Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

November 28, 2016
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and approval of minutes.	Tab 1	Steve Johnson, Chair
Report of Rule 3.3 Subcommittee (*Larsen v. Utah State Bar*, 2016 UT 26, and Comment 3 to Rule 3.3).	Tab 2	Tom Brunker (sub-c chair), John Bogart, Phillip Lowry, Padma Veeru-Collings
ABA Model Rule 8.4(g) proposed amendment	Tab 3	Simón Cantarero (subcommittee chair), Billie Walker, Vanessa Ramos, Joni Jones, and Trent Nelson
Next meeting.		Steve Johnson

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

October 3, 2016
DRAFT

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven Johnson (chair)
Gary Sackett
Joni Jones
Trent Nelson
John Bogart
Vanessa Ramos
Phillip Lowry
Simòn Cantarero
Daniel Brough
Gary Chrystler
Billie Walker
Thomas Brunker
Timothy Conde (recording secretary)

Excused:

Hon. Darold J. McDade
Timothy Merrill
Don Winder

Staff:

Nancy Sylvester

Approval of Minutes

Mr. Sackett provided a few non-substantive comments regarding the draft of the meeting minutes. Those comments were adopted and incorporated. The committee adopted the meeting minutes, as revised.

ABA Model Rule 8.4(g) Proposed Amendment

Robert Rice, President of the Utah State Bar, and Margaret Plane, Salt Lake City Attorney and the State Delegate for Utah to the ABA's House of Delegates, attended the meeting to speak about the ABA's proposed changes to Rule 8.4(g). Mr. Rice commented that the Utah State Bar promulgated a statement regarding diversity and inclusion years ago and it continues to

work to implement it. Mr. Rice stated that a change to Rule 8.4(g) would further the Bar's efforts. Mr. Rice also commented that he is confident the Office of Professional Conduct could implement the new rule in a manner that is consistent with the Bar's diversity and inclusion statement.

Ms. Plane encouraged the committee to take the proposed change seriously. She was a State Delegate in the ABA's House of Delegates at the time the rule change was debated. The focus of the debate seemed to her to be the ability of a state bar to enforce the rule. After months of debate, she believes the rule change the ABA adopted represents a good model rule. Ms. Plane encouraged the committee to make some change, should it not adopt the model rule as written. In other words, the discussions should not be only whether the model rule is adopted, but also whether some deviation of the model rule should be adopted. She believes an anti-discrimination rule protects clients and attorneys.

The model rule includes a mens rea requirement. Ms. Plane provided the committee with a state-by-state survey of black letter rules for anti-discrimination. Some of the issues she expects to be debated are the breadth of the rule and the difficulty of enforcement. Ms. Plane offered to provide the committee with additional resources.

Chairman Johnson inquired whether the issue of the rule change could be resolved during the meeting that day. The group opined that the issue should be analyzed and discussed further. Chairman Johnson appointed a subcommittee to study the issue and make a recommendation to the committee. Simón Cantarero (chair), Billie Walker, Vanessa Ramos, Joni Jones, and Trent Nelson were appointed to the subcommittee. In addition to the issues the group had already identified, the group also encouraged the subcommittee to discuss a possible conflict between Rules 8.4(g) and 1.16. Ms. Plane commented that a sentence was inserted into Model Rule 1.16 to address that issue.

Once the subcommittee was formed, the committee continued to discuss concerns about the proposed rule change. Specifically, discussion ensued about whether members of the committee had viewed conduct that might violate the rule. Members commented they could not be sure, since the rule was vague regarding what constitutes the "practice of law." Another issue raised by the group was whether courts have defined the practice of law and how any such definition bears on the proposed rule change. There were also questions raised about the proposed rule's impact, if any, on affirmative action policies, the definition of "socio-economic," the rule's impact on extending Title VII to all lawyers, and an attorney's freedom to make appropriate client intake decisions. Members also wondered why Rule 8.4 was chosen as the vehicle for the many changes being proposed. Ms. Plane answered that doing so would likely allow the broadest application of the proposed changes. The committee also asked about whether formal comments were made during the ABA process. Ms. Plane said there were and agreed to supply those comments and along with some other resources on this issue.

Report of Rule 3.3 Subcommittee

A subcommittee had been formed to work with the Utah Supreme Court to determine what changes, if any, should be made to Rule 3.3 in light of the Court's decision in *Larsen v.*

Utah State Bar, 2016 UT 26. The subcommittee reported that the Court requested that "recklessly" be added to the rule. The subcommittee also identified additional issues that should be considered as a result of the decision. For example, it wondered if "recklessly" should apply to all three subparts of the rule. This is reflected in Ms. Sylvester's notes, which were attached to the meeting agenda. The subcommittee also invited input regarding whether 3.3(a)(3) should be subject to a "reckless" standard. It proposed amending (a)(1)(3) to permit liability only if one *knows* the evidence is false. Another issue identified was whether "recklessly" should be defined in the rule. Members suggested inserting the following change: "with reasonable diligence should have known." In other words, the rule should apply the definition set forth in the *Rader* decision, which *Larsen* cites. The subcommittee agreed to approach the Court again for further guidance regarding the applicability of the reckless standard to subparts. Chairman Johnson also suggested that a comment be made highlighting any differences between the proposed changes and the model rule and why any changes should be made that would cause the rule to be different from the model rule.

Note About Ethics Advisory Opinion re Lawyers Settling Potential Malpractice or Disciplinary claims.

Last spring, the committee asked the ethics committee to write an opinion about settling complaints against attorneys. The ethics committee issued its report and it comported with what this committee had requested.

Update on Licensed Paralegal Practitioners and the Effects on the Rules of Professional Conduct.

The Utah Supreme Court is concerned with providing legal services in areas that are vastly unrepresented. This committee has been assigned to work with Justice Deno Himonas to work on implementing the new paralegal practitioners program. The Utah Rules of Professional Conduct will need to be adjusted to accommodate this new program. A few changes will be simple (*e.g.*, 5.2 and 4.1), but some others will require more extensive work, *e.g.*, Rule 14-802. The Court has set February 2017 as the goal to have the changes made.

NEXT MEETING: November 28, 2016 @ 5 p.m.

The meeting adjourned at 6:41 p.m.

Tab 2

Rule 3.3. Candor toward the Tribunal.

(a) A lawyer shall not knowingly or recklessly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(a)(3) offer evidence that ~~the lawyer knows to be~~is false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false or is reckless with respect to its truth.

Representations by a Lawyer

~~[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).~~

Legal Argument

[4] Legal argument based on a knowingly or recklessly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) ~~requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This~~ imposes a duty that is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] ~~The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false.~~ A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false or a lawyer's recklessness with respect to its truth, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] ~~Although p~~Paragraph (a)(3) ~~only prohibits a lawyer from offering evidence the lawyer knows to be false, it~~ permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing

advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

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(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or.

(a)(3)(b) A lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer, the lawyers client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(bc) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Rules of Professional Conduct Committee
From: Nancy Sylvester
Date: November 22, 2016
Re: Model Rule 8.4(g)

Below and attached to this memorandum are resources related to ABA Model Rule 8.4(g) that Margaret Plane discussed at the last meeting and provided separately. I have already circulated these by email. I have also included a recent Bar Journal Article on this topic. The subcommittee will present their recommendation at the committee meeting on Monday; it is not provided here.

- November 2016 Bar Journal Article (attached).
- Women Lawyers of Utah Report: http://utahwomenlawyers.org/wlus-initiative-report/.
- Resolution 109 and Report adopting new MRPC 8.4(g). The report includes some background on the resolution and the drafting decisions.
- Memo by Keith Swisher on the constitutionality of House of Delegates Resolution 109. This was provided by the chair of the ABA's Ethics committee.
- Link to the main page re the proposed amendment to 8.4: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html
- Link to the comments on the December 22, 2015 draft: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html
    - The December 22 draft evolved. For comparison, here is that draft: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheck

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dam.pdf . Pasted below is the language of the original proposal—which is what all of these comments are in response to.

- United States Conference of Bishops letter, which is listed with the other comments to the original draft, and here is the link: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/moses_3_11_16.authcheckdam.pdf
- Note these comments are both for and against the December proposal.

December 22, 2105 DRAFT proposal:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

***

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Comment

[3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system.

Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.

Implementing the ABA's New Anti-Discrimination Rule

by Keith A. Call

On August 8, 2016, the American Bar Association House of Delegates adopted a rule designed to eliminate discrimination and harassment in conduct related to the practice of law. The House of Delegates vote followed months of debate, comment, and revision, culminating in a revised rule that faced very little opposition.

The Rule

The new rule adds a new paragraph (g) to Model Rule of Professional Conduct 8.4, which defines acts of professional misconduct. The new rule provides:

> 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.

Model Rules of Prof'l Conduct R. 8.4(g). The ABA also added three new comments to Rule 8.4. *See id.* R. 8.4 cmts. 3–5, *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

Model Rule 8.4(g) broadly prohibits harassment and discrimination in all conduct "related to the practice of law." *Id.* R. 8.4(g). New comment 4 begins to define this to include "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." *Id.* R. 8.4 cmt. 4.

Comment 3 describes the meaning of discrimination and harassment. Discrimination includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." *Id.* R. 8.4 cmt. 3. Harassment includes "sexual harassment and derogatory or demeaning verbal or physical conduct," as well as "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature." *Id.* The comment adds that substantive anti-discrimination and anti-harassment statutes and case law may guide the interpretation of these concepts under the rule. *Id.*

While there is much yet to be determined regarding the full scope and application of the new rule, it clearly leaves open the possibility for a lawyer to limit his or her representation of clients based on personal views. By expressly allowing lawyers to accept, decline, or withdraw from a representation in accordance with Rule 1.16, Rule 8.4 allows lawyers to refuse representation if the client "insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." Model Rules of Prof'l Conduct R. 1.16(b)(4). Comment 5 of Rule 8.4 also contains a "*Batson*" sentence, stating that a "trial judge's findings that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." *Id.* R. 8.4 cmt. 5.

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

What about Utah?

The Model Rules of Professional Conduct are not, of course, legally binding in Utah. It remains to be seen whether Utah will adopt the ABA's version of Rule 8.4(g).

But the Utah Rules of Professional Conduct are not silent on the issue. Rule 8.4(d) already provides that it is professional misconduct to "engage in conduct that is prejudicial to the administration of justice." Utah R. Prof'l Conduct 8.4(d). And Utah's Comment 3 to that rule provides: "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...." *Id.* R. 8.4 cmt. 3.

Real Solutions

While appropriate legislative "fixes" to insidious issues such as discrimination and harassment are certainly valuable and needed, I maintain that issues like these cannot simply be legislated away. There is a human element to these issues that rule makers cannot fix. Complex and compelling issues such as rights to equality, privacy, free speech, and religious liberty will continue to bump into each other as we move our way forward as a society.

I believe one key to increased social harmony is better communication, understanding and respect on an *individual*, person-to-person level. Most of us commonly associate with those who look, act, and believe similar to ourselves. Social scientists refer to this as the "similarity attraction theory." Functioning as separate "groups" of mass individuals, it is much easier to ignore, misunderstand, and disrespect the views and rights of others. However, most of the time, interacting one-on-one with someone holding a different worldview or different life experience will promote understanding and respect.

As lawyers, we have unique opportunities to lead out in making our law firms, neighborhoods, communities, state, and nation socially better and stronger. We should each look for more opportunities to expand our social networks to include others not like ourselves for better understanding, social advancement, and personal enrichment.

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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) undermine~~s~~ 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.

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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

[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. S*ee, 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
August 2016

Response to First Amendment Concerns Raised in Certain Comments to the Proposed Amendment to Model Rule 8.4

Existing precedent in the states supports the ABA's proposal:

- As the Report notes, twenty-two states already incorporate similar anti-discrimination and anti-harassment provisions into their rules. The First Amendment has not hindered these states in adopting their rules, and the First Amendment has not hindered these states in applying their rules.
- Furthermore, thirteen states have adopted the existing Model Rule comment, which prohibits lawyers when representing clients from "knowingly manifest[ing] by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. . . ." These comments have not been struck down on First Amendment grounds, and as the Report suggests, "manifesting bias or prejudice" is broader and more subjective than harassment and discrimination.

The States' interest in this regulation is compelling:

- Diversity is a compelling state interest.[1] Diversity is particularly compelling in the legal profession, whose members are the public's ambassadors to the courts both as advocates and (later) as judges. Yet both the legal profession and the bench are not sufficiently diverse.[2]

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[1] *See generally Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (referring to diversity as a compelling interest); *Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 438 (Tenn. 2007) (quoting Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1117 (2003) (footnote omitted)) ("The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?"); Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004) ("The lack of racial and ethnic diversity at the capstone of the legal profession, the judiciary, is one of the most compelling and contentious issues surrounding judicial selection in the United States.").

[2] *See, e.g.*, Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241 (2015); Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271 (2014); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

- Members and prospective members of the legal profession have historically and recently faced harassment and discrimination.[3]
- States have a compelling interest in protecting clients and other participants in the justice system from harassment and discrimination.

States have historically enacted and upheld ethical regulations of the legal profession's speech and conduct—regulations that often impose restrictions significantly beyond those imposed on other citizens:

- "On various occasions [the Supreme Court has] accepted the proposition that States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (internal quotation marks omitted).
- A state may generally regulate practices that have "demonstrable detrimental effects . . . on the profession it regulates." *Id.* at 631; *see also id.* at 635 ("The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered.").
- "Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. In each of these cases, we engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073 (1991) (citations omitted).
- "[T]he State bears a special responsibility for maintaining standards among members of the licensed professions. The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' While lawyers act in part as 'self-employed businessmen,' they also act as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Ohralik v. Ohio State Bar*

[3] *See, e.g.*, Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 497-500 (1985) (noting that the legal profession discriminated against women, immigrants, and Jewish applicants until well into the twentieth century); Report at 6 n.15 (noting recent cases in which lawyers have been disciplined for harassing or discriminating against various groups, including other lawyers).

Ass'n, 436 U.S. 447, 460 (1978) (internal citations and quotation marks omitted).

- "A layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics." *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633, 638 (S.C. 2011) (quoting *In re Woodward*, 300 S.W.2d 385, 393–94 (Mo. 1957)).

The Proposal provides adequate notice of the proscribed conduct and is not overly broad, and vagueness and overbreadth challenges to similar ethical rules have generally failed:

- To the extent the opponents raise vagueness or overbreadth challenges, courts have upheld professional conduct terms significantly less defined than harassment and discrimination. *See, e.g.*, *Grievance Adm'r v. Fieger*, 719 N.W.2d 123 (Mich. 2006) (rejecting a vagueness challenge to ethical 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"). As the *Fieger* court noted, "while [certain professional conduct rules] are undoubtedly flexible, and the [disciplinary authority] will exercise some discretion in determining whether to charge an attorney with violating them, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. *Fieger*, 719 N.W.2d at 139 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)); *see also Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (rejecting overbreadth challenge to rule prohibiting conduct prejudicial to the administration of justice); *Chief Disciplinary Counsel v. Zelotes*, 98 A.3d 852, 868 (Conn. 2014) (rejecting a vagueness challenge to "conduct prejudicial to the administration of justice:" "We conclude that although the plain text of rule 8.4(4) may lack detail and precision, . . . its meaning is clear from the rules, the official comments to the rules, and case law interpreting rule 8.4(4) or rules that substantively are identical") (citation omitted); *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633, 637-38 (S.C. 2011) (rejecting a vagueness and overbreadth challenge to the following civility requirement: "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 vagueness, overbreadth, and under-inclusiveness challenges to the following ethical terms: "willful," "moral turpitude," "dishonesty," and "corruption," among other terms).
- The definitions in the Proposal's comments help to limit any inadvertently broad interpretation of the new rule. *See generally* MODEL RULES OF PROF'L CONDUCT Scope cmt. 21 ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.").
- Finally, the Proposal's reference to the significant body of harassment and discrimination law provides further notice and guidance to lawyers.

Attorneys have no significant interest in engaging in the proscribed conduct, especially as their conduct relates to the practice of law:

- It is unclear what, if any, interest exists to use discriminatory epithets in legal practice or to harass those with whom the attorney interacts. "'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .'" *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 140 (Mich. 2006) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–310 (1940)); *see also generally Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 854 (Cal. 1999) (noting that the First Amendment does not displace Title VII and state law prohibitions against employment discrimination); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1535-36 (M.D. Fla. 1991) (concluding that offensive "pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment" and noting that even "if the speech at issue is treated as fully protected, and the Court must balance the governmental interest in cleansing the workplace of impediments to the equality of women, the latter is a compelling interest that permits the regulation of the former and the regulation is narrowly drawn to serve this interest"); J.M. Balkin, *Free Speech and Hostile Environments*, 99 Colum. L. Rev. (1999) (concluding that sexual harassment laws regulating workplaces do not violate the First Amendment).
- If such an interest were to exist in a particular circumstance, the respondent could make an as-applied challenge (or any other type of challenge). If the challenge is meritorious, the First Amendment will protect the respondent. *Cf. Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) ("Assuming for the argument that [an ethical rule] might be considered vague in some hypothetical, peripheral application, this does not . . . warrant throwing the baby out with the bathwater.") (citation omitted).[4]

The Proposal does not infringe on attorneys' associational rights; if anything, the Proposal broadens those rights:

- Although certain opponents appear to suggest that the new rule would infringe on attorneys' associational rights, that is clearly not the case with the current draft. The new rule permits lawyers to accept or decline matters in their discretion, and indeed, the rule excepts from its coverage the entire area of accepting and terminating representation.
- Thus, the proposal expressly "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16."

[4] Of course, because defending charges might inflict significant financial, reputational, and other harm on the respondent, states should ensure in enacting the regulation in the first place that the regulation is constitutional on its face. As noted above, the regulation at issue is indeed constitutional on its face.

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession
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;

(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 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.

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