describes the manner in which a state has chosen to implement the conduct rule. For example, states may either append or modify existing rules of professional conduct or add entirely new provisions to their rules. The Washington proposal adds a new section to Rule 8.4 governing misconduct.

\(^{58}\) "Scope" refers to the type and severity of behavior regulated by a particular rule.


\(^{60}\) Susan Riss, *Nation’s Toughest Bias Rules Issued; Lawyers’ Discrimination Against Gays, the Poor, Barred*, N.J.L.J., Aug. 9, 1990, at 27.

employment discrimination is better handled by existing agencies or the courts.\textsuperscript{62}

Interestingly, Vermont has taken the opposite approach. While the Vermont professional conduct rules do not contain provisions governing discriminatory behavior in the courtroom and other legal settings, the rules explicitly proscribe discrimination "in hiring, promoting, or otherwise determining the conditions of employment of that individual."\textsuperscript{63}

New York professional conduct rules also explicitly prohibit employment discrimination. The New York rule provides that "[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{64}

Similar to the New Jersey rule, drafters of the Minnesota rule expanded Rule 8.4. The scope of the rule, however, is limited to acts of harassment. The Minnesota rule provides that it is "professional misconduct for a lawyer to . . . 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 professional activities."\textsuperscript{65} The Minnesota Supreme Court recently adopted a further amendment adding illegal discrimination to the rules governing attorney misconduct.\textsuperscript{66} In addition, the court added substantial comments following Rule 8.4 explaining the scope, intent, and purpose of

\textsuperscript{62} Id. Rule 8.4(g) cmt.

\textsuperscript{63} The Vermont rule provides as follows:

\begin{itemize}
  \item A lawyer shall not . . . discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, place of birth or age, or against a qualified handicapped individual, in hiring, promoting, or otherwise determining the conditions of employment of that individual.
\end{itemize}


\textsuperscript{64} \textbf{New York Code of Professional Responsibility} § 1200.3(a)(6) (1993).

\textsuperscript{65} \textbf{Minnesota Rules of Professional Conduct Rule} Rule 8.4(g) (1992).

\textsuperscript{66} The amendment added the following section to Rule 8.4:

\begin{itemize}
  \item It is professional misconduct for an attorney to . . . commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.
\end{itemize}

the discrimination and bias rules. 67 Because the language of professional conduct rules is often broad, and sometimes ambiguous enough to allow flexibility in application, such comments are helpful in fleshing out the meaning and the application of these rules in particular contexts. Additionally, such comments often provide insight into the motivation for inclusion of a particular rule.

In a paragraph explaining the impetus for the anti-discrimination amendment in the Minnesota Rules of Professional Conduct, the drafters reflect the position taken in this Comment:

[The provision proscribing discrimination] reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law thereby manifests a lack of character required of members of the legal profession. 68

Like Washington, Minnesota, and New Jersey, the Rhode Island Rules of Professional Conduct fairly track the Model Rules of Professional Conduct. However, rather than adding a new provision to Section 8.4, governing professional misconduct, the Rhode Island Supreme Court adopted language from an existing provision—conduct prejudicial to the administration of justice 69—but also added language identifying “harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, nationality, or sex,” 70 as prejudicial conduct.

The Michigan State Bar recently proposed what are perhaps the most radical and far-reaching amendments to attorney conduct rules. 71 The proposed Rule 5.7 adds a new section

67. See id. Rule 8.4 cmt.
70. Id. The Rhode Island rule states as follows: “It is professional misconduct for a lawyer to . . . 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.”
71. MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 5.7 (State Bar Proposal 1991). The Michigan State Supreme Court is also considering recommendations from the State Task Forces on Racial/Ethnic Issues in the Courts and Gender Issues in the Courts. The Task Force proposal recommends adding the following language to Rule 8.4 of the MICHIGAN RULES OF PROFESSIONAL CONDUCT: “It is professional misconduct for a lawyer to . . . engage in sexual harassment or invidious discrimination.”
to the *Michigan Rules of Professional Conduct* headed "Discriminatory Practices," which states the following:

(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.\(^{72}\)

The Michigan proposal attempts to expand the scope of coverage of professional conduct rules beyond all existing rules. The proposed rule not only governs attorney behavior, but it makes an attorney responsible for the conduct of those under his or her control. The rule governs both the professional and the private activities of an attorney, proposing sanctions for conduct that is not necessarily illegal. Comments included in the state bar proposal make it clear that there need not be a "formal adjudication that the conduct is illegal or actionable for there to be grounds for discipline."\(^{73}\)

In support of the constitutionality of the provision barring membership in clubs that discriminate, the Comments conclude that "[t]here is no constitutional right to discriminate,"\(^{74}\) and suggest that there is a "sufficiently compelling state interest"\(^{75}\) in preventing harassment and discrimination in the legal profession that can only be accomplished by proscribing such conduct.\(^{76}\) The Comments further note, however, that organizations associated with particular religions that are "closed to persons of different religious persuasion" are exempted from this rule.\(^{77}\)

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\(^{73}\) *Id.*

\(^{74}\) *Id.* Rule 5.7 cmt.

\(^{75}\) *Id.*

\(^{76}\) *Id.*


\(^{77}\) *Id.*
B. Judicial Conduct Rules

In August 1990, the American Bar Association adopted revisions to the *Model Code of Judicial Conduct,* \(^{78}\) which specifically "direct judges not to manifest bias or prejudice themselves and not to permit those under their direction and control to do so."\(^{79}\) Canon 3 of the revised *Judicial Code* now includes the following two sections:

(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 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 proceeding.\(^{80}\)

Comments following the new model judicial rules echo many of the same concerns about bias described in this Comment. The drafters explain: "A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."\(^{81}\) The drafters further note that “[j]udicial bias, as perceived by parties or lawyers in the proceeding, jurors, the media and others, may be mani-

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79. *Id.*

80. *Id.* at 53-54 (citing the *MODEL JUDICIAL CODE* § 3B(5) (Final Draft 1989)). The asterisk after “require” indicates that it is defined in the terminology section of the Judicial Code. *Id.* at 54 n.5. That section explains that the word “require” is subject to the rule of reason, and that “[t]he use of the term “require” in the [context of this rule] means [that] a judge is to exercise reasonable direction and control over the persons subject to a judge’s direction and control.” *Id.*

81. *Id.* at 54 n.4 (citing the *MODEL JUDICIAL CODE* § 3B(5) cmts. (Final Draft 1989)).
fested by nonverbal communication such as facial expression and body language as well as words."

Two proposals to amend the Michigan Code of Judicial Conduct are currently before the Michigan Supreme Court, one drafted by the Michigan Task Force on Racial/Ethical Issues in the Courts and the Task Force on Gender Issues in the Courts and the other drafted by the Michigan State Bar. The Task Force proposal adds language to Canon 3(A) of the Michigan Code of Judicial Conduct and states:

(10) A judge shall not engage in sexual harassment or invidious discrimination and shall prohibit staff, court officials, and others subject to the judge’s direction and control from doing so. A judge shall prohibit sexual harassment or invidious discrimination against parties, counsel, or others on the part of lawyers in proceedings before the judge.\(^8^3\)

The Task Force proposal modifies the Michigan Court Rules by adding a new provision to Rule 2.003 governing the disqualification of a judge, and a new provision to Rule 9.205 governing the standards of judicial conduct. The new provision in Rule 2.003 would disqualify a judge from hearing a case in “a proceeding in which the judge . . . (7) has engaged in sexual harassment or invidious discrimination . . . .”\(^8^4\) New Rule 9.205 would make a judge who “engages in sexual harassment or invidious discrimination against parties, counsel, or others” guilty of misconduct in office.\(^8^5\)

The Michigan State Bar proposal first modifies Canon 2(C) of the Michigan Code of Judicial Conduct, adding the following language: “A judge shall not hold membership in any organization that the judge knows invidiously discriminates on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin.”\(^8^6\) The State Bar proposal then adds Section (c) to Canon 3, which states:

A judge shall not engage in invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin, and shall prohibit staff, court officials, and others subject to the judge’s direction and control from doing so. A judge shall prohibit invidious discrimination

\(^8^2\) Id.
\(^8^3\) MICHIGAN CODE OF JUDICIAL CONDUCT Canon 3A (State Bar Proposal 1991).
\(^8^4\) MICHIGAN COURT RULES Rule 2.003 (State Bar Proposal 1991).
\(^8^5\) Id. Rule 9.205.
\(^8^6\) MICHIGAN CODE OF JUDICIAL CONDUCT Canon 2(c) (State Bar Proposal 1991).
against parties, witnesses, counsel, or others on the part of lawyers in proceedings before the judge. 87

The State Bar proposal adds a section to Rule 9.205 of the Michigan Court Rules that makes a judge "guilty of misconduct in office if . . . the judge engages in invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin." 88

III. A PROPOSED AMENDMENT TO THE WASHINGTON RULES OF PROFESSIONAL CONDUCT

As Section II illustrates, various approaches have been taken by states in drafting rules designed to eliminate the effects of bias on state judiciaries. Based on the experiences of these states, members of Washington Women Lawyers and the Washington State Bar Association Committee on Opportunities for Minorities in the Legal Profession drafted an amendment to the Washington Rules of Professional Conduct. 89 This author advocates the adoption of the original proposed amendment, which adds the following provision to Rule 8.4 governing misconduct:

It is professional misconduct for a lawyer to engage in harassment or invidious discrimination on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status in connection with a lawyer's professional activities.

Part A first compares the rule proposed in this Comment to the rules adopted by other states and to the WSBA rule presently under consideration by the Washington Supreme Court. Part B then explains the operation and application of the proposed Washington rule, using Title VII and Washington discrimination laws as models for interpreting the proposed rule.

A. Comparison of the Proposed Washington RPCs and Rules from Other States

Like the New Jersey rule, the rule proposed in this section adds an additional provision to Rule 8.4. Because the rules serve an educational as well as a disciplinary function, adding a

87. Id. Canon 3(c).
89. See supra note 5.
separate section—in contrast with Rhode Island’s approach adding definitional language to existing sections of its RPC—highlights recognition by the Bar and the judiciary of the importance of such rules.

Unlike the Minnesota rule and the Washington State Bar Association proposal currently before the Washington State Supreme Court, the rule advocated here targets both harassment and invidious discrimination. Use of the term “invidious discrimination” distinguishes instances of legitimate distinction based on a characteristic from distinction based on an evil motive. Thus, this term targets discriminatory trial tactics. Use of the word “invidious” has the same effect as the provision in the Model Code of Judicial Conduct, stating that language barring a judge from manifesting bias or prejudice “does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status . . . are issues in [a] proceeding.” 90 Consequently, the use of the word “invidious” appropriately limits the scope of the rule to the kinds of behavior most harmful to the judicial system. Similarly, the use of the term “unlawful discrimination,” such as the rule currently under consideration in Washington and Minnesota, would limit the rule to thresholds established by Title VII and state anti-discrimination laws. Thus, this language would not protect harassment or discrimination in settings not currently covered by state and federal law. Furthermore, it would not protect against harassment or invidious discrimination based on sexual orientation or marital status, because these classes are not recognized as protected under the law.

The New Jersey rule is arguably more expansive than the Washington proposal because the New Jersey rule covers conduct “likely to cause harm,” 91 whereas the Washington language is limited to intentional acts of discrimination or harassment.

Unlike the current Michigan proposal, the proposed Washington language covers only lawyers’ professional activities. The Michigan language may impermissibly chill an attorney’s associational rights under the First Amendment. 92 One way

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90. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(b) (1990).
91. NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 8.4(g) (1992).
for Washington to achieve a similar result without running afoul of the Constitution would be to include aspirational, rather than mandatory, language in comments explaining the rule, suggesting that lawyers and judges refrain from participation in non-legal activities that condone racist and sexist behavior.

While the rule advocated in this Comment does not expressly identify employment discrimination or harassment as grounds for sanctions, lawyers' professional activities clearly include legal employment. Thus, the proposed rule should be interpreted to include harassment or invidious discrimination in the workplace as well as the courtroom. Although Title VII and state harassment statutes would also govern employment settings, it is important that the Bar be able to take measures against attorneys who demean the profession in this manner. Therefore, comments should be included with the rule that explicitly state that the rule governs workplace conduct as well as courtroom conduct.

B. Operation of the Proposed Rule

Because anti-bias conduct rules have only been in place since the late 1980s, there is little information concerning violations to aid in interpreting the operation of such a rule.93 However, both state and federal discrimination law should serve as models for the interpretation and application of the language of the rule proposed in this Comment.

Title VII of the Civil Rights Act of 1964 makes it unlawful "for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."94 Courts have upheld discriminatory work environment claims based on sex,95 race,96 reli-

93. For example, since Rule 8.4(g) of the MINNESOTA RULES OF PROFESSIONAL CONDUCT became effective January 1, 1990, the Minnesota State Bar Association has received approximately nine or ten complaints involving harassment allegations. Only one complaint resulted in disciplinary action, and another is pending further disciplinary proceedings. Letter from William J. Wernz, Director, Minnesota Office of Lawyers Professional Responsibility, to Leland G. Ripley, Chief Disciplinary Counsel, Washington State Bar Association (Sept. 13, 1991) (on file with the University of Puget Sound Law Review).
gion, and national origin. In *Meritor Savings Bank v. Vinson*, the Supreme Court identified the types of sexual harassment actionable under Title VII. According to the Court, actionable harassment can take one of two forms: (1) *quid pro quo*, or (2) hostile work environment. Further, the Court noted that physical or verbal conduct can constitute harassment. In establishing these two categories, the Court relied in large part on guidelines established by the Equal Employment Opportunity Commission, the administrative agency charged with enforcing the provisions of Title VII.

Three years later in *Price Waterhouse v. Hopkins*, the Court ruled that sex stereotyping was a form of unlawful discriminatory conduct under Title VII. In *Price Waterhouse*, the Court found that comments made by partners at Price Waterhouse, a large accounting firm, which suggested that

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98. Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977).
100. In *Meritor*, the Supreme Court identifies *quid pro quo* harassment as "harassment that involves the conditioning of concrete employment benefits on sexual favors." *Id.* at 62.
101. Hostile work environment harassment is not based on economic benefits, but instead on a pervasive "hostile or offensive working environment." *Id.*
102. *Id.* at 65.
103. The EEOC Guideline governing sexual harassment states as follows:
(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.


The EEOC Guideline governing racial or ethnic harassment is similarly worded:
(a) The Commission has consistently held that harassment on the basis of national origin is a violation of Title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin.

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

*Id.* § 1606.8 (footnote omitted).
104. 490 U.S. 228 (1989).
Hopkins lacked sufficient femininity,\textsuperscript{105} established a discriminatory animus by sex stereotyping.\textsuperscript{106}

Washington's anti-discrimination statute\textsuperscript{107} is significantly broader in scope than Title VII, governing, \textit{inter alia}, acts of discrimination in employment, credit and insurance transactions, HIV infection, or real estate transactions.\textsuperscript{108} In the introduction to the statute, the legislature declared that acts of discrimination based on "race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of serious state concern,"\textsuperscript{109} and that "such discrimination . . . menaces the institutions and foundation of a free democratic state."\textsuperscript{110}

The language of both Title VII and Washington's anti-discrimination statute suggest a goal and purpose similar to the proposed professional conduct rule: the elimination of discriminatory or harassing behavior in certain particularly sensitive environments such as the courtroom. Although important differences exist between the federal and state statutes and the proposed conduct rule,\textsuperscript{111} the application of these statutes can, nonetheless, assist in interpreting and applying the proposed rule. Using federal and state statutes as models, the remainder of this section suggests guidelines for identifying "harassment" or "invidious discrimination."

The Supreme Court has established four requirements for a prima facie claim of sexual harassment under Title VII. An employee must prove that (1) he or she was subjected to unwelcome sexual conduct, (2) the unwelcome conduct was based on his or her gender, (3) the unwelcome sexual conduct was sufficiently pervasive or severe to alter the terms or conditions of the employee's employment and create an abusive or hostile work environment, and (4) the employer knew or should have known of the harassment and failed to take

\textsuperscript{105} One partner described [Ms. Hopkins] as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to "take a course in charm school"; and a fourth suggested that Ms. Hopkins would have a better chance at partnership in the firm if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." \textit{Id.} at 235.

\textsuperscript{106} \textit{Id.} at 251.

\textsuperscript{107} \textsc{Wash. Rev. Code} § 49.60.010-.330 (1990).

\textsuperscript{108} \textit{Id.} § 49.60.010.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{See infra} note 116 and accompanying text.
prompt and reasonable remedial action.112 Element three defines the threshold of harassment necessary to violate the statute. Consequently much litigation has centered around this element.113 Generally, "the more severe the conduct, the less pervasive it need be."114

The proposed rule offers similar elements that identify the threshold necessary to invoke the rule. Because the rule is written from the perspective of the harasser, instead of the individual subjected to the proscribed behavior, the elements are tailored to conform to this perspective. Thus, to be eligible for sanctions under proposed Rule 8.4(g), an attorney (1) while acting in a professional capacity, must (2) engage in harassing or invidiously discriminatory behavior, (3) on the basis of sex, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, (4) sufficiently pervasive or severe to create an abusive or hostile legal environment, or pose a significant threat to the fairness of a particular proceeding, or to the judicial system in its entirety. Structuring the elements of the rule in this manner allows comparison to Title VII and to the Washington discrimination statutes,115 subject to two limitations.

The first limitation on the use of state and federal discrimination law for comparison is the limited scope of these statutes. While the proposed rule governs unlawful conduct under state and federal discrimination statutes, it also applies to certain conduct that falls outside the scope of these statutes. Because lawyers perform much of their work in a highly sensitive and volatile environment, the proposed rule of professional conduct may demand a higher standard of conduct than do state and federal statutes governing the general public. As an officer of the court, it is a lawyer's duty to behave in a manner that reflects positively on the judicial system and promotes fairness in legal proceedings.116

Additionally, certain forms of discrimination, such as dis-


113. Winterbauer, supra note 112, at 812. See, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).

114. Winterbauer, supra note 112, at 812 (citing Ellison, 924 F.2d at 878).

115. See supra notes 106-109 and accompanying text.

crimination on the basis of sexual preference, are currently afforded no protection under the law, but would be covered under the proposed conduct rule. "[I]ntimidation, abuse, harassment, or threats that focus on an individual's sexual orientation"\textsuperscript{117} have no place in court or in other legal proceedings.

Discrimination based on sexual orientation is a substantial problem in legal proceedings. The American Civil Liberties Union of New Jersey notes that "the issue of sexual orientation is more likely to be raised in the context of litigation than age or marital status as a way of attempting to undermine the opponent or the opponent's counsel."\textsuperscript{118} In Washington, one attorney reported an incident in which an expert witness, who was lesbian, was questioned extensively by the opposing counsel about her sexuality.\textsuperscript{119} The expert witness's sexuality had nothing to do with her expertise, but the opposing counsel was nonetheless attempting to reduce her credibility with the jury.

Thus, while state and federal statutes do not currently afford protection based on sexual preference, it is important that the code of conduct rules recognize this form of discrimination as offensive and threatening to the equal administration of justice in order to provide a mechanism to address the problems previously discussed.

A second but related distinction between proposed Rule 8.4(g) and Title VII is the level of harassment necessary to violate the conduct rule. Because discriminatory or harassing behavior can jeopardize case outcomes, impair the integrity of the legal profession, and prevent women and minority lawyers from effectively carrying out their duties, the threshold necessary to invoke sanctioning under the proposed rule is arguably lower than the threshold of actionable behavior under state or federal law. Subtle but intentional tactics that would not rise to the level of protection under Title VII or Washington discrimination laws can nonetheless cause irreparable harm and pose a significant threat to the fairness of a particular proceeding, as well as damage the integrity of the legal profession. For


\textsuperscript{119} Incident reported to the Author by a member of Washington Women Lawyers.
example, courts have held that isolated incidences of physically harassing or abusive behavior will not satisfy the threshold of conduct necessary for a Title VII claim. However, in a trial setting a few well-timed gender- or race-biased comments intended to prejudice a litigant or witness, or intended to reduce the credibility of the opposing counsel, can threaten the fairness of the entire proceeding. Similarly, overly aggressive, threatening, or abusive behavior toward an opposing counsel, taking place over a brief period of time, e.g., one trial, can impair that attorney's ability to effectively perform his or her duties. Thus, even using Title VII principles, the severity of the harm dictates a low threshold of actionable conduct.

State and federal laws are also beneficial in developing the standard of reasonableness to use in evaluating claims of harassing or discriminating behavior under the proposed rule. In Title VII cases, the circuits are split over the standard of reasonableness and the perspective to be used in determining the severity and persvasiveness of the alleged harm. The majority has "defined harassment from the perspective of the objective, gender-neutral, reasonable person." The Ninth Circuit, however, has adopted the opposite approach. In Ellison v. Brady, the Ninth Circuit held that the victim's perspective must be used to determine whether the conduct creates an abusive work environment under Title VII. In Ellison, the perspective was that of a reasonable woman because the victim was female. Thus, under the Ellison rationale, "if a reasonable woman would find the conduct sufficiently severe or pervasive to alter the terms or conditions of [her] employment and create an offensive environment, then the conduct is sexual harassment."

The Washington Supreme Court was among the first state

120. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) ("[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to sufficiently significant degree to violate Title VII."); citing Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991) ("[A]n isolated epithet by itself fails to support a cause of action for a hostile environment."); Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) ("[S]exually hostile or intimidating environments are characterized by multiple and varied combinations and frequencies of offensive exposure.").


122. Id. at 813; see Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).

123. 924 F.2d 872 (9th Cir. 1991).

124. Id. at 878.

125. See Winterbauer, supra note 111, at 815.
courts to adopt the reasonable woman standard. In State v. Wanrow, 126 Yvonne Wanrow was charged with murder and assault after she shot an intruder, whom she believed was responsible for molesting one of her children, in the home in which she was staying. 127 The supreme court adopted a standard of reasonableness for judging Wanrow's claim of self-defense that required a jury to consider Wanrow's conduct in light of the totality of the circumstances, 128 and "in light of her own perceptions of the situation, including those perceptions which were the product of our nation's long and unfortunate history of sex discrimination." 129 The court stressed that "until the effects of [sex discrimination] are eradicated, care must be taken to ensure that . . . self defense instructions afford women the right to have their conduct judge[d] in light of the . . . handicaps that are the product of sex discrimination." 130 Finally, the court concluded that the failure to consider the woman's perspective is to deny women the right to trial "by the same rules which are applicable to male defendants." 131

The Washington Supreme Court's rationale in Wanrow can logically be extended to the application of anti-harassment and anti-discrimination professional conduct rules. The Task Force reports note that a higher percentage of women and minority attorneys perceive the existence of bias in the Washington legal system, 132 and further perceive a greater detrimental impact on the system. 133 To determine whether an attorney's conduct is sanctionable under proposed Rule 8.4(g), the standard of reasonableness should be from the perspective

126. 88 Wash. 2d 221, 559 P.2d 548 (1977).
127. Id. at 226, 559 P.2d at 551.
128. Wanrow was five foot four inches tall and had a cast on her leg. Id. The night of the shooting the decedent entered the home in which Wanrow was staying, and when asked to leave he declined to do so. Id. He was a large man, over six feet tall, and visibly drunk when he entered the home. Id. Wanrow's seven-year-old daughter had previously identified the decedent as the man who molested her. Id. at 224, 559 P.2d at 550. He first approached one of the children in the room and then approached Wanrow. Id. at 226, 559 P.2d at 551. Wanrow, startled by the situation, shot the decedent. Id.
129. Id. at 240, 559 P.2d. at 559 (citation omitted).
130. Id.
131. Id. at 240-41, 559 P.2d at 559.
132. GENDER AND JUSTICE REPORT, supra note 1, at 112 (a higher percentage of women respondents than men noted gender biased behavior); MINORITY AND JUSTICE REPORT, supra note 3, at xxii ("Minorities believe that bias pervades the entire legal system in general and hence, they do not trust the court system to resolve their disputes or administer justice evenhandedly.").
133. GENDER AND JUSTICE REPORT, supra note 1, at 112.
of the reasonable "victim" of harassing or discriminatory behavior. Adopting a standard that includes both objective and subjective factors would allow the rule to protect women and minority participants in the legal system from a divergence in opinion as to what constitutes in appropriate conduct, but would not overburden the system with complaints by oversensitive participants. By adopting a standard that considers the perspective of the victimized individual(s), the rule serves to sensitize all attorneys to the effects of harassing and discriminatory behavior.

In sum, as the Washington State Legislature declared, "acts of discrimination are matters of serious state concern."134 The rule proposed in this section (1) provides a clear message that harassing and discriminatory behavior will not be tolerated in Washington legal proceedings, (2) effectively targets the kind of behavior that is most detrimental to the legal system, (3) reasonably limits the scope of the rule to professional behavior that has a direct effect on the system, and (4) provides a concrete rule that the Washington State Bar can use to discipline attorneys.

IV. THE PROPOSED AMENDMENT PASSES CONSTITUTIONAL SCRUTINY

Opponents of the rule proposed in this Comment, and of similar rules proposed or in place in other states, argue that because these rules regulate verbal conduct, such rules impermissibly restrain an attorney's right to free speech under the First Amendment.135 This section critically examines this argument with respect to the rule proposed in this Comment. Part A identifies the constitutional obstacles to the regulation of speech and identifies the various tests applied by the Supreme Court when scrutinizing government action regulating speech, it then applies these tests to the proposed rule and concludes that the proposed rule falls within the scope of per-

134. WASH. REV. CODE § 49.60.010 (1990).
missible regulation. In support of this conclusion, Part B further explores the analogy between the protections afforded under the proposed rule and under Title VII and Washington discrimination laws.

A. First Amendment Doctrine

The Supreme Court has never held that the First Amendment protects all speech. The Court has removed from protection categories of speech that are considered to be of such slight social value that any benefit that may be derived from them is clearly outweighed by their costs to order and morality.\(^\text{136}\) These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words.\(^\text{137}\)

Where the Court determines that the regulated speech does not fall into the category of "low value," and thus unprotected speech, it generally affords that speech First Amendment protection, unless it finds a compelling governmental interest, unrelated to the suppression of the speech, that outweighs the value of the protected speech.

Where the regulation of the speech is directed at the content of the speech, the inquiry is particularly rigorous. Supreme Court analysis of such content-based regulations, however, has been far from clear. At times the Court has held that content-based regulations must be rejected unless they fall into the narrow class of unprotected speech mentioned above.\(^\text{138}\) However, the Court has developed other lines of analysis for content-based restrictions, in which governmental interests are balanced against individual interests.\(^\text{139}\)

\(^{137}\) Id. at 571-72.

In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986), the Court blurred the line between content-neutral and content-based restrictions and upheld a ban on adult theaters within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Id. at 54. The Court found that although the ordinance in question did, in fact, regulate films on the basis of their content, the predominate concern of the City was the effect of adult theaters on the surrounding community and not with the content of the adult films themselves. Id. at 47. The Court upheld the city ordinance because the ordinance served a substantial governmental interest, which was unrelated to the suppression of speech, and which allowed for reasonable alternative avenues of communication. Id. at 52.
In *United States v. O'Brien*, the Court established a three-part test that has often been employed to determine whether a governmental regulation is sufficiently justified. Under the *O'Brien* test, a governmental regulation is justified only when it satisfies the following elements: (1) the governmental regulation must further an important or substantial governmental interest, (2) the governmental interest must be unrelated to the suppression of free expression, and (3) the incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

Applying the three-part *O'Brien* test, the proposed rule falls within the zone of substantial governmental interests permissibly protectable under the First Amendment. First, the proposed rule clearly furthers a substantial state interest: the fair and effective administration of justice. The Gender and Justice and Minority and Justice Task Force reports amply demonstrate that discrimination exists in the Washington judicial system, that stereotyping and bias impair the credibility and efficacy of law, and that discrimination impedes the effective administration of justice. The proposed rule is designed to combat these effects.

Commentators who resist even the most minor government restraints on speech argue that any regulation of speech thwarts the truth-seeking process and inhibits the sharing of knowledge. Toleration of distasteful speech, these commentators argue, is the price to be paid for individual liberty. In the judicial process, however, the regulation of certain speech furthers the truth-seeking process, whereas unregulated speech and behavior has a stifling effect on the delivery of justice. Because discriminatory behavior throws individual rights into jeopardy, the court has a duty to eliminate these tactics. Failure to adopt such a rule is tantamount to official condonation of discriminatory behavior. Furthermore, in addition to curbing actual discriminatory behavior, rules such as the proposed rule have symbolic, practical, and educational value as a public statement supporting the rights and equal dignity of all persons.

141. *Id.* at 377.
143. *Id.*
Furthermore, the proposed rule is sufficiently narrow in scope so as to infringe on allegedly protected speech no more than is permissibly necessary to further the goals of the rule. Unlike the Michigan proposal, the proposed Washington rule limits the scope of its application to behavior in connection with an attorney's professional activities and, furthermore, limits prohibited conduct to behavior that is intentionally discriminatory.

Two additional lines of analysis further support the constitutionality of the proposed rule: forum-based analysis and public trust analysis. The Court has, on occasion, applied a forum-based analysis to determine whether the forum is one generally dedicated to the free exchange of ideas, or whether the forum is a place where individuals can reasonably expect to be insulated from certain speech, or to have their own speech constrained. Forum-based analysis reflects an understanding that "paternalism is not considered a legitimate justification for restricting free speech,"\(^\text{144}\) but that under certain circumstances victims of oppressive speech may not be free to ignore or to counter such speech. A forum-based analysis upholds First Amendment protection in settings that promote or support counter-speech, and it rejects First Amendment protection where effective counter-speech is suppressed.

Using the forum-based analysis, the Supreme Court has upheld forum-based restrictions in schools,\(^\text{145}\) the military,\(^\text{146}\) and the home.\(^\text{147}\)

In *F.C.C. v. Pacifica Foundation*,\(^\text{148}\) the Court affirmed the Federal Communication Commission's sanctioning of a radio broadcast that the Commission found obscene. In upholding the sanction, the Court applied a forum-based analysis, noting the "uniquely pervasive presence" that broadcast media has

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\(^{147}\) FCC v. Pacifica, 438 U.S. 726 (1978) (limiting broadcast of obscene words to captive audience); Rowan v. United States P.O., 397 U.S. 728 (1970) (control over unwanted mail allowed because of sanctity of the home).

established in our lives, and that the nature of broadcast media is such that listeners cannot adequately protect themselves from unexpected program content.\textsuperscript{149} Thus, because broadcast media directs speech at a captive audience, the Court found that an individual's right to be free from obscene radio broadcasting outweighed the First Amendment rights of Pacifica to freely broadcast the material.\textsuperscript{150}

Applying a forum-based analysis to the proposed rule, it is clear that courtroom and employment settings have never been viewed as places devoted to unfettered expression. In fact, limitations on speech abound in both these settings. Rules of professional conduct, as well as state and federal rules of evidence, significantly constrain what can and cannot be said both inside and outside the courtroom. Just as the rule of relevance\textsuperscript{151} prohibits testimony that is not germane to the case, and the hearsay rule\textsuperscript{152} prohibits evidence that is not trustworthy, proposed Rule 8.4(g) eliminates communication or commentary that detracts from the merits of a case and is in fact detrimental to the truth-seeking process. Just as the broadcast media required special treatment under the First Amendment, legal proceedings similarly create a captive audience, and thus require special treatment as well.

In certain captive settings, such as the courtroom, victims of discriminatory behavior are not free to respond. For a variety of reasons, these victims are compelled to remain silent. Legal settings, particularly the courtroom, further constrain one's ability to defend oneself against harassment and discriminatory behavior. Usually many interests are at stake, typically the clients'. Attorneys, litigants, and witnesses who are subjected to discriminatory tactics or behavior are often unable to negate the effect of such behavior on a jury.\textsuperscript{153}

\textsuperscript{149} Id. at 748.

\textsuperscript{150} Id. at 748-49.

\textsuperscript{151} The Federal Rules of Evidence provide that "[e]vidence which is not relevant is not admissible." FED. R. EVID. 402 (1991).

\textsuperscript{152} The Federal Rules of Evidence provide that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802 (1991).

\textsuperscript{153} An excerpt from the GENDER AND JUSTICE REPORT describes a trial in which a woman attorney was forced to turn over much of her case to her co-counsel because the judge refused to entertain any objections or arguments from the woman attorney. Given the judge's attitude, the woman attorney had no choice and it was the only way the client could be well represented. GENDER AND JUSTICE REPORT, supra note 1, at 116.
Title VII regulations similarly reflect this concern. Employees are protected from discriminatory behavior because under the controlled environment of the work place, the detrimental effect of such behavior is significant and because individuals' abilities to defend themselves against harassment and discriminatory behavior is often constrained.

Often a rationale for rejecting paternalism as a justification for the regulation of speech is that the state has no duty to protect individuals from discriminatory words—recipients of such commentary are overly sensitive. In a legal setting, however, discriminatory conduct has an impact on all who witness it, including jurors who may ultimately base their opinions on the credibility of the litigants and witnesses. Thus, the state has a duty to proscribe any conduct that has the effect of unfairly undermining the credibility of litigants or witnesses, or detracting from the merits of a particular case. The effect of discriminatory tactics goes far beyond the sensitivities of those who are the object of such behavior. Furthermore, there is a public expectation that legal settings, both public and private, should be unbiased and neutral toward the participants. The state has a compelling interest in providing an environment where all participants in the judicial process can proceed free of the baggage associated with discriminatory behavior.

Similarly, the government's interest in "promot[ing] efficiency and integrity in the discharge of its official duties," is the cornerstone of public trust analysis of speech regulations. Under a public trust analysis, the Court has held that those charged with the public trust can be asked to limit expression that undermines their ability to do their jobs. Using the public trust analysis, the Supreme Court has justified speech regulations in school, work place settings, and even the judicial system.

154. See Riccio, supra note 142, at 1.
155. Id.
158. Schware v. Board of Bar Examiners, 335 U.S. 232 (1957) (attorney discipline for expression of particular views held constitutional because it bore a rational connection to attorney's fitness to practice law).
Connick v. Myers\textsuperscript{159} illustrates public trust analysis employed by the Court when the suppression of speech involves those charged with the public trust. In Connick, the respondent, a former Assistant District Attorney in Louisiana, alleged that she had been wrongfully terminated for exercising her right to free speech, because she prepared an office questionnaire “concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.”\textsuperscript{160}

The Court, upholding the termination, employed a balancing test “between the interests of the [employee], as a citizen, . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”\textsuperscript{161} The balancing test, identified by the Court in Connick, “requires full consideration of the government’s interest in the effective and efficient fulfillment of its responsibilities to the public.”\textsuperscript{162} The Court explained: “To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.”\textsuperscript{163}

A primary function of the judicial system is to deliver fair, equal, and effective justice. This goal is undermined by discriminatory behavior. To promote fair and effective justice, the state must have wide latitude in fashioning rules to eliminate discriminatory behavior. Although public trust analysis is generally applied to public employees, its principles can be applied to rules of professional conduct governing both public and private attorneys. All attorneys are officers of the court and thus represent state interests in the judicial system.

Three recent decisions involving attorney disciplinary proceedings further illustrate the substantial weight accorded the state’s interest in the fairness of a particular proceeding and the public confidence in the judicial system. The rulings, from the United States Supreme Court and the highest courts of New York and Missouri, uphold a state’s right to limit attorney speech or conduct when that conduct threatens to prejudice a

\textsuperscript{159} 461 U.S. 138 (1983).
\textsuperscript{160} Id. at 141.
\textsuperscript{161} Id. at 142.
\textsuperscript{162} Id. at 150.
\textsuperscript{163} Id. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).
particular proceeding or to "bring the Bench and Bar into disrepute." 164

In *Gentile v. State Bar of Nevada*,165 the majority concluded that state bar associations' professional conduct rules may prohibit extra-judicial statements by trial lawyers that pose a "substantial likelihood of material prejudice" to a trial.166 The Court held that the First Amendment rights of attorneys are limited by the power of the courts to regulate attorney conduct to ensure a fair trial.167

In *In re Westfall*,168 the Missouri Supreme Court upheld a reprimand in an attorney discipline proceeding issued to a prosecuting attorney who called a judge's ruling "illogical" and "a little bit less than honest."169 Among other infractions, the court upheld a finding that Westfall had violated Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice."170 At his trial, Westfall asserted that, as applied, Rule 8.4 violated his First Amendment right to free speech and his listeners' right to know.171 In upholding Westfall's reprimand and rejecting his First Amendment arguments, the court noted that "[l]awyers are an integral part of and integral to the administration of justice. . . . [L]awyers do not stand in the shoes of ordinary citizens."172 As such, the court found a sufficient state interest in the regulation of attorney speech and conduct to uphold the reprimand.

Finally, in *In re Holtzman*,173 New York's highest court upheld a letter of reprimand issued under New York's *Code of Professional Responsibility* DR 8-102 and 1-102(A)(6). Section 1-102(A)(6) provided that "a lawyer shall not [e]ngage in any conduct that adversely reflects on [the lawyer's] fitness to prac-

166. *Id.* at 2725.
167. *Id.* at 2722. A different majority ultimately found that Nevada's application of the material prejudice rule was unconstitutionally vague, not for its restrictions on speech, but because Nevada included a safe harbor provision that permitted a lawyer to make statements "without elaboration" of the general nature of the claim or defense. *Id.* at 2731. The Court reasoned that "general" and "elaboration" are "classic terms of degree" that provide no real guidance to the lawyer wishing to make a public statement. *Id.*
168. 808 S.W.2d 829 (Mo. 1991).
169. *Id.* at 831.
170. *Id.* at 839.
171. *Id.* at 833.
172. *Id.* at 836.
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The court ruled that the language of the rule was not impermissibly vague and explained that "the guiding principle must be whether a reasonable attorney . . . would have notice of what conduct is proscribed." As examples of prohibited conduct, the New York court pointed to acts that "serve to bring the Bench and Bar in disrepute," and acts that "tend to undermine the public confidence in the judicial system."

In sum, Gentile, Westfall, and Holtzman demonstrate that "[b]road standards governing professional conduct are permissible" and wise. The proposed rule falls well within the bounds of permissible state regulation and furthers a substantial state interest: the fair and effective administration of justice.

B. Title VII Analogy

The Title VII and Washington anti-discrimination analogies to the proposed rule, used in Section III to explain the proposed rule's scope and application, further serve as models to support the constitutionality of the proposed rule. Although both Title VII and Washington's anti-discrimination statute potentially intrude on harassers' free speech rights, these statutes are not typically viewed as mandated speech restrictions on free speech. No Title VII claim has been defended on First Amendment grounds. Thus, "Title VII may be seen both as evidence that intrusions on such speech are not unprecedented and as a viable ideological model for the" regulation of discriminatory or harassing behavior in judicial system. This section explores three similarities between the workplace and the judicial system that justify affording the same protected status to participants in legal proceedings that is currently afforded to employees.

First, Title VII elevated the workplace to protected status when harassment interferes with work performance, because

174. Id. at 31. This disciplinary provision is now DR 1-102(A)(7).
175. Id.
176. Id.
177. Id.
179. See Lange, supra note 6, at 120.
180. Id. at 121 n.93.
181. Id. at 120.
182. Much of the methodology used in this section parallels the approach taken by Ellen E. Lange, supra note 6.
Congress found that the quality of an individual’s employment represents a substantial governmental interest worthy of protection. Arguably the importance of fair and impartial legal proceedings warrants a similarly protected status.

Second, Title VII protects the work environment because this environment is such that escape from harassing or discriminatory behavior is difficult and the consequences are often severe. The loss of income, self-esteem, success, and the difficulty in relocating that may ensue when an individual attempts to escape racial or sexual harassment in the workplace are often prohibitive and may force an individual to remain in the oppressive environment. Victims of harassing or discriminatory behavior in the legal system face similar constraints. Attorneys, litigants, and witnesses who are subjected to discriminatory trial tactics or behavior are often unable to respond or negate the effect of such behavior on a jury.

Finally, Title VII regulates behavior in discrete and definable environments. "The boundaries of the workplace are identifiable . . . [e.g.,] a job description, an office building, or a specific relationship." Similarly, the proposed rule would regulate behavior within limited and definable boundaries, e.g., courtrooms, judges’ chambers, law offices, bar activities, and other professional meetings. Because the proposed rule is limited in scope to conduct in connection with a lawyer's professional activities, the "risk of overintrusiveness is limited by the nature of the setting." The rule thus balances the state's interest in regulating the profession against an individual attorney's First Amendment free association and speech rights. Just as employers and employees under Title VII are free from its regulation once outside the work place, attorneys remain free to participate in organizations or activities that promote ideologies inconsistent with the rule so long as those activities remain unconnected to their participation in the judicial system.

V. CONCLUSION

Logically, what Title VII has achieved in the workplace should also be achieved in the legal environment. The value

183. See Lange, supra note 6, at 127-28.
184. Id. at 127.
185. Id.
186. Id.
and necessity of fair legal proceedings warrant giving the courtroom the same protected status as the workplace. The protective rights accorded the individuals in the workplace—protection from harassment and discrimination—ought to be accorded to participants in the legal system.\textsuperscript{187}

The persisiveness and severity of harm due to harassing and discriminatory tactics by attorneys are amply documented and illustrate the need for corrective measures. The Task Force findings further demonstrate the inability of the current \textit{Washington Rules of Professional Conduct} to adequately address these tactics. Some judges continue to permit openly sexist, racist, and derogatory conduct in the courtroom,\textsuperscript{188} and many attorneys view sexual and racial trial tactics as legitimate forms of advocacy. Although the anecdotal evidence of such behavior exists, attorneys are rarely disciplined for such offensive conduct because the current rules do not set a clear standard of minimally acceptable conduct with respect to the treatment of other attorneys or participants in the judicial system.

A mandatory professional conduct rule specifically forbidding harassing or discriminatory behavior would further four important functions.\textsuperscript{189} First, such a provision would demonstrate that the Washington Supreme Court and the Washington State Bar Association are committed to eliminating the effects of bias on the state judiciary. Lawyers wield tremendous power in our society. Attorney behavior can set or modify societal norms.\textsuperscript{190} Thus, "mobilizing lawyers . . . to combat

\textsuperscript{187} Id.

\textsuperscript{188} According to Gender and Justice Task Force survey respondents, "judges, counsel, or others intervene only in a minority of cases where gender-biased behavior occurs." \textit{Gender and Justice Report, supra} note 1, at 132. One respondent writes, "The judge was very condescending to a young female witness of mine. His attitude was blatant and offensive." \textit{Id.} at 131. Not all judges, however, permit or participate in such conduct. Another survey respondent noted that "[a] witness and examining counsel repeatedly referred to a mature woman as 'girl' and finally 'the honey'. The judge instructed both male participants to use appropriate, respectful language when discussing the woman." \textit{Id.} at 133.

\textsuperscript{189} See Koustenis, \textit{supra} note 19, at 167 (supporting mandatory conduct rules barring discriminatory trial tactics).

\textsuperscript{190} In an editorial supporting the adoption of the proposed conduct rules for attorneys and judges in Michigan, attorney Victoria Roberts describes the actions taken by the Associated Press Sports Editors to combat discriminatory membership policies at golf clubs as an example of the power of a group to attack invidious discrimination through cohesive group action. Roberts explains:

[The Associated Press Sports Editors] urged the Professional Golf Association (PGA) to take a leadership role in eliminating discriminatory membership
invidious discrimination could have a tremendous impact.”191

Second, the rule would have an enormous educative value, both inside and outside the legal profession. While some attorneys intentionally engage in conduct designed to reinforce stereotypes to play to particular biases, others are simply unaware of the effect such behavior has on all who are exposed to the conduct. The significantly larger percentage of women and minority survey respondents who reported that they perceived bias in the Washington courts suggest that some attorneys are not aware of the impact of conduct that reinforces stereotypes or perpetuates bias. The proposed conduct rule would call attention to the effects of such behavior and force attorneys to think about what conduct is appropriate and reasonable in a legal setting.

Because non-attorneys are exposed to and are affected by attorney conduct, others participating in legal proceedings would also be influenced by such a rule. If non-attorney participants see lawyers and judges treating women and minorities with respect and dignity, they are more likely to also engage in the same behavior and to question the appropriateness of any other type of treatment. Women and minority attorneys who would no longer be forced to defend their gender or their race could more easily become societal role models and more effective advocates for their clients.

Additionally, “a mandatory provision would make it much easier to address the subject in law school legal ethics courses.”192 The Gender and Justice Report calls for the development of “required curriculum instruction on the existence of and effects of gender [and race bias] in the courts and in the

policies throughout the country by making open membership policies a prerequisite for hosting a championship. This action followed a statement by the founder of the all-white Shoal Creek Golf Club in Alabama, the site of the PGA Open in August [1990], that he would not be pressured into accepting blacks.

Faced with a media and advertising boycott of the PGA, the Shoal Creek founder was, in fact, pressured into accepting a black member. More significantly, the PGA revamped its golf course selection criteria to give the same weight to membership policies that it accords to such factors as the quality of the golf course and the course's ability to handle spectators and accommodate an event of the magnitude of the PGA.


191. Id.

192. Koustenis, supra note 19, at 167.
Students exposed to the proposed conduct rule would enter the profession aware of the problem of bias in the Washington courts and aware of what behavior is expected of them.

Third, the proposed rule gives the Washington State Bar Association the tool it needs to combat invidious discrimination. Because of the destructive effect that discrimination has on the integrity of the judicial system, the Bar's disciplinary procedures are the appropriate mechanism to address and eliminate the discriminatory behavior of lawyers as lawyers. Furthermore, "such a provision would assist [victims of harassing or discriminatory behavior] who wish to file complaints."194

Finally, for all the reasons mentioned above, adopting such a rule makes progress toward the eradication of bias instead of merely accepting the status quo.

In sum, the Washington Supreme Court should join the courts of Minnesota, New Jersey, New York, Rhode Island, and Vermont, and "commit itself unambiguously to the elimination of all manifestations"195 of harassing and invidiously discriminatory behavior by attorneys. The Washington Supreme Court should adopt proposed Rule 8.4(g).

"Injustice anywhere is a threat to justice everywhere."

—Martin Luther King

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193. GENDER AND JUSTICE REPORT, supra note 1, at 138.
194. Koustenis, supra note 19, at 167.