ABA Rule 8.4

Adopted Aug 8, 2016

Old Rule 8.4 - Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Old Rule 8.4 – Comment 3

*A lawyer who, **in the course of representing a client**, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.*

New Rule 8.4(g)

"It is professional misconduct for a lawyer to:

…

(g) Engage in conduct that the lawyer knows or reasonably should know *is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."*

New Rule 8.4 – Comment 4

"Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law."

Paragraph (g) does not prohibit conduct undertaken to promote diversity.

REVISED 109

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DISABILITY RIGHTS
DIVERSITY & INCLUSION 360 COMMISSION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON WOMEN IN THE PROFESSION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This ~~Rule~~ paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others ~~because of their membership or perceived membership in one or more of the groups listed in paragraph (g)~~. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who is, or is perceived to be, a member of one of the groups~~. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct undertaken to promote diversity.~~ Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at

recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] ~~Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.~~ A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

~~[4]~~ [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

~~[5]~~ [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

REPORT

"Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment."

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

I. Introduction and Background

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public's interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct ("Model Rules") were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major "Goals" that were adopted by the House of Delegates.[1] Goal III is entitled, "Eliminate Bias and Enhance Diversity." It includes the following two objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, "Bias, Prejudice and Harassment." This rule prohibits judges from speaking or behaving in a way that manifests, "bias or prejudice," and from engaging in harassment, "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.[2] This current proposal now before the House will further implement the Association's Goal III objectives by placing a similar provision into the Model Rules for lawyers.

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[1] ABA MISSION AND GOALS, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited May 9, 2016).

[2] Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: "A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others."

When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR") each proposed language to add a new paragraph (g) to Rule 8.4, "Professional Misconduct," to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new antidiscrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association's Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as "the current provision."

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association's Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[3]

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) *only* if such conduct is also determined to be "prejudicial to the administration of justice." As the Association's Goal III Commissions noted in their May 2014 letter to SCEPR:

> It [the current provision] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the Model Rules where a Comment is purported to "solve" an ethical issue that otherwise would require resolution through a Rule. Now—thirty-three years after the Model Rules were first

[3] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [21] (2016).

adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: "The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated."[4] As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: "The current Model Rules of Professional Conduct (the "Model Rules"), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation."[5] The Association should now correct this omission. It is in the public's interest. It is in the profession's interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association's four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identify. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it "does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system."[6]

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers ("APRL"), the National Organization of Bar Counsel ("NOBC") and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick

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[4] Paulette Brown, *Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession*, ABA J. (Jan. 1, 2016, 4:00 AM), http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

[5] In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

[6] Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.

presented a memorandum of the Working Group's deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive antidiscrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to add Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.[7] Written comments were also invited.[8] President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an antidiscrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

III. Need for this Amendment to the Model Rules

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, *Misconduct,* which explains that certain conduct may be considered "conduct prejudicial to the administration of justice," in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client *but only* when those words or conduct are also "prejudicial to the administration of justice."

Yet as the Preamble and Scope of the Model Rules makes clear, "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[9] Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

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[7] *American Bar Association Public Hearing* (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf.

[8] MODEL RULE OF PROFESSIONAL CONDUCT 8.4 DEC. 22 DRAFT PROPOSAL COMMENTS RECEIVED, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html (last visited May 9, 2016).

[9] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [14] & [21] (2016).

Therefore, SCEPR, along with its co-sponsors, proposes amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an antidiscrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function,* which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.[10] The Standards explain that prosecutors and defense counsel should not, "manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status." This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an antidiscrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-five jurisdictions have not waited for the Association to act. They have already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.[11] By contrast, only thirteen jurisdictions have decided to address this

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[10] ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards.html (last visited May 9, 2016); ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html (last visited May 9, 2016).

[11] *See* California Rule of Prof'l Conduct 2-400; Colorado Rule of Prof'l Conduct 8.4(g); Florida Rule of Prof'l Conduct 4-8.4(d); Idaho Rule of Prof'l Conduct 4.4 (a); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers' Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(i); Michigan Rule of Prof'l Conduct 6.5; Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l Conduct 5.08; Vermont Rule of Prof'l Conduct 8.4(g); Washington Rule of Prof'l Conduct 8.4(g); Wisconsin Rule of Prof'l Conduct 8.4(i); D.C. Rule of Prof'l Conduct 9.1.

issue in a Comment similar to the current Comment in the Model Rules.[12] Fourteen states do not address this issue at all in their Rules of Professional Conduct.[13]

- As noted above, the ABA has already brought antidiscrimination and anti-harassment provisions into the black letter of other conduct codes like the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.
- The Florida Bar's Young Lawyer's Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.[14]
- The supreme courts of the jurisdictions that have black letter rules with antidiscrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.[15]

IV. Summary of Proposed Amendments

A. Prohibited Activity

SCEPR's proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

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[12] *See* Arizona Rule of Prof'l Conduct 8.4, cmt.; Arkansas Rule of Prof'l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof'l Conduct 8.4, Commentary; Delaware Lawyers' Rule of Prof'l Conduct 8.4, cmt. [3]; Idaho Rule of Prof'l Conduct 8.4, cmt. [3]; Maine Rule of Prof'l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof'l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof'l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof'l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof'l Conduct 8.4, cmt. [3]; Utah Rule of Prof'l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof'l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof'l Conduct 8.4, cmt. [3].

[13] The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

[14] The Florida Bar, *Results of the 2015 YLD Survey on Women in the Legal Profession* (Dec. 2015), http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement.

[15] In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. *In re* Moothart, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was "a cool person to know." On one day, the lawyer sent 19 text messages asking whether the victim was the "kind of girl who likes secret contact with an older married elected DA . . . the riskier the better." One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. *In re* Kratz, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student's appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. *In re* Griffith, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? *In re* McGrath, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re* Campiti, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a "black male" and that such association was placing the children in harm's way. During a hearing, the lawyer referred to the African-American man as "the black guy" and "the black man." *In re* Thomsen, 837 N.E.2d 1011 (2005).

Proposed new black letter Rule 8.4(g) does not use the terms "manifests . . . bias or prejudice"[16] that appear in the current provision. Instead, the new rule adopts the terms "harassment and discrimination" that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], "harassment" is defined as including "sexual harassment and derogatory or demeaning verbal or physical conduct . . . . of a sexual nature." This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.[17]

Discrimination is defined in new Comment [3] as "harmful verbal or physical conduct that manifests bias or prejudice towards others." This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes "verbal or physical conduct," and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.

Proposed new Comment [3] also explains, "The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer's conduct. As the Preamble to the Model Rules explains, "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."[18]

B. Knowledge Requirement

SCEPR has received substantial and helpful comment that the absence of a "mens rea" standard in the rule would provide inadequate guidance to lawyers and disciplinary authorities. After consultation with cosponsors, SCEPR concluded that the alternative standards "knows or reasonably should know" should be included in the new rule. Consequently, revised Rule 8.4(g) would make it professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination…."

Both "knows" and "reasonably should know" are defined in the Model Rules. Rule 1.0(f) defines "knows" to denote "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The inference to be made in this situation is not what the lawyer should or might have known, but whether one can infer from the circumstances what the lawyer actually knew. Thus, this is a subjective standard; it depends on ascertaining the lawyer's actual state of mind. The evidence, or "circumstances," may or may not support an inference about what the lawyer knew about his or her conduct.

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[16] The phrase, "manifestations of bias or prejudice" is utilized in proposed new Comment [3].

[17] ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: "Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome."

[18] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [5] (2016).

Rule 1.0(j) defines "reasonably should know" when used in reference to a lawyer to denote "that a lawyer of reasonable prudence and competence would ascertain the matter in question." The test here is whether a lawyer of reasonable prudence and competence would have comprehended the facts in question. Thus, this is an objective standard; it does not depend on the particular lawyer's actual state of mind. Rather, it asks what a lawyer of reasonable prudence and competence would have comprehended from the circumstances presented.

SCEPR believes that any standard for the conduct to be addressed in Rule 8.4(g) must include as alternatives, both the "knowing" and "reasonably should know" standards as defined in Rule 1.0. As noted, one standard is a subjective and the other is objective. Thus, they do not overlap; and one cannot serve as a substitute for the other. Taken together, these two standards provide a safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.

There is also ample precedent for using the "knows or reasonably should know" formulation in proposed Rule 8.4(g). It has been part of the Model Rules since 1983. Currently, it is used in Rule 1.13(f), Rule 2.3(b), Rule 2.4(b), Rule 3.6(a), Rule 4.3 [twice] and Rule 4.4(b).

"Harassment" and "discrimination" are terms that denote actual conduct. As explained in proposed new Comment [3], both "harassment" and "discrimination" are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—"harassment" and "discrimination"—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law.

The addition of "knows or reasonably should know" as a part of the standard for the lawyer supports the rule's focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.

C. Scope of the Rule

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in "conduct related to the practice of law" when the lawyer knew or reasonably should have known the conduct was harassment or discrimination. The proposed rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer's practice of law, nor does it limit a lawyer's representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer's ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients.[19]

Some commenters expressed concern that the phrase, "conduct related to the practice of law," is vague. "The definition of the practice of law is established by law and varies from one jurisdiction to another."[20] The phrase "conduct related to" is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.[21] The proposed scope of Rule 8.4(g) is similar to the scope of existing antidiscrimination provisions in many states.[22]

Proposed new Comment [4] explains that conduct related to the practice of law includes, "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities *in connection with the practice of law*." (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. "[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity."[23] For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation." Such conduct need not be

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[19] *See, e.g.*, Neal v. Clinton, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001).

[20] MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [2].

[21] *See, e.g.*, Grievance Adm'r v. Fieger, 719 N.E.2d 123 (Mich. 2016) (rejecting a vagueness challenge to rules requiring lawyers to "treat with courtesy and respect all person involved in the legal process" and prohibiting "undignified or discourteous conduct toward [a] tribunal"); Chief Disciplinary Counsel v. Zelotes, 98 A.3d 852 (Conn. 2014) (rejecting a vagueness challenge to "conduct prejudicial to the administration of justice"); Florida Bar v. Von Zamft, 814 So. 2d 385 (2002); *In re* Anonymous Member of South Carolina Bar, 709 S.E.2d 633 (2011) (rejecting a vagueness challenge to the following required civility clause: "To opposing parties and their counsel, I pledge fairness, integrity, and civility . . . . "); Canatella v. Stovitz, 365 F.Supp.2d 1064 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: "willful," "moral turpitude," "dishonesty," and "corruption"); Motley v. Virginia State Bar, 536 S.E.2d 97 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client's "reasonably informed about matters in which the lawyer's services are being rendered"); *In re* Disciplinary Proceedings Against Beaver, 510 N.W.2d 129 (Wis. 1994) (rejecting a vagueness challenge to a rule against "offensive personality").

[22] *See* Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct "in connection with the practice of law"; Indiana Rule of Prof'l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer's "professional capacity"; Iowa Rule of Prof'l Conduct 8.4(g) which addresses conduct "in the practice of law"; Maryland Lawyers' Rules of Prof'l Conduct 8.4(e) with the scope of "when acting in a professional capacity"; Minnesota Rule of Prof'l Conduct 8.4(h) addressing conduct "in connection with a lawyer's professional activities"; New Jersey Rule of Prof'l Conduct 8.4(g) addressing when a lawyer's conduct is performed "in a professional capacity"; New York Rule of Prof'l Conduct 8.4(g) covering conduct "in the practice of law"; Ohio Rule of Prof'l Conduct 8.4(g) addressing when lawyer "engage, in a professional capacity, in conduct"; Washington Rule of Prof'l Conduct 8.4(g) covering "connection with the lawyer's professional activities"; and Wisconsin Rule of Prof'l Conduct 8.4(i) with a scope of conduct "in connection with the lawyer's professional activities."

[23] MODEL RULES OF PROF'L CONDUCT, Preamble [3].

related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude.[24]

However, insofar as proposed Rule 8.4(g) applies to "conduct related to the practice of law," it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice.[25] Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction's highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions that have adopted an antidiscrimination Rule, the provision is focused entirely on employment and the workplace.[26] Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules.[27] Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice that includes the solicitation of clients and advertising of legal services is already subjects of regulation under the Model Rules.[28] And fourth, this would not be the first time the House of Delegates adopted policy on the terms and conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement polices,[29] and earlier, in 1992, the House recognized that "sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work

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[24] MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. [2].

[25] MODEL RULES OF PROF'L CONDUCT, Preamble [1] & [6].

[26] *See* D.C. Rule of Prof'l Conduct 9.1 & Vermont Rule of Prof'l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.

[27] Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. *See* California Rule of Prof'l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof'l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof'l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof'l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. *See, e.g.*, Iowa Rule of Prof'l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof'l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof'l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers' Rules of Prof'l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).

[28] *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

[29] ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).

environment."[30] When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is: professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions that already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupportable.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. "Conduct related to the practice of law" includes these activities.

Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that "the legal profession is largely self-governing."[31] As such, "a lawyer's failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process," not the civil legal system.[32] The two systems run on separate tracks.

The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[33] Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted

[30] ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).
[31] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].
[32] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].
[33] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].

of a crime.[34] To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity.[35] Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons.[36] A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

D. Protected Groups

New Rule 8.4(g) would retain the groups protected by the current provision.[37] In addition, new 8.4(g) would also include "ethnicity," "gender identity," and "marital status." The antidiscrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person's marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

"Gender identity" is added as a protected group at the request of the ABA's Goal III Commissions. As used in the Rule this term includes "gender expression", which is a form of gender identity. These terms encompass persons whose current gender identity and expression are different from their designations at birth.[38] The Equal Employment Opportunities Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.[39] In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another's gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual

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[34] *E.g.*, People v. Odom, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).

[35] A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here: http://www.americanbar.org/groups/sexual_orientation/policy.html.

[36] For a list of states that have not extended protection in areas like employment to LGBT individuals see: https://www.aclu.org/map/non-discrimination-laws-state-state-information-map.

[37] Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display "geographic bias" by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.

[38] The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as "the individual's internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called 'gender expression,' and may or may not conform to social stereotypes associated with a particular gender." *See Diversity & Inclusion Reference* Materials, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited May 9, 2016).

[39] https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.[40]

Some commenters objected to retaining the term "socioeconomic status" in new paragraph (g). This term is included in the current provision and also is in the Model Code of Judicial Conduct. An Indiana disciplinary case, *In re Campiti*, 937 N.E.2d 340 (2009), provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant's socioeconomic status: the litigant was receiving free legal services. SCEPR has found no instance where this term in an ethics rule has been misused or applied indiscriminately in any jurisdiction. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer's ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer's ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer's pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 to not avoid appointments from a tribunal except for "good cause."

E. Promoting Diversity

Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female.[41] The most recent figures for racial demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.[42] Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

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[40] A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

[41] American Bar Association, *Lawyer Demographics Year 2016* (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

[42] *Id.*

F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR's proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer's ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State's Rule 8.4(g), which reads: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: "(1) the representation will result in violation of the rules of professional conduct or other law." Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (*See* Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (*See* Rules 1.7, 1.9, 1.10, 1.11, and 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities, with a citation to Model Rule 1.2(b). That Rule reads: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer's firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to give reasonable assurance that lawyers in a firm conform to current Rule 8.4(d) and Comment [3] and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

SCEPR has also agreed to develop a formal Ethics Opinion discussing Model Rule 5.3 and its relationship to the other ethics rules, including this new Rule.

G. Legitimate Advocacy

Paragraph (g) includes the following sentence: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." The sentence recognizes the balance in the Rules that exists presently in current Comment [3] to Rule 8.4. It also expands the current sentence in the existing comment by adding the word "advice," as the scope of new Rule 8.4(g) is now not limited to "the course of representing a client" but includes "conduct related to the practice of law."

H. Peremptory Challenges

The following sentence appears in the current provision: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." SCEPR and the other cosponsors agreed to retain the sentence in the comments.

V. CONCLUSION

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-five jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to engage in conduct that the lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
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Eliminating Bias, Harassment, and Discrimination in the Legal Profession: Proposed Changes to Model Rule 8.4

Sarah C. Haan
Dominic Lovotti

Is a lawyer who makes unwanted sexual advances to a legal assistant in violation of the Idaho Rules of Professional Conduct? Under existing rules, which essentially track the ABA's Model Rules of Professional Conduct, probably not, unless the lawyer's acts are prejudicial to the administration of justice. However, if Idaho adopts proposed revisions to the ABA's Model Rules, the answer will almost certainly be yes.

The draft proposal seeks to strengthen ethics protections for protected classes and to advance the ABA's goal of eliminating bias, harassment, and discrimination in the legal profession.

The ABA Standing Committee on Ethics and Professional Responsibility is currently seeking approval for a draft proposal that would revise Model Rule of Professional Conduct 8.4 to add anti-discrimination and anti-harassment provisions to the black letter rules governing conduct in this profession. The draft proposal seeks to strengthen ethics protections for protected classes and to advance the ABA's goal of eliminating bias, harassment, and discrimination in the legal profession.

Many believe that the ABA's existing Model Rule 8.4(d) provides insufficient protection for at least two reasons. First, it considers discrimination by an attorney to be misconduct only when prejudicial to the administration of justice, which is generally understood to be discrimination in connection with client representation. Second, the current anti-discrimination provision is only mentioned in a comment to Model Rule 8.4 – Comment 3. Comments are advisory and not every state adopts them. (Idaho generally does.)

The proposed changes have sparked controversy. From its earliest drafts, the ABA's Standing Committee has openly sought comment from the public on how best to achieve the desired protections and to assuage practitioners' concerns. The most forceful objections are that the revised Rule will force attorneys to accept work that they can decline under the existing framework, and that attorneys affiliated with religious organizations will not be able to select people with whom they work.

As it stands now, the proposed draft has addressed many of the concerns raised in the proposal process. The ABA Standing Committee has prepared a formal Report and Resolution for presentation and a vote at the ABA House of Delegates Annual Meeting in August 2016.[1] Commentators believe the proposal is likely to pass. What follows is an examination of the current rule, the proposed changes, a description of the controversy, concluding with an endorsement of the ABA's proposed draft.

The current rule

Currently, Model Rule 8.4(d) and its Comment 3 work in tandem to address discrimination. 8.4(d) makes it professional misconduct for a lawyer "to engage in conduct that is prejudicial to the administration of justice." Comment 3 goes on to state that "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)."

The Idaho Supreme Court has adopted ABA Model Rule 8.4(d) and Comment 3 verbatim as Idaho Rule of Professional Conduct 8.4 and its Comment 3.

The proposed changes

The changes sought to Model Rule 8.4 would create an additional section, 8.4(g), redraft Comment 3, and add two additional comments. The new Rule 8.4(g) would make it professional misconduct for a lawyer "to harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." The revised language goes on to specify that "[t]his Rule does not

limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16."[2]

The revised Comment 3 further defines what would constitute discrimination or harassment: "[D]iscrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." *Id.*

The newly-drafted Comment 4 expands the breadth of interactions that could potentially cause an attorney to violate Rule 8.4(g): "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity." *Id.*

The newly-drafted Comment 5 explains how this new Rule and its Comments should be interpreted in light of other Model Rules: "Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b)." *Id.*

Proponents of the revised Rule seek to further the reach of the disciplinary authorities to address implicit and explicit bias in the legal profession.

The controversy

Proponents of the revised Rule seek to further the reach of the disciplinary authorities to address implicit and explicit bias in the legal profession. The concern here is that the ABA Model Rules, which are supposed to be a guiding light for the legitimacy and credibility of the legal profession nationwide, currently allow harassment and discrimination to occur so long as they are not tied to client representation.

In addition, because Comments to the Model Rules are generally not binding and not every state adopts them, there are states that have not even adopted Comment 3 to the current Rule 8.4. On the other hand, 24 states have already added anti-discrimination or anti-harassment provisions to their codes of professional responsibility. Idaho falls in the middle, essentially tracking the ABA Model Rules and Comments on this subject word-for-word.

Opponents to the revised Rule have raised several grievances with the proposed change.[3] First, Model Rule 8.4 has historically been solely concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system. The new Rule change addresses neither of those issues. Second, attorneys may be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases because attorneys will be forced to take cases or clients they might have otherwise declined. And third, attorneys may end up being sanctioned for expression that is protected by the First Amendment.

Another frequent comment in opposition has raised concerns about a religious exemption so religious organizations or attorneys affiliated with these organizations can maintain their practice of hiring people with similar beliefs.[4] The comments in opposition demonstrate that there are a significant number of attorneys who would like to be able to continue to be selective

about clientele or hiring practices.

For a more complete picture, you can examine additional information and useful commentary found in a joint Report to the House of Delegates submitted by the ABA's Standing Committee, which summarizes the case for adopting the revisions.[5] The Standing Committee is supported by other sections and commissions of the ABA representing these areas: Civil Rights and Social Justice, Disability Rights, Diversity and Inclusion, Racial and Ethnic Diversity in the Profession, Sexual Orientation and Gender Identity, and Women in the Profession.

Final thoughts

Overall, the proposed revision is a good idea for the ABA Model Rules and for the Idaho bar. The proposal process, during which the ABA Standing Committee has revised the draft proposal several times in response to practitioner comments, has produced a workable improvement to Rule 8.4. The new Rule will promote important anti-discrimination and anti-harassment principles and present little potential downside for most lawyers. It successfully promotes the ABA's major goal of eliminating bias and enhancing diversity in the legal profession and, more broadly, in the justice system as a whole.

Hopefully, as the proposed Rule change makes its way to Idaho, it will cause Idaho lawyers to consider biases, harassment, and discrimination, and their effects on our profession. All individuals are capable of acting upon bias and of being harmed by the biases of others. With the diversification of the Idaho bar and the client population, the time is right to grapple over these significant issues, even if they make us uncomfortable. It is up to each of us to be active and productive participants in the conversation.

The new Rule will promote important anti-discrimination and anti-harassment principles and present little potential downside for most lawyers.

Endnotes

1. ABA Standing Committee on Ethics and Professional Responsibility, Section on Civil Rights and Social Justice, Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates (Aug. 2016), *available at*: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf

2. *Id.* at 1-2.

3. American Bar Association, Model Rule of Professional Conduct 8.4, Dec. 22 Draft Proposal – Comments Received, *available at*: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html

4. Comments on Proposed Amendment to Model Rule 8.4. United States Conference of Catholic Bishops, *available at*: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/moses_3_11_16.authcheckdam.pdf

5. *See* endnote 1, *supra*.

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partiality, integrity, and competence.

All of this is part-and-parcel of the rule of law. In Idaho the judicial power of the state is vested in the Supreme Court. Title 3 of the Idaho Code grants supervisory power of attorneys to the Supreme Court. And that, in a nutshell, is how the Supreme Court has granted judges the power to require lawyers in legal proceedings to refrain from manifesting bias or prejudice, or engaging in harassment, based upon a host of attributes.

Personal standards

So much for what the Idaho Supreme Court has cast upon judges for the regulation of lawyers in legal proceedings. What should lawyers, as a self-regulated profession, choose as their standard for the due regard of others they interact with in the practice of law? Our current rule is contained in IRPC 8.4(d) which provides that "(i)t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

That's the blackletter rule that frankly requires reference to Comment [3] thereto to the effect that "(a) lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."

Why has the profession buried the anti-bias and prejudice rule in a comment? In a word – compromise. For reasons none of us can be proud of segments of the national bar had been unwilling to support a blackletter rule prohibiting discrimination, harassment, bias, and prejudice on the basis of attributes including race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. The Idaho rules of professional conduct are based in large part on the American Bar Association Model Rules of Professional Conduct. It wasn't until 1998 that Comment [3] found its way into the Model Rules. It has been a fight ever since to push these standards from a mere comment to the status of a blackletter rule. Now that has changed.

A new day

On August 8, 2016 the ABA House of Delegates approved Resolution 109 to amend Model Rule 8.4 to bring into the blackletter of the ABA Model Rules of Professional Conduct an anti-harassment and antidiscrimination provision. Idaho's members to the ABA House of Delegates Larry C. Hunter, Deborah A. Ferguson, and Jennifer M. Jensen each voted in favor of resolution 109. Delegate Hunter informed me that the rule was thoroughly worked over and had been the subject of several amendments such that the final text had broad support of the House of Delegates.

Here's the text of new Model Rule 8.4(g): *It is professional misconduct for a lawyer to*:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

In addition to the new text in paragraph (g) are new comments to Model Rule 8.4 contained in Comments [3] through [5]. Comment [4] describes the *scope of conduct* defined by the phrase "conduct related to the practice of law":

> [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

So while Idaho's new Code of Judicial Conduct requires Idaho judges to control certain lawyer conduct in "proceedings before the court", Comment [4] makes it clear that *conduct related to the practice of law* includes (1) client representations, (2) interacting with others while engaged in the practice of law, (3) operating a law firm, and (4) participating in business and social activities in connection with the practice of law.

Functionality for consensus

The new Model Rule, its associated comments, and existing Model Rules contain a number of safeguards to protect against inadvertent violations, recognize First Amendment freedoms, and accommodate conscientious objections:

- Lawyers are not required to take matters they consider repugnant or have fundamental disagreement with. Rule 1.16(b)(4);
- A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Comment [5] to Rule 8.4(g).
- A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice. Comment [5] to Rule 8.4(g).
- A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law. Comment [6] to Rule 8.4(g).
- A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. Rule 1.2(b).
- A knowledge requirement was incorporated. The rule prohibits conduct a lawyer "knows or reasonably should know" is harassment or discrimination. These two terms – "knows" and "reasonably should know" – are defined in the Model Rules, and this dual standard – "knows or reasonably should know" – is widely used throughout the Model and Idaho Rules. See IRPC 1.13(f), 2.3(b), 3.6(a), 4.3 and 4.4(b).
- The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Comment [3] to Rule 8.4(g).

So how will members of the Idaho State Bar regard the blackletter rule contained in the new Model Rule 8.4(g)? We'll find out this fall. During its September board meeting the ISB Board of Commissioners voted to submit a resolution to our membership for its determination pursuant to IBCR 906 – the Resolution Process. Let's see how this goes!

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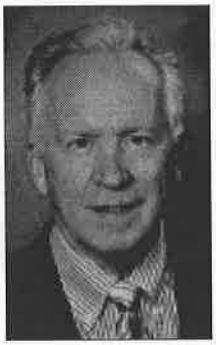

ETHICS COLUMN

Francis G.X. Pileggi, Esquire

ABA Seeks to Enforce Political Correctness

During the nearly two decades that I have written this ethics column, I have eschewed controversial topics. Not this time.

In August, the American Bar Association adopted a new Model Rule of Professional Conduct 8.4(g), which creates a new definition for discrimination against certain protected classes. The Model Rules approved by the ABA are typically adopted by each state at which time a violation of any rule could subject a lawyer to penalties that include disbarment or suspension from the practice of law.

It is a violation of the new Rule 8.4(g) to engage in discrimination based on "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law." Discrimination includes "verbal" conduct that "manifests bias."

One leading expert on constitutional law and legal ethics, Professor Ronald Rotunda, has written recently in *The Wall Street Journal* that the new rule is in conflict with the First Amendment right to free speech. He uses the example of two lawyers discussing a case and one exclaims: "I abhor the idle rich. We should raise capital gains taxes." According to the good professor, that lawyer has just violated the new ABA rule "by manifesting bias based on socioeconomic status."

Another example could involve a law firm that rejects a young man's application for a job as a messenger. If the law firm designates their restrooms by sex, the applicant could argue that the firm engaged in "gender identity" discrimination. If the disgruntled messenger identifies with the opposite sex (or says that he does), he could assert that he was not hired because the firm demonstrated gender-identity bias based on the firm's restrooms being segregated.

Another widely-respected constitutional law scholar, Professor Eugene Volokh, has written that state courts and state bars should resist pressure to adopt the new rule. Volokh explains that the new rule could even expose a solo practitioner to penalties if something she "said at a law-related function offended someone employed by some other law firm."

Moreover, in his expert view, the rule does nothing to limit the rule's impact on the First Amendment right to free speech. He adds that the ABA intends to: "limit lawyers' expression of viewpoints that it disapproves of."

The ABA's membership includes less than one-third of the approximately 1.2 million lawyers in the United States. Another highly-regarded legal scholar, often cited in court opinions, Professor Stephen Bainbridge, has written on his blog, in connection with the new rule, that the "ABA no longer represents the interests of all lawyers but only those who belong to the PC crowd."

Another lawyer who frequently publishes articles on the right to free speech has written about the new rule to argue that he could be subject to professional penalties for publicly expressing his view that same-sex marriage is contrary to religious principles to which he adheres. He expresses concern that, as with other speech codes, the chilling effect resulting from fear of enforcement remains at least as problematic as actual enforcement. The chilling effect will create the impression that certain ideas that are not politically correct, and that could be perceived as offensive by certain favored victim groups, are verboten. Will the new rule subject lawyers to the expense of defending ethics complaints if a conversation over a drink at a bar association event is now within the jurisdiction of the thought police? Even if no ethics complaint is filed, will someone who is expressing religious beliefs that are not politically correct, be verbally tarred and feathered as "one of those people"—bigots and haters? Will law firms need to change the signs for all restrooms used by their employees to label them all as gender-neutral restrooms?

Even if the newly unethical speech does not violate state or federal law, it could still be a violation of the new rule. The new restrictions on what lawyers are allowed to say may ameliorate unemployment, especially among young lawyers who might consider specializing in this new area.

It remains to be seen how vigorous the enforcement will be of the new orthodoxy against those committing the sin of political incorrectness in its latest iteration? ◆

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THE WALL STREET JOURNAL.

http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418

OPINION | COMMENTARY

The ABA Overrules the First Amendment

The legal trade association adopts a rule to regulate lawyers' speech.

The American Bar Association building, Washington, D.C. *PHOTO: ALAMY*

By **RON ROTUNDA**
Aug. 16, 2016 7:00 p.m. ET

The American Bar Association represents about a third of the country's 1.2 million lawyers. But it is more than a trade association. It also has some governmental power, which makes its latest foray into political correctness of more than passing interest.

States give the ABA power to accredit law schools, which must teach the association's Model Rules of Professional Conduct. The ABA also lobbies state courts to adopt these rules, which become real law governing how and whether lawyers can practice.

At its San Francisco convention this month, the ABA adopted a rule regulating things from lawyers' speech to the access to their office restrooms. Even before state courts adopt these changes, law schools must teach this rule and bar exams must test on it.

Known as 8.4(g), the rule provides that it is "professional misconduct" to engage in discrimination based on "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." The rule specifies that discrimination includes "verbal" conduct that "manifests bias."

If lawyers do not follow this rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). The ABA report explaining the rule quotes past ABA President Paulette Brown, who says lawyers are "responsible for making our society better," and because of our "power," we "are the standard by which all should aspire."

In case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

More likely consequences include a scenario where, e.g., a law firm does not hire a job applicant who seeks a position as a messenger. If this firm designates restrooms by sex, the applicant can always argue that the firm engaged in "gender identity" discrimination. If the disappointed job seeker identifies with the opposite sex (or claims

to), he creates leverage by claiming that he was not hired because the firm's restrooms demonstrated gender-identity bias.

Lawyers hauled before the discipline board will find that the proceedings, unlike courts, are typically not open to the public, there's no jury and the rules of evidence are relaxed.

If the disappointed applicant sues, the risk also includes civil liability, derived from violating the new ABA rule. The law firm will face expensive discovery, a gauntlet of motions, and possibly years of litigation, particularly if the applicant files a class action.

It is hardly the best use of scarce bar resources to discipline lawyers who may violate a vague rule that prohibits some speech even if the speech relates to conduct that does not violate state or federal law. Yet the new rule offers one possible advantage: It may ameliorate underemployment among lawyers, since so many will be needed to meet the demand the rule creates.

Mr. Rotunda is a professor at Chapman University's Fowler School of Law.

The Washington Post

The Volokh Conspiracy | Opinion

Banning lawyers from discriminating based on 'socioeconomic status' in choosing partners, employees or experts

By Eugene Volokh August 10

As I mentioned in my lawyer speech code post, the American Bar Association has just adopted a new provision in its Model Rules of Professional Conduct — an influential document that many states have adopted as binding on lawyers in their state. This proposal would allow lawyers to be punished for a wide range of "discrimination and harassment"; I've criticized the "harassment" ban, but here I want to focus on a different aspect of the rule, which I also discussed when the rule was first proposed (emphasis added):

> It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or *socioeconomic status* in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. . . .
>
> Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and *participating in bar association, business or social activities in connection with the practice of law*. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing [diverse] employees or sponsoring diverse law student organizations.
>
> A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Lawyers also

> should be mindful of their professional obligations . . . to provide legal services to those who are unable to pay, and their obligation . . . not to avoid appointments from a tribunal except for good cause. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.

So let's see how this works as to "socioeconomic status." That term isn't defined in the proposed rule, but the one definition I've seen — interpreting a similar ban on socioeconomic-status discrimination in the Sentencing Guidelines — is "an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); see also *United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007) (likewise treating wealth as an element of socioeconomic status); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (same).

All of the following, then, might well lead to discipline if the ABA adopts this rule as part of its influential Model Rules of Professional Conduct, and then states adopt it in turn:

1. A law firm preferring more-educated employees — both as lawyers and as staffers — over less-educated ones.
2. A law firm preferring employees who went to high-"status" institutions, such as Ivy League schools.
3. A law firm contracting with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.
4. A solo lawyer who, when considering whether to team up with another solo lawyer, preferring a wealthier would-be partner over a poorer one. (The solo might, for instance, want a partner who would have the resources to weather economic hard times and to help the firm do the same.)

Back when the rule was limited to actions that were "prejudicial to the administration of justice" and didn't cover ordinary employment decisions, including socioeconomic status as one of the forbidden bases for discrimination may have made sense. For instance, insulting a witness because of his poverty, where the poverty is not relevant to the case, might reasonably be condemned. But now the rule is being broadened far beyond this. And though people pointed out the breadth of the rule when the ABA was first considering it, the ABA did nothing to materially limit the scope of the rule — apparently, it does indeed want to bar lawyers from discriminating based on socioeconomic status in choosing partners, employees and experts.

I think that, more broadly, there's no reason for state bars or state courts to go beyond the existing state and federal anti-discrimination categories when it comes to employment and similar matters. If state law bans, say, sexual orientation discrimination in employment generally, that would normally apply to law firms as well as to other firms. But if a state legislature chose not to ban sexual orientation, gender identity or marital status discrimination, I think that, too, should apply

equally to lawyers. State bars and state courts may reasonably impose special rules on behavior in court, behavior with respect to witnesses, and the like; but I don't think they should become employment regulators.

Yet even if state bars and courts do want to regulate employment discrimination, they should certainly not include "socioeconomic status." To my knowledge, no state anti-discrimination law prohibits such discrimination, and there is very good reason not to prohibit it.

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