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Should Ethical Rules Forbid Discrimination in Law Practice?

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Lectured by

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Regulation of Lawyers
Problems of Law and Ethics

Tenth Edition

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New York University School of Law

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6. *Can a Lawyer's Gender, Religion, or Race Create a Conflict?*

Karen Horowitz's Dilemma

Karen Horowitz

"I'm a 30-year-old fifth-year litigation associate at a large midwestern law firm. I went to law school at Berkeley, clerked for a Ninth

Circuit judge, then started at my current firm. Because it is relevant to what I'm about to raise, you also have to know that I'm Jewish. I'm married and have two kids. My husband's a chemist.

"I have learned a lot at my job. I have always been treated with respect and courtesy. I work with all the litigation partners. That is not to say I like everyone here equally, but that's another matter.

"Two years ago I began working on a very complicated civil case, brought by a certain southern state in state court, arising out of an alleged violation of state banking laws. The defendant is a bank holding company that our firm represents on many matters. I worked on the pleadings, discovery, evidentiary issues, motions to dismiss and for partial summary judgment, and on a challenge on federal preemption grounds to the constitutionality of the statute under which our client is charged. We won some, and we lost some.

"The case was supposed to be tried in the state capital, a medium-sized city, but it was recently moved to a rural county that is not, to put it mildly, renowned for its enlightened attitudes — religious, gender, or racial. There is said to be hostility to what we might call "difference," a category that supposedly includes me, and also to northerners, which does include me.

"Last week Blair Thomas, the head of our litigation department, told me that I would not be going down as part of the defense team. The reason: They think a Jewish woman lawyer on the defense team could prejudice the jury against our client. I was told that the client concurred in this judgment. They said it was bad enough that some of the lawyers are northerners — we also have local counsel — we couldn't afford to complicate matters by bringing me into the courtroom. I must say, Blair was quite candid. He could have made some excuse — they needed me elsewhere, for instance. I appreciate that, I guess. He said I was a valuable associate whose work was appreciated and would be recognized at bonus time and with other important assignments. But the firm had a responsibility to its client, which came first.

"Well, I think the firm has a responsibility to me too, and that's a responsibility not to exclude me from an important case — on which I've already been working for two years — because of my sex or religion. If clients don't like it, the firm shouldn't represent them. It used to be that businesses justified discrimination against this group or that by pointing to their customers. 'It's not us,' they'd say, 'we're not prejudiced. But our customers won't work with you-name-it, so what can we do?' Or, 'We can hire you, but we can't let you interact with the clientele.'

"Well, if you ask me, this is no different. The firm tells me it's not prejudiced, even its clients aren't prejudiced, it says, but someone else is and so my career gets sidetracked.

"I don't know what I'm going to do about this. I don't know what I can do. But I don't buy the 'our client comes first' explanation."

J. Blair Thomas

"I know how Karen feels. It stinks. No question about it. We would never tolerate such treatment here for any other reason but this one — our responsibility to our client. Make no mistake about it. It's not the firm that wants to exclude Karen, or even the client, which has worked with Karen on this matter and other matters for years. But we can't ignore where we're going to have to try this case. The demographics of this county are astonishing. Most of the jurors will be fundamentalist rednecks, and the judge isn't much better. If these people don't belong to some hate group or supremacist organization, they probably have at least one friend who does.

"Also, this case can cost our client more than $500 million if it goes the wrong way. Look what happened to Texaco before a local jury in Texas. They had to settle for $3 billion. I think Karen has to be reasonable. The fact is, there are situations — other cases, other states — where we'd *want* her in the courtroom because we'd expect to do better if we had a woman or a Jewish lawyer on our team. The same goes for members of other groups — racial, religious, you name it. Some cases, I want a minority right up there. Other cases, I want a woman. Other cases, I want a younger lawyer or an older lawyer, depending. Gosh, there are some courtrooms a client would have to be crazy to send in an obvious Yankee WASP like me. This courtroom is a good example. I'm not going either.

"A good lawyer structures his or her trial team to appeal to the jury, or at least not to alienate it. You know it's the same thing when a firm hires local counsel. Those guys down there don't do anything but sit around, smile at the jurors, and talk in the local idiom a couple of minutes a day. Why do we — why does anyone — hire them? And we all do. It's not because they know the law. It's to curry favor with the locals.

"The judge and jury are going to decide this case. We have to appeal to them whether we like their biases or not. I find those biases repulsive. But I don't count. I'm a lawyer with a client who is at serious risk. My client is my only concern, whether it's a bank or a death-row inmate. Karen has to understand that. Her day will come in other matters. Her career hasn't been sidetracked at all. No one blames her for not being able to continue on this case, and no decision is going to be made based on her religion or the fact that she's a gal or anything else except the quality of her work."

How Roger Baldwin Picked a Lawyer

Is Karen putting her own professional interest ahead of the interest of her client? Is her "problem" a "conflict" within the meaning of the rules? At the very least, isn't it disturbing that Blair might be right (I say "might be"), because despite efforts to eradicate bias in public life, whether on the basis of religion, race, sex, sexual orientation, or other factors, it might still be advisable to consider possible juror bias in making trial assignments like the one here? Is it?

I used to discuss this problem at bar events. My law school even hired actors to record the parts of Blair and Karen on video. Let me share one story that has troubled me for years.

At a Chicago event, a lawyer in the audience said he represents plaintiffs injured in motorcycle accidents. (We do live in an age of specialization.) The defendant was a manufacturer of motorcycles. On the first day of jury selection, an older Korean-American woman was chosen. The next day, the defense lawyer showed up with a male Korean-American associate at counsel's table. This associate (and the lawyer telling the story said he assumed it was an associate, not a paralegal or an actor) had never appeared in any of the pretrial work, nor was his name on any papers, for the two years the case was pending. The lawyer believed that defense counsel brought him in just to sit at counsel table as close to the Korean-American woman as the position of the defense table allowed. If so, do you have any problem with that? Is there anything that can be done about it even if you do?

Consider the perspective of Roger Baldwin, founder of the American Civil Liberties Union, an organization committed to elimination of bias. (This information comes to us in a portrait of Baldwin by Peggy Lamson.*) Baldwin was arrested in a labor demonstration in Patterson, New Jersey, in the fall of 1924. Citing a 1796 statute, the indictment charged that Baldwin "unlawfully, riotously and tumultuously did make and utter great and loud noises and threatenings" with the intent to "commit assault and battery upon the police officers and . . . to break, injure, damage and destroy and wreck the city hall." Baldwin was convicted by the trial judge and sentenced to six months in jail. New York lawyer Samuel Untermyer handled the appeal without fee, but the conviction was affirmed.

> One more possible appeal remained, to the Court of Errors, the highest tribunal in the state. At this point Roger and all the ACLU lawyers came to a conclusion that Mr. Untermyer would have to be replaced. "They all said,

* Peggy Lamson, Roger Baldwin, Founder of the American Civil Liberties Union: A Portrait 160-162 (1976).

> including our Jewish lawyers, that a New Yorker, a rich Jew like Untermyer, would certainly get licked pleading before the Court of Errors in New Jersey."

Lamson then pursued the issue with Baldwin:

> "Does that mean you can't conceive of a situation in which a black lawyer would defend, let's say, a Mormon who was prevented from holding a public meeting?"
>
> "No, I can't conceive of such a situation."
>
> "Then do you think Mr. Redding [an ACLU cooperating lawyer] or any other black lawyer would be less effective in such a case *just because* he was black?"
>
> "Yes, of course, that's what I think. He'd be less effective unless he was extraordinarily good. Because he'd have to be extraordinarily good to overcome a jury's prejudice."
>
> "Whereas a white lawyer would just have to be average good, is that it?"
>
> "Not necessarily," Roger said calmly. "It depends on the prejudice. For instance, we wouldn't use a New York lawyer in Alabama, and we wouldn't use a southern lawyer, particularly one with a strong accent, in a northern court. In New Jersey we all decided not to use a Jewish lawyer when we knew prejudice against him existed. And you have to remember that because of that tactic we won the Patterson, New Jersey, case, which was far more of a victory than just keeping me out of jail."

School District of Abington Township v. Schempp, 374 U.S. 203 (1963), was an important Supreme Court opinion on the constitutionality of school prayer. Ellory Schempp was a high school student in Abington Township, a Philadelphia suburb. In 1957, he wrote to the ACLU's Philadelphia chapter. As a Unitarian, he wrote, he felt uncomfortable when the Lord's Prayer and the Bible were read each day in school.

According to U.S. District Judge Louis Pollak, Bernard Wolfman, a partner at a Philadelphia firm and a member of the ACLU, interviewed Ellory and urged the ACLU to take the case. It agreed. But as Judge Pollak wrote in a memorial to Henry Sawyer, Wolfman (later a Harvard law professor) did not argue the case. Instead, the work fell to Sawyer, then a young partner at another Philadelphia firm.

> The Board's decision to provide counsel for the Schempps, however, did not mean that Wolfman would be that counsel. Wolfman decided that for him, as a Jew, to represent the Schempps in a challenge to Bible reading and recitation of the Lord's Prayer merely would add unnecessary and probably detrimental baggage to what clearly would be a controversial and, in many quarters, an unpopular cause.

Louis Pollak, Lawyer Sawyer, 148 U. Pa. L. Rev. 25 (1999).

E. HARDBALL AND INCIVILITY

> "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications; I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged. . . ."
>
> —From the Oath of Admission to the Florida Bar

> A DeKalb County State Court judge has slapped Sutherland, Asbill & Brennan with more than $175,000 in sanctions after finding its attorney tried to "litigate [the] plaintiff to death" in a contract dispute.
>
> —Daily Report, Aug. 22, 2014

"Hardball" is a late addition to the bar's lexicon and the debate about its behavior. "Hardball" tactics in litigation and elsewhere are seen to betoken a decline in professionalism. The opposite of "hardball," apparently, is not "softball," but "civility." Committees and commissions nationwide have called for a "return" to civility, the assumption being that it was once a place lawyers

* The court's opinion recounts that discovery in a 1979 lawsuit against a BASF predecessor, represented by Cahill, revealed contamination of the talc. The claim settled with a "confidentiality clause that prohibited the . . . parties from discussing the case or sharing the evidence. Much of the . . . evidence has yet to be seen again." Confidential settlement agreements that suppress information about public danger have inspired proposals to forbid them. See chapter 10A.

dwelled. See the Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, reprinted at 143 F.R.D. 441 (1992). Lawyers can be disciplined for lack of civility. In re White, 707 S.E.2d 411 (S.C. 2011) (violation of Rules 4.4(a) and 8.4(e)—equivalent to 8.4(d)—and suspension ordered where in letter lawyer referred to Town Manager as having "no brains," appeared to have no "soul," was "insane" and "pigheaded").

The *Mullaney* opinion below imposes monetary sanctions for rather uncivil gender-biased conduct at a deposition. References to race, though rare today, are not unknown and can also lead to sanctions. See Thomas v. Tenneco Packaging Co., 293 F.3d 1306 (11th Cir. 2002) (lawyer censured for filing documents "strewn with generalizations and conclusory comments that paint opposing counsel as a racist bigot and thus impugn his character").

Behavior need not be sexist or racist to invite judicial criticism. In Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994), the court chastised famed Texas lawyer Joe Jamail for the manner in which he defended a deposition, held in Texas but incident to a Delaware court contest for control of Paramount. One example of Jamail's deposition statements: "Don't 'Joe' me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon." (The meaning of the last comment has always escaped me. It must be a Texas thing.) Jamail was not a member of the Delaware bar, so the court invited him to explain his conduct. Jamail responded: "I'd rather have a nose on my ass than go to Delaware for any reason." Tex. Law., Feb. 14, 1994, at 11. (If Jamail appears rather independent, recall that he was the lawyer who got a $10 billion judgment against Texaco for his client Pennzoil and ultimately settled for $3 billion. Jamail was representing Pennzoil for a contingent fee.)

Incivility can be toward the court as well as counsel. In my "What Got Into Them?" file is Taboada v. Daly Seven, Inc., 636 S.E.2d 889 (Va. 2006). After losing an appeal, lawyer Barnhill's petition to rehear "described this Court's opinion as 'irrational and discriminatory' and 'irrational at its core.' He wrote that 'George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to reach such an absurd result.'" (He didn't invoke Kafka but others do.) For reasons that escape me, Barnhill included the following line: "'[I]f you attack the King, kill the King; otherwise the King will kill you.'" Obviously, Barnhill was very angry. He probably broke Rule # 1, which says: NEVER SEND ANYTHING YOU WROTE WHEN VERY ANGRY. When the court told Barnhill to show why he should not be sanctioned, he sensibly hired a lawyer and expressed "his apology and sincere regret." The episode was aberrational. He would not file any more briefs until another lawyer reviewed them. The court, however, said the conduct was "very serious" and suspended Barnhill's right to practice before it for one year.

I could fill quite a few of this book's pages with examples of male lawyers behaving badly toward female lawyers, witnesses, opposing clients, judges, and even their own clients. Why does this happen? Possibilities include (a) it's strategic—the aggressors believe that it will rattle the women;

(b) it's instinctive — this is just the way these men treat women, nothing personal; (c) it's generational — the offenders are mainly older lawyers who are threatened by women professionals; (d) it's a product of confusion — the offenders don't know how to talk to women as equals; (e) something else. What do you think may have been the explanation in the next case?

MULLANEY v. AUDE

126 Md. App. 639, 730 A.2d 759 (Ct. Spec. App. 1999)

ADKINS, JUDGE.

This case involves the adversarial use of gender bias in the discovery process. James L. Mullaney, Esq., and Allan E. Harris, Esq., appellants, appeal from the imposition . . . of attorneys' fees incurred in obtaining a protective order against them. . . .

FACTS AND PROCEDURAL BACKGROUND

Betty Sue Aude, appellee, brought a tort action for fraud, negligence, intentional infliction of emotional distress, and battery against Mr. Mullaney, alleging that he infected her with genital herpes. Susan R. Green, Esq., and Gary S. Bernstein, Esq., represented Ms. Aude. Mr. Mullaney was represented by Mr. Harris and Benjamin Lipsitz, Esq. After a trial, the jury found that Mr. Mullaney negligently infected Ms. Aude with genital herpes, but that Ms. Aude was contributorily negligent. Accordingly, judgment was entered in favor of Mr. Mullaney on December 10, 1996.

APPELLANTS' DEPOSITION CONDUCT

During the course of pre-trial discovery, Ms. Aude was deposed. At the deposition, she was asked about a document that she failed to bring with her. As Ms. Aude was leaving the room to retrieve that document, Mr. Harris remarked that she was going to meet "[a]nother boyfriend" at the car. Ms. Green and Mr. Bernstein quickly told Mr. Harris that his comment was in poor taste and asked him to refrain from making further derogatory comments. The following ensued:

Mr. Mullaney: It's going to be a fun trial.
Mr. Harris: It must have been in poor taste if Miss Green says it was in poor taste. It must have really been in poor taste.
Ms. Green: You got a problem with me?
Mr. Harris: No, I don't have any problem with you, babe.
Ms. Green: Babe? You called me babe? What generation are you from?
Mr. Harris: At least I didn't call you a bimbo.
Mr. Lipsitz: Cut it out.
Ms. Green: The committee will enjoy hearing about that.
Mr. Bernstein: Alan, you ought to stay out of the gutter. . . .

Appellants next contend that Mr. Harris's comments to Ms. Green at Ms. Aude's deposition were not sexist behavior or disruptive to the discovery process. We unequivocally reject this assertion, and with this decision hope to make it crystal clear how this Court views the exhibition of gender bias by lawyers in the litigation process.

A. STRATEGIC NAME CALLING AND BIAS

The absence of civility and respect exhibited by lawyers towards one another has been for years the subject of significant concern for bar and bench leaders. In the words of Judge Paul L. Friedman of the United States District Court for the District of Columbia:

> Although the "modern age" of the legal profession has witnessed progress in opening its doors wider to women and minorities and others who were previously excluded, this age has also opened its doors to the "Rambo litigator" which has spawned a generation of lawyers, too many of whom think they are more effective when they are more abrasive. . . .

Some attorneys engage in actively undermining another attorney's case by using gender. . . . Mr. Harris's behavior with respect to Ms. Aude and her counsel at the deposition was a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of "sexual [deposition] tactics." With respect to the effect on the profession, we think Judge Waldron stated it well when he said: "These actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors."

Appellants refused to acknowledge, in their brief or at oral argument, that it was derogatory for Mr. Harris to address Ms. Green as "babe," during a deposition. They unblushingly ask this Court to construe Mr. Harris's use of the term "babe" as a term of endearment because it is "a nickname for 'Babe' Ruth, a towering athletic figure and an American folk hero, and 'Babe' Didrickson, an outstanding and multi-talented female athlete. . . ." They contend that the term "indicates approval, [and] is a sign of approbation." Thus, they say, Mr. Harris's "calling someone 'babe' would to him not in any way be a derogatory act, but would at least imply a commendatory opinion of the person so addressed." We find this argument singularly unpersuasive. If Ms. Green, when up to bat at the annual Bar Association softball tournament, hit a home run, and in that context Mr. Harris chose to call her "Babe," this argument *might* be plausible. In the context of this case, however, we can only characterize the argument as disingenuous.

Lest there be any doubt about Mr. Harris's intended meaning when he addressed Ms. Green as "babe," we need look no further than the transcript of the deposition. When Ms. Green asked him to refrain from the use of that

term, Mr. Harris responded: "At least I didn't call you a bimbo." To our knowledge, neither Babe Ruth nor Babe Didrickson was endearingly addressed as "bimbo." . . .

If Mr. Harris, by the use of such tactics, can evoke in Ms. Green any emotional response that puts her off-balance, makes her defensive, makes her feel inadequate, or just plain angry and distracted, he has succeeded with his strategy. In so doing, he likely has interfered with the discovery process. While strategy and tactics are part of litigation, and throwing your adversary off-balance may well be a legitimate tactic, it is not legitimate to do so by the use of gender-based insults.

Mr. Harris defends his action by including in the record copies of advertisements in which Ms. Green held herself out to be a "hardball" attorney. At oral argument, counsel suggested that if she advertises herself as "hardball" she should expect some "rough and tumble"[7] experiences during the course of litigation. This incident, he posits, was simply that. Mr. Harris and his counsel widely miss the mark with this argument. There is no doubt that with our adversarial system of justice, lawyers who choose to litigate must withstand pressure, adversity, and the strategic maneuvers of their opponent. Fortunately, however, we have long passed the era when bias relating to sex, race, religion, or other specified groups is considered acceptable as a litigation strategy. The Maryland Code of Judicial Conduct mandates that "[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."* . . .

We think that the trial court, in finding that Mr. Harris's conduct exhibited gender bias in a deposition, acted in a manner consistent with the directives of this Canon. . . . The imposition of sanctions under these circumstances reinforces the commitment of the judicial system to impartiality. . . .

7. The term "rough and tumble" is a paraphrase of the words used by counsel at argument.

* [Today, the ABA's Code of Judicial Conduct is broader. See Rule 2.3(C) and (D). — Ed.]

e. Discrimination in Choice of Clients

The incident recounted in the following decision generated much debate in the legal academic community. Excerpts from one law review article, part of a symposium, follow. The decision was issued by a single commissioner of the Massachusetts Commission Against Discrimination (MCAD) and affirmed by the full commission. The commission enforced a state law making discrimination based on gender in the provision of services illegal. Do you believe the decision was correct or do you side with the criticisms in the excerpts that follow?

STROPNICKY v. NATHANSON

Massachusetts Commission Against Discrimination (Feb. 25, 1997)

I. PROCEDURAL HISTORY . . .

II. FINDINGS OF FACT

1. Complainant, Joseph Stropnicky, is a white male residing in Beverly, Massachusetts. . . .
3. During the summer of 1991, Complainant was in the process of executing a divorce settlement agreement with his wife of eighteen years.

He testified that his role throughout his marriage was non-traditional. During the early years of his eighteen year marriage, Complainant worked to support himself and his wife while she pursued a career in medicine. Once Complainant and his wife had children, he stayed home serving as homemaker and caregiver for seven years. After his second child's third birthday, he returned to school and acquired a teaching degree in biology. At the time of their divorce, Complainant was earning one-tenth of his wife's salary. . . .

5. On or about July 21, 1991, Complainant phoned Respondent's office seeking to retain Attorney Nathanson to review his draft separation agreement. Nathanson's secretary informed him that Nathanson did not represent men in divorce proceedings. Complainant insisted on speaking with Nathanson and demanded that she return his call. . . .
6. Nathanson returned Complainant's phone call and explained that she would not review Complainant's separation agreement because she only represented women in divorce proceedings. She maintained this position even after Complainant explained that the circumstances surrounding his divorce were those traditionally associated with women in divorce proceedings.
7. Following their telephone conversation, Complainant sent Nathanson a letter stating that her "women only" divorce practice was discriminatory. On July 24, 1991 he filed a discrimination complaint with this Commission. . . .
10. Nathanson testified that she represented only women in divorce cases, in part, because she sought to devote her expertise to eliminating gender bias in the court system. She stated that the issues that arise in representing wives in divorce proceedings differ from those involved in representing husbands. By example, she noted that wives' attorneys emphasize the value of homemaker services and the limited future earning potential of homemakers re-entering the work force, while husbands' attorneys tend to minimize these issues. . . .
12. The issues of alimony, child support, and distribution of assets faced by Complainant at the time of his divorce were those traditionally associated with wives in divorce proceedings.
13. Nathanson testified that she needs to feel a personal commitment to her client's cause in order to function effectively as an advocate, and that in family law she has only experienced this sense of personal commitment in representing women. She testified that her female divorce clients derive a specific benefit from her limited practice. They feel comfortable sharing their anxieties and concerns with an advocate whom they trust to be wholeheartedly as well as intellectually committed to their interests. Nathanson believes that her practice of advancing arguments only on behalf of women enhanced her credibility with judges she appeared before in the family law courts.

14. Nathanson testified that all of her potential clients undergo a screening process. She does not make a final decision about whether to represent a particular client in divorce proceedings without having spoken at length to the client about the matters in controversy and conferring with her partners. She would not represent women whose positions in divorce litigation were repugnant to her personal values. She testified that in other legal proceedings, not involving controversies between men and women, she has no ethical problem with representing men.

III. Conclusions of Law

A. JURISDICTION . . .

B. LIABILITY . . .

Respondent does not dispute denying legal representation to Complainant solely on the basis of his gender. She does assert that it is not unlawful discrimination to limit one's professional practice to representing traditionally disadvantaged groups, including women. While I make no judgments about Respondent's motives in choosing to represent only women in divorce matters, I must conclude that the law does not allow her to deny service based solely on a potential client's gender.

By this ruling, I do not intend to regulate the areas of practice an attorney may choose to pursue. Nor do I intend to undermine those professional considerations attorneys traditionally rely upon in making business decisions. I conclude, simply, that an attorney or law office holding itself out as open to the public may not reject a potential client solely on the basis of gender or some other protected class. Thus, *e.g.*, Respondent may deny representation to a handicapped individual who wishes to pursue a discrimination claim based on disability on the grounds that the attorney has no expertise in that area of the law, but not because he or she chooses not to represent the handicapped.

This ruling does not impinge upon Nathanson's right to devote her practice to furthering the cause of women as she defines that cause. Had Nathanson concluded that the issues raised by Complainant's divorce action were not consistent with her specialty and area of interest and rejected Complainant on that basis, rather than solely because he is a man, the focus of this inquiry would be different. However, Nathanson never inquired into the nature or circumstances of Complainant's divorce case and stated only that she did not represent men in divorce cases. Had this case involved the rejection of a female or African-American on similar grounds it would appear more starkly to be a violation of the spirit and intent of [the statute]. Though this action involved discrimination against a male, I conclude that it constituted unlawful discrimination. . . .

[Nathanson was ordered to pay Stropnicky $5,000.]

Joan Mahoney

USING GENDER AS A BASIS OF CLIENT SELECTION: A FEMINIST PERSPECTIVE

20 W. New Eng. L. Rev. 79 (1998) . . .

There is no question that Ms. Nathanson discriminated, in that she chose her clientele based on gender. The question before the MCAD, and being discussed in this Symposium, is whether that particular form of discrimination is, or ought to be, unlawful. . . .

II. Normative Standards: The Feminist Approach

[A]ssuming that the law should apply at all, most feminists presumably would object to the practice of a lawyer who restricted his or her clientele to men, just as we would be offended by a lawyer who refused to represent people of color. But one of the questions this case raises is the issue of what we might call parity in antidiscrimination law, otherwise known as the test of whether what's good for the goose is good for the gander.

Virtually no one believes in absolute parity; that is, that women should always be treated precisely the same as men and that people of color should always be treated precisely the same as whites. At a minimum, when acts of discrimination by government or industry have been demonstrated, remedial action to redress that wrong, even if it temporarily gives an advantage to employees or job applicants of color is acceptable even to the most conservative members of the Supreme Court. Many people would go further than that and allow remedial action to achieve a more integrated work place or educational institution even without a showing of past purposeful discrimination.

On the other hand, many people, including some feminists, would take the position that other than redressing past discrimination, or imbalances in the representation of women and people of color in institutions, everyone should be treated as similarly as possible. That position almost certainly would support the finding of the MCAD, that Ms. Nathanson was engaging in impermissible discrimination when she restricted her divorce practice to women, unless, perhaps, she could show that women had a more difficult time securing representation, in which case her position might be defined as remedial.

Many feminists would, however, disagree with the decision of the MCAD. The issue is not whether women have been unable to secure representation, but whether Ms. Nathanson believes women have different needs in divorce cases, that they need a particular kind of representation, which she is more capable of providing, or even simply more interested in providing. Some lawyers, for example, only represent plaintiffs in tort cases, while others are more comfortable representing defendants. Most labor lawyers represent either unions or employers, but rarely represent both. In the criminal law field, one either acts as a criminal defense lawyer or a prosecutor, but rarely

in both capacities at the same time. The difference here, of course, is that sex discrimination is prohibited by law, whereas refusing to act for a cigarette company is not. But maybe the two situations have more in common than it would initially appear. . . .

C. CULTURAL FEMINISM . . .

Much of the work in this area has been done as an analysis of the different way women would approach law and the legal system, as opposed to a specific critique of a statute or particular area of law, as the two schools discussed above are more likely to do.

Cultural feminists tend to look at the ways in which women are different, not presumably because of some reliance on genetics or physical characteristics, although the ability to bear children is certainly a physical difference that is reflected in women's approach to any number of issues, including those of law. The emphasis, however, is on the difference in women's experiences, within our culture, and how, as a result of those experiences, women look at legal issues and legal systems in ways that are, by and large, different from the ways that men do. . . .

Rather than looking at whether women have achieved formal equality within the legal system regarding the divorce process, or whether the results of divorce tend to continue the oppression of women, cultural feminists would be more likely to look at the way women experience divorce within the legal system. If, to oversimplify Carol Gilligan's approach, women are more concerned with relationships, and men are more concerned with rights, then the way each approaches divorce, and, in particular the division of assets and child custody, is likely to be very different.

Given that, Ms. Nathanson's decision to restrict her divorce practice to women is perfectly understandable; she should be treated no differently than a lawyer who specializes in representing tort plaintiffs, unions, or criminal defendants. The issue is not whether she is, in fact, discriminating against men, but whether, having decided to specialize in the issues of concern to women in divorce cases, she would be either wasting her limited resources — in a lawyer's case, the resource in most demand being time — or taking on an issue, rather than a client, she was not fully prepared to represent.

Suppose, for example, a lawyer has built his or her practice on the representation of plaintiffs in employment discrimination cases, and that, as a result, the lawyer's clients have consisted of women and people of color. Suppose also that a white male were to approach the lawyer and ask for representation in what is sometimes called a reverse discrimination case, that is, that the employer was trying so hard to hire women or people of color that this person did not get full and fair consideration for a position. If the lawyer turns the case down, using as shorthand that he or she does not represent white males in discrimination cases, what the lawyer would really

mean is that he or she does not represent that kind of claim, rather than that kind of person.

Using a cultural feminist approach, it would appear that Ms. Nathanson has built her practice on representing a certain kind of claim in divorce cases, one that is different from the kinds of claims men usually make, and that she is therefore justified in restricting her practice, that it is no more discrimination than it would be to restrict her practice to unions or employers, landlords or tenants, criminal defendants or the state.

f. Racist and Sexist Conduct

IN RE JORDAN SCHIFF

Docket No. HP 22/92 (Feb. 2, 1993), Departmental Disciplinary Committee, First Judicial Department, New York State Supreme Court

REPORT AND RECOMMENDATIONS OF HEARING PANEL . . .

FACTS

Respondent, a graduate of Stuyvesant High, the University of Michigan and Cardozo Law School, was admitted to practice by the Appellate Division, Second Department on March 16, 1988, and has maintained an office in New York County at all relevant times. The first deposition of respondent's client, Mrs. Morales, was held on August 30, 1989. . . .

Early in this deposition, a senior partner of Mr. Schiff's firm, Mr. Yankowitz, set a highly improper tone. When Mr. Schiff, after a dispute, rudely told Ms. Mark to "get out of here" and walked out of the room, Mr. Yankowitz thereupon appeared. Ms. Mark attempted on the record to protest Mr. Schiff's actions, and, after hearing Mr. Yankowitz, asked him to stop mischaracterizing what had occurred. Mr. Yankowitz replied:

Mr. Yankowitz: Don't tell me what to do. Ever. It's my office, it's my firm. This is my client. The record is clear. I have made my statement and I have recited what the judge has directed in this case. You don't make the rules, you don't wear a black robe, you are not the judge.

Ms. Mark: Excuse me, first of all, let the record reflect that Mr. Yankowitz is pointing at me, standing and shouting. In the second place, let the record reflect that the court hasn't said a thing about this deposition so you obviously don't know what you are talking about. Finally—

Mr. Yankowitz: Your statements are ludicrous.

Ms. Mark: I am not finished.

Mr. Yankowitz: You have lost your mind, young lady, continue the deposition or leave.

After this example of mentoring at Shapiro & Yankowitz, the deposition proceeded.

Respondent Schiff said to Ms. Mark:

Just do your examination and shut up. Just do your examination already. Enough with the bullshit. Do your examination or I am going to throw you out of the office. Bitch. You are the nastiest person I ever met and I am going to really be all over you during this exam, so you better watch your ass.

Ms. Mark: Mark that for a ruling as well, please. I will be seeking sanctions for all of this.

Mr. Schiff: Do whatever you want to do. Do whatever you want to do. The judge is sick of you and your firm anyway.

Ms. Mark: Mark that for a ruling.

Mr. Schiff: You give lawyers a bad name. You and your firm give attorneys a bad name, I will tell you that right now. . . .

Ms. Mark: I am not going to sit here and listen to your scatological comments all day.

Mr. Schiff: I know a scatalog when I see one.

Mr. Schiff descended further during discussions which were held off the record but in the presence of the court reporter, Mr. Harold Brown, and the Spanish interpreter, Ms. Nancy Adler, both of whom testified before us. Ms. Mark testified that Mr. Schiff referred to her as a "cunt," an "asshole," and advised her that she should "go home and have babies." This evidence was corroborated in substantial part by the other witnesses. . . .

Ms. Mark explained why she continued with the deposition after the degrading and vulgar comments had been made to her by respondent. "I had a client to protect and this case was about to be certified for trial."

[A] panel member asked, "Ms. Mark, was there a procedural advantage, to your knowledge, which Mr. Schiff was seeking to achieve by engaging in misconduct?" Her answer was:

> I have no explanation for why these events took place as they did. I felt there was an attempt here to prevent the defense from obtaining relevant information regarding an additional injury that had been alleged in a supplemental Bill of Particulars, and if I had just crawled back to my office and felt bad about what happened and not made my motion, I would not have had benefit of all the information that was uncovered at a supplemental deposition as far as the medical records that were obtained as a result of this and the continued deposition.

Discussion

Not surprisingly, there is a paucity of precedent in disciplinary cases concerning sexual harassment of female attorneys by male adversaries. Possibly this is because those women so victimized are hesitant to complain, perhaps believing that if a woman aspires to have the designation "Attorney-at-Law" on her business card she must be willing to ignore obscene, explicit vulgarities directed at her anatomy and gender. Indeed, in this

case, the complaint to the Disciplinary Committee did not come from the victim but rather came by referral from Judge Jane Solomon. However, women attorneys must be assured that humiliating and reprehensible sexual harassment is definitely not a "rite of passage" which must be silently endured, and that should they encounter it in the course of their practice, they must feel confident they can file a complaint, secure in the knowledge that it will be taken very seriously and investigated very thoroughly. . . .

We conclude that respondent, without provocation, chose to degrade and disparage his adversary by using dirty, discriminatory gutter language offensively directed to harass her because of her gender. Moreover, his was not an isolated comment, possibly uttered spontaneously and without intent, but was instead an ongoing calculated rudeness intended to intimidate a female colleague. . . .

In mitigation, respondent apologized to Ms. Mark by letter and at the hearing. Half of the panel gives very little weight to apologies made under pressure of a court order and the disciplinary process. The other half considers the apologies to constitute evidence of contrition.

In aggravation, the record shows that a direction by Judge Postel to apologize to Ms. Mark, which reflected the Court's opinion of respondent's conduct, and the sanctions imposed on Shapiro & Yankowitz by Judge Solomon on May 3 and September 6, 1991, were insufficient warning to convince Mr. Schiff that his conduct was in need of reform. This was evidenced by . . . the transcript of a deposition taken March 17, 1992, in yet another case, where he called Eileen Stegensky, Esq. a "cunt" and . . . a "nasty fucking bitch."

The Panel finds that on the evidence presented to us all charges are sustained. . . . The Panel unanimously finds that public censure is the appropriate sanction, because those in the profession must understand that sexual harassment is unacceptable behavior and the public must understand that the profession abhors such behavior and will not condone it. Were it not for respondent's unblemished record and his youth, 28 years, which leaves room to believe that he can mend his ways, and the consideration that he is no longer with the firm that set him such a bad example, our recommendation would be even more severe.

s/Sheldon H. Elsen, Chair For the Panel

The court censured Schiff, In re Schiff, 599 N.Y.S.2d 242 (1st Dept. 1993), writing that his conduct was "inexcusable and intolerable [and] reflects adversely on his fitness to practice law."

Courts discipline lawyers for racist or sexist conduct in practice. At a deposition, New York lawyer Thomas Monaghan criticized the opposing lawyer's pronunciation of certain words. A sample: "This is finished. We are not going any further. Because you, my dear, with all due respect, are not totally

aware of what you are saying, and that is frightening. Because not only did you say extablish, you repeatedly said expecially." When the opposing lawyer, an African-American woman, asked Monaghan what he wanted her to do, he said: "I want you to admit on the record, you cannot pronounce two words." At a hearing on a sanction motion, Judge Mukasey cited the fact that on admission to the court lawyers promise to "abstain from all offensive personality," called Monaghan's conduct "outrageous," and fined him $500. The court referred Monaghan to the federal court's disciplinary committee, where he agreed to accept a public censure "for his race-based abuse of opposing counsel." N.Y.L.J., Apr. 30, 2001, at 7.

A public reprimand and two-year probation were ordered for a lawyer who, among other things, "made demeaning facial gestures and stuck out his tongue at Ms. Berger and Ms. Figueroa . . . told Ms. Figueroa that she was a 'stupid idiot' and that she should 'go back to Puerto Rico' [and] told Ms. Figueroa that depositions are not conducted under 'girl's rules.' The entire record is replete with evidence of Martocci's verbal assaults and sexist, racial, and ethnic insults. . . ." Florida Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001).

The Model Rules contain no express prohibition of biased conduct or speech in the practice of law. Should they? Some states have amended their ethics rules to contain variously worded prohibitions. Some of these address employment discrimination. Others are broader. For example, Florida Rule 4-8.4(d) forbids lawyers "to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic." Minnesota Rule 8.4(g) forbids lawyers to "harass a person 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."