

# THE USE OF SELF-REGULATION TO CURB DISCRIMINATION AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION<sup>©</sup>

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Many law societies in Canada have responded to studies documenting gender bias and sexual harassment in the legal profession by introducing anti-discrimination rules. The Law Society of British Columbia introduced anti-discrimination rules in 1993. This article discusses the attitudes of a stratified random sample of lawyers (50 women and 50 men) called to the Bar in British Columbia between 1986 and 1990, gathered through in-depth interviews conducted in 1993-94. It addresses the question of whether they think the Law Society's rules prohibiting discrimination and sexual harassment will be effective. The article also raises some questions about the role of self-regulation in curbing such behaviour in the legal profession.

Plusieurs barreaux canadiens ont répondu aux études sur le sexisme et le harcèlement sexuel dans la profession juridique, par le biais de règles anti-discriminatoires. Le Barreau de la Colombie-Britannique a présenté de telles règles en 1993. Cet article discute de l'attitude d'un échantillon de 50 avocates et de 50 avocats admis au barreau de cette province entre 1986 et 1990, à travers des entrevues en profondeur tenues en 1993-94. La présente discussion tente d'une part, de connaître l'efficacité de ces règles, et d'autre part, soulève quelques questions au sujet du rôle de l'autoréglementation dans la diminution de tels comportements dans la profession juridique

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## I. INTRODUCTION

Studies of members of the legal profession by law societies across Canada in the late 1980s and early 1990s found a widespread perception that gender bias was prevalent in the legal profession.<sup>1</sup> Similar beliefs

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<sup>1</sup> For bibliographies summarizing these studies, see S.B. Boyd, J. Bouchard & E. Sheehy, *Canadian Feminist Literature on Law: An Annotated Bibliography* (Toronto: University of Toronto Press, forthcoming); J. Brockman & D.E. Chunn, eds., *Investigating Gender Bias: Law, Courts and the Legal Profession* (Toronto: Thompson Educational Publishing, 1993) at 247-50; and G. Schellenberg et al., *Annotated Bibliography on Gender Equality in the Legal Profession* (Ottawa:

were found, for example, in the United States,<sup>2</sup> Australia,<sup>3</sup> and New Zealand.<sup>4</sup> In 1991, the Law Society of British Columbia's subcommittee on women in the legal profession, relying on two such surveys,<sup>5</sup> recommended that discrimination on the basis of sex in employment and sexual harassment be defined as professional misconduct.<sup>6</sup> These recommendations were endorsed and expanded upon in 1992 by a second committee (established in 1990), the Law Society of British Columbia's gender bias committee. The committee recommended that the *Professional Conduct Handbook* include the principle that "every member is entitled to equal treatment with respect to conditions of employment and partnership without discrimination because of sex,

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Canadian Bar Association, 1993). Fiona Kay has recently conducted a follow-up study in Ontario. Although the wording of the questions was changed between the 1990 and 1996 studies, the results indicated that the perception of gender bias is still widespread: F.M. Kay, N. Dautovich & C. Marlor, *Barriers and Opportunities Within Law: Women in a Changing Legal Profession: A Longitudinal Survey of Ontario Lawyers 1990-1996* (Toronto: Law Society of Upper Canada, 1996) at 86-88.

<sup>2</sup> In 1996, the National Center for State Courts cited studies on gender bias in the courts completed in 41 states, and a number by the American Bar Association and the Ninth Circuit Court of Appeals. Many of the states have done follow-up studies, and twenty-nine states have studied racial and ethnic bias in the courts: *Gender Bias Topic Bibliography* (Williamsburg, Va.: National Center for State Courts, April, 1996); and *Racial and Ethnic Bias in the Court* (Williamsburg, Va.: National Center for State Courts, April, 1996).

<sup>3</sup> See for example, C. Parker, *Justifying the New South Wales Legal Profession 1976 to 1997* (Sydney: Faculty of Law, University of New South Wales, 1997) [unpublished]; and M. Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Melbourne: Oxford University Press, 1996).

<sup>4</sup> J. Cockanye, ed., *Women in the Legal Profession: The Report of the Second Working Party on Women in the Legal Profession* (Auckland: Auckland District Law Society, 1989). The First Working Party on Women in the Legal Profession reported in 1981, and a summary of its report is contained in Part 8 of the Cockanye report.

<sup>5</sup> A 1990 survey of members of the Law Society found that 97.5 per cent of the women and 83.4 per cent of the men who responded thought there was some bias or discrimination against women in the legal profession: J. Brockman, "Gender Bias in the Legal Profession: A Survey of Members of the Law Society of British Columbia" (1992) 17 Queen's L.J. 91 at 100. There was also evidence, at 129-32, of sexual harassment in the legal profession. The subcommittee also considered the findings of a 1989 survey of former members of the Law Society, in which 94 per cent of the women and 75 per cent of the men who responded thought there was gender bias against women in the legal profession: J. Brockman, "'Resistance by the Club' to the Feminization of the Legal Profession" (1992) 7(2) Can. J.L. & Soc'y 47 at 73.

<sup>6</sup> Law Society of British Columbia, Women in the Legal Profession Subcommittee, *Women in the Legal Profession: A Report of the Women in the Legal Profession Subcommittee* (Vancouver: Law Society of British Columbia, 1991) (Chair: K.P. Young) at 31, 37. This report was circulated to all members of the Law Society. In 1972, a special committee of the Law Society had recommended that the Law Society adopt an anti-discrimination rule. Although approved by an "overwhelming" majority at the Annual General Meeting, the Benchers decided against creating a rule because it "would be difficult if not impossible to enforce": L. Smith, M. Stephenson & G. Quijano "The Legal Profession and Women: Finding Articles in British Columbia" (1973) 8 U.B.C. L. Rev. 137 at 164.

sexual orientation, marital status, and family status, as well as race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age or disability,” and that discrimination on these grounds be defined as professional misconduct.<sup>7</sup> Similar non-discriminatory rules were endorsed by the Canadian Bar Association’s Task Force on Gender Equality in the Legal Profession.<sup>8</sup>

On 11 September 1992, just prior to the release of the Report by the Law Society of British Columbia's gender bias committee, the Benchers introduced a new ruling in the *Professional Conduct Handbook* which read as follows:<sup>9</sup>

*Chapter 2 Integrity*

*Discrimination*

3. A lawyer must not discriminate on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, marital or family status, disability or age.
4. For the purposes of Ruling 3, “age” means less than 65 years of age.

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<sup>7</sup> Law Society of British Columbia, Gender Bias Committee, *Gender Equality in the Justice System: A Report of the Law Society of British Columbia Gender Bias Committee* (Vancouver: Law Society of British Columbia, 1992) (Chair: E.N. (Ted) Hughes) vol. 1 at 3:30. The committee, at 3:9, also endorsed the subcommittee’s recommendation that sexual harassment be defined as professional misconduct.

<sup>8</sup> Canadian Bar Association, Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability: Report of the Task Force on Gender Equality in the Legal Profession* (Ottawa: Canadian Bar Association 1993) (Chair: Hon. B. Wilson) at 286-88.

<sup>9</sup> The ruling was introduced to the profession through an announcement in the Law Society’s newsletter to its members: “Benchers Rule Sex Discrimination is Unprofessional Conduct” *Benchers’ Bulletin* (August-September, 1992) 1-3. The Law Society of Upper Canada adopted a rule of professional conduct dealing with sexual harassment in July of 1992 (Rule 27), and a rule dealing with discrimination in September of 1994 (Rule 28): Kay, Dautovich & Marlor, *supra* note 1 at 5.

Law societies in Alberta, Manitoba, Nova Scotia, Quebec, and Saskatchewan have introduced similar rules or policies. See Law Society of Alberta, *Code of Professional Conduct* (Edmonton: The Society, 1996) c. 1, Rule 8 (prohibiting discrimination) and Rule 9 (prohibiting sexual harassment); Law Society of Manitoba, *Code of Professional Conduct* (Winnipeg: The Society, 1994) c. 20; and Nova Scotia Barristers’ Society, *Legal Ethics and Professional Conduct Handbook* (Halifax: The Society, 1996) c. 24 (a model sexual harassment policy was adopted on 22 March 1996 and an anti-discrimination rule was adopted on 26 April 1996). In Quebec the *Professional Code*, R.S.Q., c. C-26, s. 59.1, which applies to forty-two professions was amended on 15 October 1994 so that taking advantage of a professional relationship “to have sexual relations with that person or to make improper gestures or remarks of a sexual nature” was defined as an act “derogatory to the dignity of the profession.” See also Law Society of Saskatchewan, *Code of Professional Conduct* (Regina: The Society, 1994) c. XV, Commentary 4 (prohibiting discrimination and sexual harassment).

5. Sexual harassment is a form of discrimination on the basis of sex.<sup>10</sup>

6. Ruling 3 does not preclude any program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.

The Law Society introduced its own workplace harassment policy to cover its staff in 1994, and a year later, the Benchers decided that the policy would also apply to themselves and other volunteers, such as committee members.<sup>11</sup>

What does the Law Society have to gain by introducing such rules? Law societies in Canada are self-regulating organizations (SROs) that have a vested interest in keeping their own houses in order for a variety of reasons, not the least of which is to keep the government from doing it for them.<sup>12</sup> Historically and today, the regulative bargain between SROs and the state involves the state granting an SRO a monopoly on the provision of services (enforced by demarcationary strategies), and control over entry standards (enforced by exclusionary strategies).<sup>13</sup> In return, the SRO regulates the application of knowledge,

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<sup>10</sup> A footnote to the ruling states: [t]his reflects the Supreme Court of Canada's decision in *Janzen v. Platy Enterprises Ltd.*, [1989] 1. S.C.R. 1252. The Court discusses the issue at pp. 1276-1291. The Chief Justice said:

Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands (at 1281).

Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. ... Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour (at 1282).

He concluded:

... "sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."

While the *Janzen* case dealt with sexual harassment in an employment situation, these Rules cover more than lawyers' conduct as employers or employees. They also deal with relations among counsel, among partners, between lawyers and clients and between lawyers and court personnel.

<sup>11</sup> "Benchers Come Under Law Society Harassment Policy" *Law Society of British Columbia Benchers' Bulletin* (May-June 1995) 9.

<sup>12</sup> See for example, W.W. Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers" (1995) 33 *Alta. L. Rev.* 730.

<sup>13</sup> These strategies are discussed further in J. Brockman, "'Fortunate Enough to Obtain and Keep the Title of Profession': Self-Regulating Organizations and the Enforcement of Professional Monopolies" (Paper presented at the Learned Societies Conference, St. John's, Newfoundland, June, 1997) [unpublished] [hereinafter "Fortunate Enough"]; and M. Priest, *The Scope and Limit of*

by overseeing the competence of its members, and disciplining those who engage in misconduct. SROs justify the powers delegated to them by government on the basis that they are in the best position to make and enforce rules to protect the public, because they have the required expertise among their members. SROs also argue that they can regulate a wider range of behaviour, and thereby enforce standards of conduct that are higher than if the consumer had to rely on government regulation. Self-regulation “can be pervasive and subtle in its conditioning influence,” and it is capable of reaching “beyond the periphery of the law in[to] the realm of ethics and morality.”<sup>14</sup> Using the funnel analogy,<sup>15</sup> SROs “funnel in” and deal with behaviour that would not otherwise be subject to scrutiny. Furthermore, SROs argue that they are more likely to achieve compliance than governments, because they can “quicken the sense of responsibility” in their members.<sup>16</sup> Additional influence is achieved through the fear of being ostracized by colleagues for violating professional norms.<sup>17</sup>

What makes the Law Society’s anti-discrimination and anti-sexual harassment rules interesting, in the context of the regulative bargain, is that the powers of self-regulation are being used to curb behaviour which was historically endorsed by the Law Society as a means of excluding unwanted members from the profession. For example, in 1918, at the urging of the Vancouver Law Students Society, the Law Society passed a rule that prohibited anyone from being admitted as a member unless they were entitled to vote in provincial elections. The rule was designed to exclude Chinese, Japanese, and Aboriginal people

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*Self-Regulation Theory: Case Studies* (L.L.M., Osgoode Hall Law School, York University, 1997). See also K.M. Macdonald, *The Sociology of the Profession* (London: Sage, 1995) at 10-11; and A. Witz, *Professions and Patriarchy* (London and New York: Routledge, 1992) c. 2.

<sup>14</sup> S.S. Miller, “Self-regulation of the Securities Markets: A Critical Examination” (1985) 42 Wash. & Lee L. Rev. 853 at 858, quoting William O. Douglas (a former chair of the Securities and Exchange Commission).

<sup>15</sup> J. Brockman & C. McEwen, “Self-Regulation in the Legal Profession: Funnel In, Funnel Out or Funnel Away” (1990) 5 Can. J.L. & Soc’y 1. See the discussion, at 15-32, of “funnel out” and “funnel away,” which addresses the downside of self-regulation.

<sup>16</sup> L.L. Jaffe, “Law Making by Private Groups” (1937) 51 Harv.L. Rev. 201 at 212.

<sup>17</sup> N. Gunningham, “Private Ordering, Self-Regulation and Futures Markets: A Comparative Study of Informal Social Control” (1991) 13 Law & Pol’y 297 at 298-99. The pros and cons of self-regulation are examined in more detail in B. Arnold & F. Kay, “Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-Regulation” (1995) 23 Int’l J. Soc. L. 321; “Fortunate Enough,” *supra* note 13; and Priest, *supra* note 13.

from the practice of law.<sup>18</sup> The anti-discrimination and anti-sexual harassment<sup>19</sup> rules clearly restrict the legal profession in terms of what were, at one time, formal exclusionary strategies. Such rules might be seen as an effort by the Law Society to take on a more public interest role in light of ongoing criticisms of SROS, and the application of the *Canadian Charter of Human Rights and Freedoms*<sup>20</sup> to SROS.<sup>21</sup> The changing composition of the legal profession<sup>22</sup> and public relations were probably also influential.<sup>23</sup>

This article examines the attitudes towards anti-discrimination rules (as part of professional misconduct rules) of a sample of lawyers who were called to the bar in British Columbia between 1986-1990, and interviewed by the author in 1993-94. Since all of these lawyers graduated from law school after the introduction of the *Charter*, and after the equality provisions came into effect in 1985, one might anticipate their acceptance, and perhaps endorsement, of the

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<sup>18</sup> See J. Brockman, "Exclusionary Tactics: The History of Women and Minorities in the Legal Profession in British Columbia" in H. Foster & J. McLaren, eds., *Essays in the History of Canadian Law*, vol. 6—British Columbia and the Yukon (Toronto: Osgoode Society for Canadian Legal History, 1995) 508 at 519-22; and D. Tong, *Gatekeeping in Canadian Law Schools: A History of Exclusion, The Rule of "Merit", and a Challenge to Contemporary Practice* (L.M. Thesis, Faculty of Law, University of British Columbia, 1996).

<sup>19</sup> Sexual harassment of women is an informal exclusionary strategy. See, for example, C.B. Backhouse, "'To Open the Way for Others of my Sex': Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985) 1 C.J.W.L. 1; and M.J. Mossman, "Feminism and Legal Method: The Difference It Makes" (1986) 3 Aust. J.L. & Soc'y 30.

<sup>20</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>21</sup> The Supreme Court of Canada has found that some of the activities of SROS are subject to the *Charter*. For example, a Law Society of Alberta rule prohibiting its members from practising with lawyers who were not ordinarily resident in Alberta violated the *Charter*: *Black v. Law Society of Alberta* [1989] 1 S.C.R. 591, as did a rule which severely restricted advertising by dentists: *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232. For further discussion of the *Charter's* impact on the professions see J.T. Casey, *The Regulation of Professions in Canada* (Toronto: Carswell, 1994) c. 3, 11 and updates; and K.R. Hamilton, *Self-Governing Professions: Digests of Court Decisions* (Aurora, Ont.: Canada Law Book, 1997) c. 1, 3, 9.

<sup>22</sup> In 1993 (figures were not reported in 1992), 25.5 per cent of practising lawyers in British Columbia were women: Law Society of British Columbia, *Annual Report, 1993* (Vancouver, Law Society of British Columbia, 1993) at 6. However, it was commonly known that the proportion of women in law schools was approaching, and in some cases exceeding, 50 per cent.

<sup>23</sup> In his report to the membership in 1992, Law Society Treasurer Peter Leask commented that the report of the gender bias committee "was important, both for improving self-regulation and for our relations with the public." He went on to say that "the public seemed to appreciate the profession's willingness to be self-critical as shown in Gender Equality in the Justice System": Law Society of British Columbia, *Annual Report, 1992* (Vancouver: Law Society of British Columbia, 1992) at 2.

anti-discrimination rules introduced by the Law Society. Part II of this article describes the sample of lawyers and the interviews. Part III examines whether the respondents thought the Law Society's newly introduced anti-discrimination rule would be effective, and Part IV examines whether they thought the anti-sexual harassment rule would be effective. Finally, the article raises some questions about the role of self-regulation in curbing discrimination and sexual harassment.

## II. RESEARCH METHOD

A stratified random sample of fifty women and fifty men called to the Bar in British Columbia between 1986 and 1990, and who were still members on 25 June 1993, was drawn from the Law Society's list of members. Within the strata of women and men, a proportional random sample was drawn from each of the five years of call. Those who, according to the Law Society records, were inactive or former members, worked in legal education or for the law society, or who were suspended, were eliminated from the population, so that only those practising law in government, a private firm, or in industry remained in the population sampled. Those who lived outside of British Columbia, or who were called to the bar in another province, were also eliminated from the population, in order to study a more uniform group. Despite these adjustments to the list of members from which the sample was drawn, by the time they were interviewed, some of the women in the sample had already stopped practising law. The four women who were no longer practising law were retained in the sample. Bryan Ralph, then the secretary of the Law Society, sent a letter of introduction to the lawyers, encouraging them to participate.

With the exception of one lawyer who was on an indefinite leave and could not be contacted, and for whom a substitute was found, the response rate was 100 per cent. The 100 lawyers were interviewed<sup>24</sup> between 8 July 1993 and 19 January 1994. The respondents had between three and seven years experience in the legal profession. The women ranged in age from twenty-eight to fifty-nine, with a median age of thirty-five, and 20 per cent were over the age of forty. The men ranged in age from twenty-eight to fifty-eight, with a median age of thirty-four,

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<sup>24</sup> The interviews focussed on four major areas: 1) gender bias, discrimination, and sexual harassment; 2) the adversarial/care continuum in the practice of law; 3) career advancement; and 4) the balancing of careers, children, and chores. This article discusses the respondents' attitudes towards and thoughts about the anti-discrimination rules introduced by the Law Society.

and 10 per cent were over forty years of age. Ten percent of the women and 6 per cent of the men were under thirty years of age. Each respondent was assigned a pseudonym, and quotations have been edited to ensure that respondents cannot be identified, and to make them more readable.

### III. THE EFFECTIVENESS OF ANTI-DISCRIMINATION RULES

After being asked whether they had ever been discriminated against in the legal profession on the basis of the grounds listed in the Law Society's anti-discrimination rule,<sup>25</sup> respondents were asked, "Do you think the Law Society's Rule with regard to discrimination will be effective in reducing discrimination?" They were also asked to elaborate on their response.

#### A. *The Anti-Discrimination Rule Will Not Be Effective*

Seventy-three percent of the women and 45 per cent of the men said the rule would not be effective, or indicated that they were not optimistic about its effectiveness; however, many of these respondents also thought the rule was a good idea. They had a variety of explanations for their pessimistic forecast.

##### 1. Rules don't change behaviour or attitudes

For some of the women and men, rules were not an effective means for changing behaviour, because attitudes, prejudices, and social or moral values are not altered by rules. Emily (solicitor, late 40s) commented: "you can't rule attitudes." According to Paula (barrister,

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<sup>25</sup> The respondents were shown a copy of the ruling and asked, "Since May of 1993, the Law Society's Rules of Professional Conduct have stated that lawyers 'shall not discriminate on the basis of 1. race, 2. national or ethnic origin, 3. colour, 4. religion, 5. sex, 6. sexual orientation, 7. marital or 8. family status, 9. disability or 10. age.' Have you ever been discriminated against in the legal profession on any of these grounds?"

Fifty-six percent of the women and 4 per cent of the men interviewed said they had been discriminated against in the legal profession on the basis of sex. When asked whether they thought there was bias or discrimination against women in the legal profession today which restricts their career advancement, 88 per cent of the women and 66 per cent of the men said "yes." Only 4 per cent of the women and 18 per cent of the men said there was no discrimination against women.

early 30s) “you can’t dictate opinion, manners, or social conduct, [except for] 1 per cent of overt discrimination.” Barbara (solicitor, late 20s) elaborated:

People may not be as obvious about it, but if a person has prejudices it is so ingrained that, if they are going to discriminate, they will do it regardless. A rule like this may make it worse because it will be harder to discern someone is discriminating. Everyone has their biases and prejudices, and I don't think that a rule of professional conduct is going to change what a person thinks necessarily. [Question: what might the Law Society or the legal profession do to reduce or eliminate such bias or discrimination?] It's an education thing. A lot of prejudices and discrimination arise out of ignorance. For example, sexual orientation; in the past 10 years as people become more understanding of what AIDS is all about there is more of an awareness (maybe it's not a tolerance). Education is the key.

Carissa (solicitor, mid-30s) was of the view that people have to see or experience discrimination before they change their behaviour:

No, I don't think people react to written rules. People react to demonstrated instances of injustice as opposed to “thou shalt not.” It is just like the ten commandments, we all know what they are, but how many of us observe them? Realities are what we all experience; we reflect what we have been taught. What is more helpful is real demonstrated experiences which you've gone through or others close to you have gone through. So for instance, as a female I would be very upset as a parent if my daughter was denied access to anything she wanted solely because she is a female. And I would be upset because I know from experience that that is unfair. ... The fact that there is a Law Society rule that says thou shalt not, so what? There are all sorts of rules about all sorts of things. It's sort of like parking enforcement—people break the law all the time. What influences people is, is it socially acceptable and do I really believe that it is something wrong? If I don't, then I am going to do whatever I believe anyways. Socially acceptable simply means I won't do it in the open.

For Donna (barrister, mid-40s) rules do not change “macho males who don't see women as their equals.” Carl (barrister, mid-30s) and Ivan and Simon (barristers, early 40s) were of the view that the Law Society could not do much about attitudes. As Ivan opined, “speaking as a prosecutor, people know what's illegal when they do it.” Neil (solicitor, late 30s) did not think the Law Society could change attitudes by “pulling people before tribunals.” Oscar (solicitor, early 30s) did not think the rule was enforceable:

It is so hard to point to a specific incident when what you are talking about is an overall attitude and approach to life. You can't legislate that. It's very subtle, and that is what is so frustrating about the problem if you are a woman because how do you combat that? You are talking about basic attitudes, and everyone these days is bright enough to keep their mouth shut, not to say blatantly discriminatory things. I think clearly it's attitude, and it is so hard to change.

The notion that rules do not change behaviour often coincided with the acknowledgement that lawyers are good at getting around the rules.

## 2. Lawyers will find a way around the rules

Lawyers who want to discriminate are sufficiently skilled to get around the rules. As Elizabeth (barrister, late 30s) stated, “You are dealing with lawyers. You are dealing with people, that if they want to hide a clause or hide a fact, that's what they do for a living.” A number of respondents elaborated on this theme: “First of all, nobody ever reads the rules. Secondly, people are always going to be able to find a way around them. There's always nuances, there is always something they can think of and another excuse for not hiring” (Holly, barrister, early 40s).

At the end of the day, you have a few people sitting in the boardroom and they can call it what they want, they can say, ‘she doesn't fit in,’ which is what they tell people when they don't want them to be partners: ‘well, no, he's nice, but something just doesn't click.’ If the person is gay and they don't happen to like gays at that particular firm, they'll call it something else, but they won't hire him because the Law Society says you can't discriminate. They'll say, ‘we're not discriminating. It just doesn't work; he doesn't go to bat for clients; you know, he just doesn't seem to be interested.’ They come up with some other excuse, if they don't like the person, they phase him out, like they do when people are up for partnership, and they just decide they don't want them. They find some bogus excuse, ‘well your hours aren't high enough, you're fifty hours off the mark,’ or something. I really don't think it changes much (Karen, barrister, early 30s).

I think it would be very difficult to prove because I think that most people have been sensitized to the issue of discrimination and they know that they can't blatantly discriminate against someone. But that is not to say that they can't discriminate on a more subtle or discrete basis (Ted, barrister, mid-30s).

Finally, Olive, (barrister, mid-30s) commented, “I don't think it is going to make any difference to anybody. Well it just might go underground, and they'll be a little more cagey in terms of how they get around these things. They just won't be as overt.”

The concern that lawyers are good at getting around rules, because that is what they do for a living, raises questions about our legal system and the legal profession. What impact does a strong adversarial/technical approach to the law have on equity and justice?

## 3. Reluctance to use the rule may render it ineffective

Some respondents thought that there would be a reluctance to use the rule, and that it would therefore not likely be effective. Melanie (late 20s) noted that “even lawyers that are associates that are dismissed wrongfully generally don't sue the firm because they are afraid the rest of the community won't hire them, and they'll get a bad name.” Zoe

(mid-40s) thought that not only would she be at risk, but also her clients. Ursula (solicitor, mid-30s) explained that she would never make a complaint under the rules:

Because it would not change anything, and it would just hold you up for ridicule and lack of advancement and on and on we go. By coming forward, if I had an extreme example, I don't think it would ever change things, the mind set of lawyers in that way. They are calling it the SHAD rules ... and there has been a lot of criticism of it.

Vincent (barrister, mid-30s) raised an obvious problem with lawyers complaining to their self-regulating organization: "If you have been discriminated against at [law firm] on the basis of any of the enumerated grounds, are you really going to step forth to the Law Society and complain about [the firm], when half of the benchers at one point or another came from there?" Lawyers could easily cover themselves, with "handy dandy little excuses to trot out at a hearing, and a passing of a rule isn't going to change their approach or their beliefs."

#### 4. Only time will result in change

Some respondents held no hope for change except with the passage of time, which would result in more women and minority groups entering the legal profession, and in the death or retirement of older lawyers. Betty (barrister, mid-30s) was of the view that there was nothing the Law Society could do: "Until some of those dinosaurs die out, and there are female partners or partners of colour or partners of very distinct ethnic origin, there is nothing Law Society can do about it." Likewise, Conrad (barrister, mid-30s) commented:

The most effective way to curb discrimination will be when old guys die or retire. Common sense just tells me if you have a bunch of senior partners in their 60s and they want to discriminate against homosexuals they are not going to put up a big billboard and say, 'alright, you bunch of homos, we're discriminating against you, how'd you like that?' They are going to do it in more subtle ways. Gradually, as they go away, there will be less discrimination.

Valaria (solicitor, mid-30s) was of the opinion that "What will be effective is sheer numbers of people who are discriminated against increasing." Olive (barrister, mid-30s) was optimistic about the passage of time:

When I'm twenty years call there's going to be a lot more women, and just through the process of time there's going to be a lot more women, senior partners. Until that happens, I mean ... I have an anecdotal story of the month. ... One of the big name firms downtown booked their Christmas party at the Vancouver Club, which is an all male club, and they made these women, partners and all, enter the Vancouver Club through the

back door. They didn't see anything wrong with that. They came back with 'well, we've got women partners, what's your problem?' The fact that they were using the back door is just, you know; it's such an attitude. It's just going to be a generational thing it's going to change. ...

[Question: do you see changes coming?] Oh yeah. [In provincial court] there's just so many women judges. Half, probably more than half, of the Crown Counsel are women. Defence is still underrepresented by women, relatively, but of my year call and below, there's a lot more women. Senior to me, like ten year call, I can't think of five women lawyers who practice. But junior to me there's a lot. So yeah, people are getting used to it. It's not a shock, not something you have to think about anymore. It used to be, even when I started, only so many years ago. There were a couple of women judges, but there's just been this huge raft of appointments and now, it doesn't faze anybody.

Oscar (solicitor, early 30s) and Bob (barrister, mid-30s) thought that society was moving in the direction of equality, and that there have already been dramatic changes in the legal profession. Bob added:

I know there are a lot of old timers out there, the old guard who have practised for thirty years who still have problems seeing a woman as a colleague rather than the girl that gets coffee. I've seen it happen. But that will change, I think. I've seen, even in my own year of call, people are treated as equals.

There was also some concern that the passage of time would not change anything, as Flora (barrister, early 40s) commented: "I was shocked at some of the stuff from these patriarchal puppies. These young men [lawyers] are extremely biased." Donna (barrister, mid-40's) shared this perspective: "some of the older males with the worst attitudes will eventually retire and leave the profession. ... Some of the younger males have the exact same attitude." This, however, was not a prevalent concern, as many of the women and men were convinced that time would change things, and that there were many men supportive of such changes.

##### 5. Redundant, human rights legislation

One woman and three men were of the view that the Law Society's rules did not add much to what already existed in terms of human rights legislation. Megan (barrister, mid-30s) was stunned that the rule was necessary. However, she added, "people could be so far in the dark ages that they have to have a rule like that. Never over-estimate your colleagues." Two barristers, Owen (late 30s) and Tony (early 30s), saw the rules as nothing more than a reiteration of the provincial and federal statutes, and therefore thought they would not make any additional difference. Douglas (barrister, late 40s) was of the

view that there wasn't a problem, and that the rule was the result of people "trying to be politically correct."

#### 6. Backlash, rule likely to do more harm than good

Only two women expressed concern about the backlash that might result from the rule. Despite the fact that the new rules did not refer to affirmative action, Elizabeth (barrister, late 30s) commented:

I am receiving negative responses from male lawyers that I have had no difficulty with whatsoever, but much of it is in the context of being frightened. They are now almost fearful of hiring a woman because something might be taken out of context. There is no longer the relaxed rapport that there was before. We are having much more difficulty now because of affirmative action and that type of thing. In fact, you get comments like 'it would be nice to get out of this and go back to hiring on the basis of merit.' And, you're saying, 'whoa—wait a minute, affirmative action doesn't necessarily mean. ...' I find I have to argue far more in that context than before.

Before affirmative action there was no distinction that I could see between the women and the males. We're seeing it more now, and I am hearing it more. ... There is nothing I hate worse than having the concept of merit taken from me because I am a woman, and that's what the programmes seem to be doing. I think the Law Society is catering to the lobbyists' activity. There is obviously a public concern about this, but to the extent now that it is doing far more harm than good. We are getting these big brother type comments, 'who is going to say whether we can say that.'

I am just glad that people still approach me and talk about it. I am concerned that at some point that will stop simply because I am a woman. I find that much less pleasant to work in. There were biases, there is no doubt about it, and we had to work very hard to get where we are today, and many of us have done that on the basis of merit. I find it very difficult to deal with all of a sudden the concept that there is no longer merit although you are going to get it anyway because you are a woman. That's disgusting.

Similarly, Lois (barrister, mid-30s) did not think the rule would help women:

I think it is going to be very, very dangerous, and do a lot more harm than good. It's a tough question and it's a tough decision. We are about to see more female lawyers getting more experience, and they are getting there. But it's basically lifestyle choices. Just as I don't want female firemen who can't lift me out of a burning building, and being a fireman just because she is female. I think the same thing applies here. If you can do the job, then, yes, you are discriminated against, then yes, that is wrong. I think it is going to take a lot longer to crack or to knock down the bastion and I would be much more in favour of the slow, plodding approach than making this rule where you send all of the good lawyers out there, making them afraid of me, and making my job tougher.

## 7. Probably not effective, but still a good idea

Many of the respondents who thought the rule would not be effective still thought it was a good idea. Carla had mixed feelings about the rule:

It doesn't stop any of it, but it is a message. It doesn't, however, stop discrimination because the lawyers are too sophisticated. It is a very difficult problem; lawyers are aware. The only evidence you have is comparison with your peers—[discrimination] is done on a personal level and it is frustrating. A lot of successful women will tell you its *your* hard work that makes a difference. They could help, but they can't or refuse to see it. They believe it is hard work. So it is very hard to tackle. ... The surveys are useful. They tell everyone it is not a group of isolated experiences. Sexism and racism are constantly being reinforced as an individual problem. For all those guys who deny sexism and racism, it is a splash of cold water. Education and workshops or seminars in these environments might be useful. But lawyers are sophisticated and educated. There is a large dose of denial, or they like it the way it is. If you can't cut it, they think you should get out. ...

The Law Society could take more leadership in integration and set an example. Benchers are all middle-aged white guys or the women who are benchers are useless. They are just like the men. The men can feel good that there are women; but the women are no help or have any desire to do anything different than what the men would do. So they are of no use.

Flora (barrister, early 40s) did not think the rule would be effective, in that she could not see men being “magically changed.” However, she felt it was good to have the rule in place for overt discrimination. Likewise, Jessica (solicitor, mid-40s) did not think the rule would change attitudes overnight; however, the rule was important because it signalled that discrimination was an important matter, and it provided those who were discriminated against a basis for objecting.

Jeff (barrister, early 40s) viewed discrimination as “subterranean—difficult to see and difficult to prove,” and was not optimistic about the rule. However, he added,

that doesn't mean that you shouldn't have human rights legislation or rules of conduct which touch upon it. ... I think that human attitudes and tolerances evolve slowly, and I think one can be controlled by the direction that evolution has taken. Having those values reflected in rules is a good thing ... but I don't think by introducing that rule will have a terribly significant impact on the pace of that evolution. It's almost really more of a reflection of the evolution that is happening.

There were, however, a smaller number of respondents who were more optimistic about the effectiveness of the anti-discrimination rules.

B. *The Anti-Discrimination Rule Will Be Effective*

Only 23 per cent of the women and 38 per cent of the men thought the anti-discrimination rule would be effective. Again, their reasons varied.

1. Anti-discrimination rules are educational

Some of the respondents thought the rule would be educational, or at least make lawyers aware of discrimination and the fact that it was prohibited. It was also seen as a means of providing those who are discriminated against with reassurance that discrimination was unacceptable. Opal (barrister, mid-30s) thought that the rule would help raise women's awareness:

When the human rights legislation came in back in the seventies, it did give us something to turn to. And to, in a way, say to women it is okay not to accept this type of treatment—to raise the consciousness of women. A lot of women accept this as the status quo, and don't recognize that it is discrimination because they have been raised in the same culture as the men. So, I think that it gives some legitimacy to the issues and serves as an educational tool as well.

Hank (solicitor, late 30s) thought that the rule would make people, "think twice before they do something." Harvey (solicitor, early 30s) thought it would keep the issue "in the limelight a little more," and make people "more aware that there may be a problem." Mark (solicitor, early 30s) agreed: "anytime that you bring anything out for discussion it is at least the first step in dealing with the problem. A lot of men, older practitioners, weren't even aware of the fact that there was a problem or that their attitudes might be a problem." William (mid-30s) talked about the positive effect of the report on *Women in the Legal Profession*<sup>26</sup>

In the firm that I was at we had a session where all the associates and all the partners got together and talked about discrimination when the Women in the Law report came out, and it had all been circulated to all the lawyers in the province. We talked about the issues. To the extent that talking about them would prevent discrimination from occurring I would think it would be helpful. It certainly doesn't hurt to have the policy. I thought [the discussion] was very positive because the partners were quite young and it wasn't like they were terribly resistant to the ideas. But I think that, in any case, it was helpful to the partners to realize how policies or rules that they made have without any

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<sup>26</sup> *Supra* note 6. As has been pointed out, the report was circulated to all members of the Law Society.

intention of them being discriminatory have the effect of being discriminatory. Talking about issues was helpful.

Ivan (solicitor, early 40s) thought the rule would have a deterrent effect, because at some point lawyers “will be disciplined for discriminating. If lawyers are scared of anything, they are scared of discipline.”

## 2. Anti-discrimination rules provide an avenue for redress, set standards

For some respondents the rule was seen as effective, in that it would set standards and provide an avenue of redress for those experiencing discrimination. Theresa (early 40s) thought the rule was better than nothing:

People have to be able to complain and have an effective process for resolution for those complaints—an effective process, not just in terms of the ultimate resolution, but in terms of how the procedure works; whether people who complain are treated with dignity during the complaint and are protected. I have a deep, dark suspicion that, given how lawyers are usually taught to think, that they won't be. Some of those general rules which I, as a criminal lawyer, know very well about in terms of full disclosure and ability to cross-exam, etc., can work to the disadvantage of people making complaints.

Frank (barrister, mid-30s) found it “somewhat offensive” that lawyers needed be told that they should not discriminate. However, if they were going to discriminate, a rule would not stop them. But he did recognize that the rule provided a needed “avenue for complaints to be made and for an official reprimand to be made.” Likewise, Rob (solicitor, early 30s) did not think that people necessarily follow rules. However, they do react to peer pressure:

What the rules do is give you something to point to. So if I want to say to someone that they are discriminating, and they are acting in a manner that they shouldn't be acting, the rules give me something to point to and say ‘See, here it is. This is something you are not supposed to be doing.’ But I would think that the most effective part of it is actually my saying to someone, ‘you are out of line.’ So I think the most effective thing to lessen discrimination is people's peers telling them that they are discriminating. That is more effective than the rules.

Jack (barrister, mid-30s) was optimistic about the rule:

I think they help. Lawyers, we like rules, and the rule is there and we have to respect it. We have all heard stories of sexual harassment and worse. I think the rule helps prevent it. It really creates a standard for the profession. ... I think the rules even provide comfort to all lawyers. Our marital and family statuses change. We may become disabled at some point, and we all grow older. It isn't like we stay in the profession and then you get your Q.C. and that's it.

### 3. Probably effective, but concerned about the fallout

Some respondents thought the rule would be effective, but were concerned about the reaction it might evoke in some lawyers. Sandra (barrister, late 50s) commented:

I think that it will make people more cautious about discriminating. They realize there will be sanctions. It may also make it more subtle, so that it can't be measured as easily. I think that lawyers generally have been sensitized, in the last three to four years, to the fact that there are problems out there and a lot of unhappy people, and generally are trying to be more cautious and more considerate and more scared. I have had a male lawyer say to me, 'I'm having to walk around with my hands jammed in my pockets. It's not because I'm a touchy, feely person but I am afraid to do that now [to hug people he knows]. I am afraid they will complain.' He was really quite sad about it, and I thought it was too bad. He is that kind of person, the big lovable guy that gives you a hug and doesn't mean anything. He is not trying to be sexual. I think we are sacrificing some things in our lives to fall in line with this.

Gerry (late 30s) and Rob (early 30s), two solicitors, were concerned that it be administered with an even hand:

Will it be effective? Well, I think that where you have a blatant case of blatant discrimination I think that it is probably a good idea. I think there may be situations where the Law Society might look at the situation and redress the situation. Yes, it could be effective depending on how it is administered, right? I think if it is dealt with fairly and in a non-discriminatory fashion I think it could be very effective. But it all depends on how it is administered; if it turns into a witch hunt then I would be very, very nervous about it.

The one thing I am very concerned about is that there not be an over reaction. If you make it so that every little thing is discrimination or harassment. ... That's the other issue, of course, which we haven't really touched on. There is a difference between sexual discrimination and sexual harassment, but the two sort of also go together. You really stymie a work place to the point where no one can get along and no one can do anything any more. I am interested in seeing how that is going to develop.

#### *C. Don't Know if Anti-Discrimination Rules Will Be Effective*

Four per cent of the women and 17 per cent of the men interviewed professed not to know if the rule would be effective. Edward (barrister, mid-30s) didn't think lawyers had opportunities to discriminate. Evan (barrister, late 20s) thought the rules were designed for Vancouver, but that there were no problems in the smaller areas. Two barristers, Patrick (late 50s) and Paul (early 30s), wanted to wait and see how it is enforced before offering an opinion. While Gene (late 40s) thought it was better to have a rule than not, he wasn't sure how

effective it would be: “The old boy network is definitely there. Lawyers are mostly male. It’s changing now; so, we’ll see what happens.”

#### IV. ANTI-SEXUAL HARASSMENT RULES

After being asked whether they had ever been sexually harassed since entering the legal profession as articling students,<sup>27</sup> respondents were asked, “Do you think the Law Society’s Rule with regard to prohibiting sexual harassment will be effective?” Answers to the question were sometimes coloured by the fact that the Law Society had just released the first conduct review<sup>28</sup> of sexual harassment, which was being circulated by the Law Society, in the media, and by word-of-mouth throughout the legal profession. The report summarized the facts of the case:

While sitting in Chambers waiting for the hearing of a contested motion where several lawyer were acting for clients, plaintiff’s counsel, a woman, asked counsel for one of the defendants, ‘What is your position in this matter?’ His response was ‘I prefer the missionary position.’ Plaintiff’s counsel said, ‘That’s sexual harassment.’ The defendant’s counsel made no further response.

Three weeks later, after time for reflection, the plaintiff’s lawyer wrote to the defendant’s lawyer demanding a written apology. He immediately faxed her letter back with a handwritten reply that said, ‘If I have offended you in any way I apologize.’ ...

Though invited to attend the conduct review hearing, the complainant declined to do so.

At the conduct review, the member ... said that he was immediately and genuinely sorry and that he had no intention to sexually harass the complainant, but realized that his comment was completely stupid and inappropriate. He characterized the relationship between himself and the complainant in the litigation as acrimonious.<sup>29</sup>

The conduct review panel found that the behaviour was sexual harassment, and that it was objectionable, not because it was sexual, but because “it transforms a working relationship of equality between people into a sexualized context in which women are systematically

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<sup>27</sup> Thirty-six percent of the women had been sexually harassed, and another 10 per cent were somewhat ambivalent in their responses—one said she had not been directly or overtly subjected to it, and four described behaviour which they recognized that others might consider sexual harassment, but which they did not.

<sup>28</sup> A conduct review is “an informal, private session where the lawyer comes before the Bench and another practitioner. Conduct review panels consider the facts, point out problems, suggest possible alternative actions by the lawyer and give advice on solving the problem, which the lawyer frequently accepts.” See Law Society of British Columbia, *Discipline Digest* (May 1993) 1.

<sup>29</sup> *Ibid.*

disempowered and thereby reinforces an inferior position for women.” However, it recommended that the discipline committee take no further action because the member apologized immediately after receiving the complainant's letter, and that he “was consistent in advising the panel that he considered his behaviour both rude and inappropriate and that he sincerely regretted having made the remark.”<sup>30</sup> The panel recognized the widespread problem of sexual harassment in the legal profession, the fact that many male lawyers may not recognize how their behaviour is experienced as harassment, and also the problems that women might face in reporting sexual harassment:

There is a high cost for women lawyers complaining about behaviour of this kind. Ours is a profession in which women have often had to show that they are ‘just one of the boys’ to succeed. Women making complaints may be faced with a risk of harm to their clients, to their continuing working relationships with male lawyers, or, if the harasser works in the same firm, to potentially adverse consequences to their advancement.<sup>31</sup>

The reactions to this case were mixed, but it did cause the respondents to think about the issue of sexual harassment.

#### *A. The Anti-Sexual Harassment Rule Will Not Be Effective*

Only 30 per cent of the women and 24 per cent of the men thought that the rule prohibiting sexual harassment would not be effective. Their reasons were very similar to the reasons given for thinking the anti-discrimination rules would not be effective, although on the whole they were more optimistic about the anti-sexual harassment rules than they were about the anti-discrimination rules.

##### 1. Rules don't change behaviour or attitudes

Paula (barrister, early 30s) didn't think the rule would be effective, as the Law Society was not “that effective in anything, [and] you can't dictate some jerk's behaviour.” However, she did think that the rule might be effective if lawyers who breached it were no longer allowed to have articling students (who were the most vulnerable in the legal profession). Karen (barrister, early 30s) thought that people might become more careful or cautious about what they say, but it would not solve the underlying problem. Likewise, Olive (barrister, mid-30s) didn't

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<sup>30</sup> *Ibid.* at 2-3.

<sup>31</sup> *Ibid.* at 3.

think that a rule would change anyone's attitude, other than make them a little more neurotic. Bob (barrister, early 30s) and Wesley (solicitor, early 30s) thought that the rule would make perpetrators more discrete; however, Wesley hoped that it would make those who are subject to sexual harassment more at ease with raising the issue.

## 2. Lawyers will find a way around the rules

Some of the respondents thought that lawyers would be capable of finding their way around sexual harassment rules. Megan (barrister, mid-30s) thought that men were well aware of when their behaviour was harassing. As a criminal lawyer, she doesn't believe in deterrence, and added, "I'd like to think that somebody would learn from it, but I'm not convinced because people generally deny sexual harassment anyway, and would deny that they are doing all those things." This view was contrary to that of the Law Society's conduct review panel, which stated:

It is highly unlikely that male lawyers believe that they themselves routinely inflict sexual harassing behaviour on women in the profession. This difference in perception accounts for the schism of understanding between men and women in the profession over the issue. Most men do not understand the ways in which their own behaviour may be experienced as harassing.<sup>32</sup>

## 3. Reluctance to use rules

Some respondents expressed concern that those who experienced harassment would be reluctant to use the rules. Sexual harassment from a number of years ago still bothers Dorothy (barrister, mid-30s), for whom it is a difficult issue with which to deal. According to Stewart (barrister, late 30s) a complainant's career could be "on the line" following a complaint. Angela (mid-30s) thought it was good to have a rule, "but realistically how likely is it that the legal secretary or articling student or junior associate (that's where the women are), are going to go to the Law Society and launch a complaint? Extremely unlikely. It goes back to questions of power." Betty (barrister, mid-30s) was concerned that the case in the *Discipline Digest* might

bring more scorn than applause. Where the real harassment happens is within the firm itself and a lot of women simply won't report it because of fear for their jobs. The last 5 years have been extremely tough economic times, and it is not going to get any better. Economic necessity is going to outweigh principles. More women will just think, 'I will

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<sup>32</sup> *Ibid.*

deal with it myself.' They won't go to the Law Society with it. Most women will think that they will be branded.

#### 4. The passing of time will improve the situation

A number of respondents were pessimistic about the effectiveness of the sexual harassment rule, and thought that it was a long term project which required more than a rule. According to Kristine (barrister, mid-30s), change involves a long term educational process, more women in the legal profession, and younger men being exposed to women's views on these matters. The rule was a good start: "you've got to do what you can, but I don't think we should kid ourselves and think that everything is going to change and be just lovely and wonderful because of a few rules coming in. I think that's rather naive."

#### 5. Redundant, human rights legislation

Four men saw the rule as redundant, believing it was either unwritten before the Law Society reduced it to writing, or it was simply a duplication of what already existed at common law, and in the *Human Rights Code*.<sup>33</sup> Carl (barrister, mid-30s) conceded that the power of the Law Society might make a difference; however, his experience with the disciplinary branch of the Law Society had led him to conclude that "unless it is blatant they are not going to get involved." Tony (barrister, early 30s) was of the view that repeating what was already the law wasn't going to change his behaviour: "I always considered my self bound by the law. If you put a specific rule in the rules of conduct saying that murder is misconduct; no guff! It is not something that is going to come as a shock to me or change my ways."

#### 6. Concern over the backlash and definition of sexual harassment

As with the anti-discrimination rule, there was some concern that the rule might result in a backlash—in women not being hired, and in a chilling of the office atmosphere. Betty (barrister, mid-30s) was glad to see the Law Society do something about the "missionary position" comment, because five years ago they wouldn't have considered it. On the other hand, she was concerned that they "chose to publish such a

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<sup>33</sup> R.S.B.C. 1996, c. 210.

minor incident, although they stress it was at the lesser end of the severe scale.” She was concerned about the reaction around the office, “Oh my god you can’t even open your mouth and say anything.” Evan (barrister, late 20s) thought there could be a negative effect:

Watch who you speak to, think twice about joking around. Up here it doesn't matter. The effect on big firms, will be that women won't get hired. I worry about how broad the guidelines are, that's quite scary. If I say something to a woman that is taken the wrong way and I find myself before the Law Society and explaining myself, that is a scary thing.

Some respondents expressed a concern over the definition of sexual harassment. Barbara (solicitor, late 20s) hoped the rule would be effective but she had her doubts:

Sexual harassment, liken it (probably not rightly so) to rape and consent because whether something constitutes sexual harassment, is a moving target from woman to woman. My tolerance level may be out here whereas someone else's may be here. Whether something constitutes sexual harassment depends on whether the receiver is offended by it, and it is so subjective. I hope it will get rid of things that are clearly sexual harassment (*e.g.*, if you don't sleep with me you won't be made a partner). ... Someone somewhere along the line is going to say something that will offend someone not meaning to do that but have it constitute unwelcome conduct. It's in the eyes of the beholder. That type of sexual harassment, I don't think the Law Society rule will do a lot to change.

Zeke (barrister, mid-30s) saw a double standard in the effect of the rule:

If you have a female lawyer or staff member who tells jokes, I can't see anything happening because of that. The problem always seems to arise when the male says the joke or makes the comment. ... As I and a few other lawyers have commented, if we had said that and it was the other way around it would be considered inappropriate.

## 7. An objection to the formalization of social relations

There were some lawyers who objected to the rule on the basis that it simply added more rules and formalization to issues that could be dealt with informally. Neil (solicitor, late 30s) elaborated:

I thought that the vulgar ['missionary position'] comment that was made in Chambers was handled entirely inappropriately by the woman the comment was made to. I think the enforcement rules institutionalize that kind of inappropriate dispute resolution mechanism. The incident should have been dealt with immediately, and she should have told him he was a vulgar pig and that should have been the end of it. That's how I would have dealt with it, and that's how I would expect someone to deal with me in a more honest way by saying, 'look, I don't like what you have done.' Rattling on somebody to a professional body I think is childish. If it had kept on occurring, I mean more than twice or on a number of occasions, it might have been different. I think the practice of law requires a fairly thick skin, the constant resort to litigation type modes. I think it is a problem with our society in general—people seem to confront in an official capacity far too often. I don't regard what happened in that Chambers situation as sexual harassment in this context. It was a vulgarity.

Jeff (barrister, early 40s) did not think rules would “turn untalented and boorish lawyers into capable and polite lawyers.” He continued,

In other words, there are limits beyond which you can't look to legislation to solve what is really a problem that goes back to people's upbringing, and the kinds of traditions that are within their own law firm and the kinds of attitudes and values that they apply to their day-to-day practice, so that is an interesting debate. There are those who think that the key to all psychologies is more intervention by authorities and others who say, 'you can't make nasty people nice, no matter how many rules you impose on them.'

[Question: would you say that the Rule is unnecessary?] I wouldn't say that it is unnecessary, but I think time will tell. I don't think we should look to the regulators and legislators to solve these problems exclusively. I guess I would think that it is a pity if we, as lawyers developing an ethos for practice within our own law firms, didn't feel that we also had a responsibility to articulate and discuss and try and reach some common understanding among ourselves as colleagues about what we do and what we don't do, and not sort of devolve all sort of responsibility to someone who carries a hammer.

Kevin (barrister, early 30s) objected to the trend to making more rules. When asked whether the rule against sexual harassment would be effective, we had the following exchange:

Effective in what? Effective in stopping sexual harassment or effective in increasing the tension between genders in the legal community? [Question: how about reducing sexual harassment?] I suspect it will be effective. ... [Question: would it increase the tension?] I don't think so. I was being facetious. As it sounds like a bit of an inconsistency, my being a lawyer and all, I don't really like rules, I don't like legislation. If I had my druthers, we'd get rid of half the legislation and half the bureaucracy and administration we have. So this falls into the category of rule-ifying and defining and all these kinds of things which I really think are unnecessary. I think that is unfortunate now because it is an entire new area that is going to have to be responded to, and you will have to have a mechanism in place which deals with it. It costs more when all these kinds of rules come in. It bothers me that we can't work that kind of a problem out without having to create legislation, it's not legislation but ...

### B. *The Anti-Sexual Harassment Rule Will Be Effective*

In contrast to the pessimism about the anti-discrimination rule, a majority of the respondents (66 per cent of the women and 70 per cent of the men) thought the anti-sexual harassment rule would be effective, to at least some extent.

#### 1. The rule will be educational, set standards

Some respondents thought the rule would be educational and set standards. Carla was surprised by the case in the *Discipline Digest*

It was a minor and trivial event. He apologized, and that should have been the end of it. But she persisted, and it went to the Benchers. It was a bit excessive. But it does make men pause and think—it could happen to anyone. It has a damp[en]ing effect which is good—can't get away with anything. Maybe that is what it takes. They will have to keep it up. Most men know better when they are sober. It is an area of confusion for some guys, so it is a good education. It is easier with sexual harassment than it is with sexism and racism. Their names should have been published. If they can publish Anita Hill and Clarence Thomas's names they could publish these.

Jessica (solicitor, mid-40s) thought that the rule would be effective in pointing out what sexual harassment is: “that it is not necessarily locking somebody in a room and ripping their clothes off. There are lots of ways to be sexually harassed.”

Leon (solicitor, mid-30s) said the rule was necessary to raise people's awareness, because “a lot of people probably don't think the things they are doing are sexual harassment.” The fact that the rule is now in “black and white” brings the issue forward for discussion, and this, according to Mark (solicitor, early 30s) will ultimately help. Nicholas (barrister, mid-30s) thought that a lot of men were not aware that what they were doing was harassment, and that “you have to really have your head in the sand to not now be aware of what is and isn't considered to be sexual harassment.” In addition, “if people see one of their colleagues acting boorishly towards a woman lawyer or a secretary or a staff member, they'll be taken aside and told not to do that.”

Vincent (barrister, mid-30s) thought that the rule would also assist men who are harassed by support staff, even though harassment is usually “by the more powerful harassing the less powerful.” Perhaps with the rule in place it “won't seem so odd.” He also acknowledged some of the problems people would encounter by complaining about sexual harassment:

It is difficult for support staff, most difficult for associates and articling students. With support staff, the general perception is that if you are a competent skilled paralegal or legal secretary you can say, ‘take this job and shove it I am not working here any more,’ and you can go out on the street and be working within two weeks. Associates do not have that comfort. If they walk out of a firm alleging sexual harassment they are going to have a very hard time finding a job. That is the general belief, and I don't think it is unwarranted, especially if they are in a specialty area. If a four-to-five-year-call associate is being harassed by a partner working in a specialized area that senior partner is going to know everyone who works in the field, and there will be questions asked. There is an awful lot of room for damage. It may well not come to pass. Odds are it won't come to pass. Lawyers are supposed to be intelligent, to know that if you start stabbing people in the back you are going to get your ass sued into the ground.

There is nothing I love more than a wrongful dismissal suit or that sort of conduct. But that is not much comfort to an associate who has a house to pay for, and it is no consolation when you believe that if you raise the complaint you won't work in this town again. Your belief may not be warranted but that is irrelevant to the belief. There is a lot

to get in the way. It is going to take some pretty gutsy people and it is going to take some pretty gutsy determinations from the Law Society. ... I certainly wouldn't want to be raising a sexual harassment complaint against the senior partner or against a fellow associate. That would not be something I would enjoy doing. I have to wonder if I would be taken seriously, how do I prove it, what's my credibility going to be like, what is going to be left of it. I can't see it being much different for a woman. The fears are stronger for a woman.

## 2. The rule will give victims an avenue of redress

For some, the rule was seen as a way of empowering victims of sexual harassment, and providing them with an avenue of complaint. Pamela (early 30s) thought the rule provided her something to point to when she tells someone that their behaviour is not appropriate. Gerry (solicitor late 30s) thought the rule provided more options but he thought that it was already prohibited: "there are things you don't do. I mean if the Law Society has to spell it out for us [laughs] God help us, if we are that stupid."

## 3. The rule will make people more careful

Some respondents thought the effect of the rule would be to make lawyers more careful about their conduct. Carissa (solicitor mid-30s) commented:

It will lessen the overt expression of sexual harassment in public. I'm not so sure it really changes in any significant way attitudes which are ingrained. There are lawyers, even in this firm, I know who will never ever have any different views of women in law than they ever had, but now they will know to bite their tongue. Is that good? Yes, I think that is good. But whether that, in itself, is enough, is another question. And, is that real change? Just making them watch what they say or what they do in public—I don't know. It is probably a step forward, but I don't think rules themselves actually change people's ingrained beliefs or attitudes which are reflected in hundreds of ways in what they do and who they chose to associate with, and how they conduct themselves.

Likewise, Donna (barrister, mid-40s) thought it would make people more careful, but there was some limit to how effective it would be:

It may help because some people may not have actually thought about certain things as harassment. I don't know about that. There was a female lawyer in the office next to me, while I was with the larger firm, who was young and attractive and she had a partner in the firm, a male, who was really trying to hit on her and she would come and talk to me about [it] and say, 'look, I don't really want to lose my job. I don't want to be rude to the guy. I don't want to slap his face, and I don't like what's happening. I don't want to tell him that there is no way in the world that I would go out with him because I think he is an ignorant pig, you know.' That type of male is not going to stop trying to use his position and influence to take out a woman who is not interested in him because of some rule.

Owen (barrister, late 30s) thought “people had better start governing themselves accordingly, otherwise they may be sanctioned by the Law Society.”

#### 4. Deterrent effect

For some respondents, the rule was thought to have a deterrent effect, but not necessarily because the perpetrators of harassment were changing their attitudes. Heather (solicitor mid-30s) explained:

The missionary position case sparked a lot of debate, but unless they hit some fairly senior lawyers. ... You know the Law Society puts out a lot of stuff about substance abuse too, but if you have ever been to a bar function you see that many of the Benchers are drunk. The firm I was in had a senior partner, and it was a big joke about how he was fooling around on his wife all the time. He had a penchant for young girls in the mailroom; but one time I saw him at a function where he had this young woman cornered and she was saying, ‘no, no,’ and crying. He was really close to her, talking to her like this ... and nobody came over and helped her and nobody said ‘so and so, that was too much.’ So I hope it will help and raise the awareness of that kind of thing and that if, for no other reason, it will become more self-policing, even if they don’t believe it.

Other partners will say we don’t want our firm’s name dragged through the mud by our names appearing in the *Discipline Digest* for this kind of behaviour even if we think it is fairly restrictive. So I hope it helps from that point of view, although I’m not overly optimistic ..., I think from a fear point of view. I hope they do the right thing for the wrong reason is I guess what I’m saying. I think they have no choice but to try and deal with it. How effective it will be I don’t know, because AIDS is probably going to be more effective than this in making people behave.

James (solicitor, mid-30s) thought that the rule would be effective, “to the extent that it is conduct unbecoming and persons are prosecuted for that kind of behaviour.” However, he preferred that people act out of mutual respect rather than because they might get into trouble (a “lower level of deterrent”). He was also concerned that there might be “miscues and misunderstanding.” Conrad (barrister, mid-30s) thought the rule would have an effect:

Even if you don’t care about the women, if your most highest motivating factor is so lowly crass as your own self-preservation, you’re not going to want to end up in front of the Law Society explaining why you gave some office staff members some lewd and suggestive underwear or something as a Christmas present. Even if you had no morals you’d worry about your own self-preservation.

Ida (solicitor, mid-30s) said she ignores sexual harassment at work, but stated that since the Anita Hill incident and the Canadian Bar Association report, she had noticed that the harassment was toned down, although many did not read the report. She added, “My

philosophy of life is different from other women. I would never do that [complain], betray my integrity. It is not worth throwing away your job. I never condone or ask or participate in it.” I asked her what would happen if she complained, she responded, “I would be fired. I am lucky. Why throw it away? I can deal with them by ignoring them.” When asked if the Law Society report had had any effect, she commented, “some are now scared of law suits. I am convinced someone spoke to them because they have toned it down.” When I asked Ursula (solicitor, mid-30s) if she would be prepared to bring a complaint under the policy she said, “I don’t think so. Because right or wrong the system is bigger than me, and I have to work within it. And sexual harassment to me is a long way away from sexual assault. I have a very thick skin. Yes, I feel harassed, but ‘oh shucks,’ as opposed to ‘and now I can’t keep my job.’”

Although Susan (mid-30s) felt more confident about using the policy, she identified many barriers to complainants. She discussed a situation she described as “borderline sexual assault,” where the woman should have called the police:

She was plain afraid of losing her job. She was a junior lawyer working in a firm and he was a very senior male lawyer. I know that she would have been extremely embarrassed. She was very afraid of the repercussions. That is a factor I would consider as well if I were harassed. ... You are skating on thin ice because you are likely to be labelled by some people. There could be some repercussions depending on what the conduct was. People may feel that they can’t say anything near you or they can’t be open and frank. Your opportunities to network with senior male lawyers may be cut off. It is certainly something I would think carefully about before doing but if I thought the conduct ..., if there was a touching or a grabbing that is completely over the line I would be on the phone immediately.

##### 5. Sexual harassment is more overt

Tina (late 20s) thought that the rule against sexual harassment would be more effective than the rule against discrimination because sexual harassment was more overt and more readily detectable. Daniel (solicitor, mid-30s) agreed:

There are so many ways of disguising a discriminatory decision—the rule won’t be effective. Sexual harassment is more likely to take place in a continuing situation or relationship, and it is harder to disguise and the victim is in a better position to complain and pursue the complaint. Because someone is more likely to be found out in relation to sexual harassment, I think the rule may be effective.

*C. The Anti-Sexual Harassment Rule May Be Effective*

Four percent of the women and 8 per cent of the men interviewed thought the effectiveness of the rule would depend on how (and if) the Law Society enforced it. Angela (mid-30s) thought the effectiveness of the rule would depend on how proactive the Law Society was in educating its members and enforcing the rule. Her experience with giving presentations about sexual harassment left her with little reason to be optimistic:

In most of these presentations I have been challenged, called biased, not objective. I have been presented with the most inane, contorted ridiculous fact patterns in order that the questioner (usually young male) tries to get the point across about the innocence of the hypothetical harasser. I have never seen a man subjected to this type of questioning, challenging with a tone of voice, (the volume) the gesturing that I have been subjected to on numerous occasion by young men when I make presentations on sexual harassment.

I find it appalling and demoralizing that these young men feel that they are able to behave that way, that they feel that confident about their power and their position. To question not only someone who is more senior in terms of years of experience as a lawyer but someone who is a guest and a host with presumably some expertise on the issues. I have just never seen it happen to men and I have been on many panels where my colleagues have been men.

Theresa (barrister, early 40s) also thought the rule's effectiveness would depend on the procedures put in place to enforce it.

Everybody who is a lawyer is scared of complaints to the Law Society, it is a pretty powerful weapon. As to how it actually works out in practice, I think that remains to be seen. If people make a lot of complaints and they don't get results satisfactorily then I will conclude that it didn't work to well. For now, it has been a good and fairly big step.

[Question: is there any thing you would like to see in the procedure that would assist?] Well, protection for the complainants, possibly including anonymity. That goes against every principle of most lawyers' training. So you don't expect to see that but I think that certainly the accused person has a right to know the complaint against him and to be able to test that complaint to some extent but we are talking about unequal power situations in essence and I don't know of a way to satisfactorily resolve those concerns.

Riley (early 40s) did not think that the rule itself would have much effect unless it was enforced:

I don't know that the mere statement of the rule will be terribly helpful, because most lawyers presumably already know that sexual harassment is a form of discrimination on the basis of sex. I wouldn't think that many are so completely ignorant of what has happened in our society over the last fifteen years that they wouldn't recognize that. So merely stating it, I don't know will do much. If it's enforced, if there are lawyers who are disciplined for sexually harassing people they work with, then it will be effective. I have no doubt there is sexual harassment going on in law firms. I have witnessed it [Question: was anything done about it?] No, the person being harassed didn't object. When I asked

her she said if it had been someone else doing it she would have been upset, but she tolerated it from him.

## V. THE ROLE OF SELF-REGULATION

Many of the concerns expressed by the respondents in these interviews have been dealt with by the structure the Law Society chose to enforce the rules. Shortly after I completed the interviews, the Law Society announced that, based on the recommendation of the gender equality monitoring committee<sup>34</sup> and the multicultural committee,<sup>35</sup> it would appoint an Ombudsperson to “help resolve, through informal procedures, problems of discrimination or harassment in the profession.” The Ombudsperson receives and mediates solutions to complaints from lawyers, articulated students, and legal support staff, on an informal and confidential basis. She also provides information and training sessions to law firms on issues of discrimination and harassment. Not only is the Office independent of the Law Society (in work and physical location), but the discussions are “without prejudice,” and inadmissible in Law Society disciplinary or credentials proceedings.<sup>36</sup> The importance of an independent office is illustrated by the fact that the Ombudsperson receives approximately fifty complaints a year, and delivered training to over 400 individuals in the first year. By comparison, when Alberta established a “safe counsel” model (using volunteer lawyers) in 1994 for dealing with these issues, only one complaint was received in the first year.<sup>37</sup> Since that time, the Law Society of Alberta has established an Equity Ombudsoffice similar in structure to the British Columbia Ombudsoffice.<sup>38</sup>

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<sup>34</sup> An interim committee was appointed in September 1992, and a permanent committee was formed in June 1993, as a result of the recommendations made by the gender bias committee in 1992. Its mandate is to monitor the implementation of the report. See Law Society of British Columbia, *Benchers' Bulletin*(July-August 1993) 6; and Law Society of British Columbia, Gender Equality Monitoring Committee, *Annual Report* (Vancouver: Law Society of British Columbia, 1994) (Chair: K. Nordlinger).

<sup>35</sup> The multiculturalism committee first met in March 1993, with a mandate to identify problems faced by ethnocultural and visible minorities, and to recommend solutions. See Law Society of British Columbia, Multiculturalism Committee *Annual Report, 1994-95*(Vancouver: Law Society of British Columbia, 1995) (Chair: B. Trevino).

<sup>36</sup> Law Society of British Columbia, *Benchers' Bulletin*(March-April 1995) 10.

<sup>37</sup> Law Society of British Columbia, *Benchers' Bulletin*(January-February 1996) 2, 7.

<sup>38</sup> Law Society of Alberta, pamphlet “The Equity Ombudsperson: Helping you deal with discrimination and harassment in the legal workplace” (Edmonton: Law Society of Alberta, 1 August 1997). Joanne Goss, a lawyer with extensive background in mediation and arbitration, was

The effectiveness of such a system is highly dependent on the person who fills the position. Gail H. Forsythe, British Columbia's first and present ombudsperson, is a lawyer with a degree in education and a Master of Laws degree, and with experience in mediation and conflict prevention,<sup>39</sup> and thus is very well qualified for the job. She is also very accessible, and works within a framework of complete confidentiality. Her columns in the *Benchers' Bulletin* keep lawyers informed about the work she does, and serve as an educational vehicle for reaching the entire profession and their support staff. It would be interesting to know if this particular model (education and informal resolution, with the option of proceeding to a formal hearing) would make lawyers more optimistic about the rules regarding discrimination (73 per cent of the women and 45 per cent of the men thought the rule would not be effective).

The anti-discrimination and anti-sexual harassment rules and the Ombudsoffice are not without controversy in the legal profession. Letters to the editor of the *Advocate*, the Vancouver Bar Association journal, criticized the rules when they were first introduced.<sup>40</sup> There were also complaints from the profession when the Ombudsperson's position was extended into its second year, and her fees were increased.<sup>41</sup> In hindsight, it would have been useful to have asked the respondents about whether such rules fit within their perspective of the mandate of the Law Society. Not having asked this question, a more recent study for the Law Society offers some insight into the issue. A telephone survey by MarkTrend Research for the Law Society of British Columbia found that only 44 per cent of the lawyers who responded thought that "promoting gender and racial equality in the legal profession" was an important responsibility for the Law Society.<sup>42</sup> This

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appointed as the Equity Ombudsperson on 1 May 1997. She will work to resolve complaints informally, disseminate information on discrimination and harassment, and work with law firms to develop workplace policies.

Law Society Rule 81.1(3) provides that communications or information gathered by the Ombudsoffice may not be disclosed in Law Society proceedings without the consent of both parties to the dispute: see "Equity Ombudsofficer Hired: Introducing Joanne Goss" (1997) 50 *Benchers' Advisory* 6 at 6.

<sup>39</sup> Law Society of British Columbia, *Benchers' Bulletin* (December 1994) 3.

<sup>40</sup> See generally "Grumbles" (1993) 51 *Advocate* 795 at 795-800; and (1994) 52 *Advocate* 150 at 150-51.

<sup>41</sup> See K. Keeting, "Grumbles" (1996) 54 *Advocate* 477 at 477; R. Pawliuk, at 477-78, and the response by Law Society Treasurer Karen F. Nordlinger, at 801.

<sup>42</sup> On a scale of 1 (not at all important) to 5 (very important), 44 per cent of the respondents to the MarkTrend survey indicated 4 or 5. This question resulted in the most substantial difference between women and men in their survey; 64 per cent of the women and only 36 per cent of the men

opinion was most pronounced for lawyers called between 1986-1996 (54 per cent), as compared to lawyers called between 1976-1985 (40 per cent), and those called before 1976 (23 per cent).<sup>43</sup> In examining the results of this survey, the *Benchers' Bulletin* explained that the Society would first have to establish that it agreed with its membership before acting upon their views. If it did not agree, it would need to educate the membership about its mandate.<sup>44</sup>

The controversy over the anti-discrimination rules raises some interesting questions about the mandate of SROS. Section 3 of the *Legal Profession Act*<sup>45</sup> states that,

It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

- (i) preserving and protecting the rights and freedoms of all persons;
  - (ii) ensuring the independence, integrity and honour of its members;
  - (iii) establishing standards for education, professional responsibility and competence of its members and applicants for membership, and
- (b) subject to paragraph (a),
- (i) to regulate the practice of law, and
  - (ii) to uphold and protect the interests of its members.

The section contains a dual message: the Law Society is both to protect the public interest, and to protect the interest of its members. Historically, SROS were established solely to protect the interests of their members. In fact, at one time the Law Society argued in court for the exclusion of women from the legal profession, and created rules which disallowed applications by some racial groups. It is only recently that the Law Society and other SROS have moved towards a "public interest" mandate—a mandate that sometimes takes precedence, even when it contradicts the interests of the majority of its members. The Law Society of British Columbia appears to have developed some independence from its members, and is prepared to put money and energy into racial and gender equality, even without the full support of its membership. This raises a question about how effective an SRO can

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indicated 4 or 5. See Law Society of British Columbia, *Benchers' Bulletin* (August 1996) 2.

<sup>43</sup> See MarkTrend Research, *The Law Society of BC Membership Study* (Vancouver, 13 May 1996, Doc. No. 96-101) Table 4b [unpublished].

<sup>44</sup> Law Society of British Columbia, *Benchers' Bulletin* (August 1996) 6.

<sup>45</sup> R.S.B.C. 1996, c. 255.

be in enforcing non-discrimination rules in the face of opposition or lack of support from its members.<sup>46</sup>

It is perhaps ironic that when it comes to resolving disputes within the legal profession, the Law Society established an informal system that operates not only outside the formal justice system, but also independent of its own self-regulating system.<sup>47</sup> However, self-regulation allows for such flexibility, and it appears that this may be the most effective way of enforcing anti-discrimination and anti-sexual harassment rules. In addition, informal resolution has many advantages over prolonged, polarized litigation.<sup>48</sup> It will take some time and re-evaluation to determine how effective such rules are in curbing discrimination and sexual harassment within the legal profession.

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<sup>46</sup> I am grateful to an anonymous reviewer for drawing this important question to my attention. An SRO that strays too far from the support of its members is sometimes threatened with alternative arrangements. Some lawyers in Ontario have suggested that a new organization be created to represent the interests of lawyers, and the Law Society could be left to protect the interests of the public. See P. Kulig, "New Lawyers' Association Coming to Ontario?" *Lawyers' Weekly* (23 May 1997) 1.

<sup>47</sup> The informal system does not replace the formal system. Complaints can bypass the informal system or use the formal system if the informal process is not satisfactory.

<sup>48</sup> See G.H. Forsythe, "After the First Year: Are Services in Demand? What are the Results?" Law Society of British Columbia, *Benchers' Bulletin* (Jan-Feb 1996) 7, for a list of benefits to resolving conflicts in an informal manner.