Agenda

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

September 25, 2017
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, introductions, and approval of minutes.	Tab 1	Steve Johnson, Chair
Military attorney admissions Rules 14-804, 14-806	Tab 2	Steve Johnson, Paul Burke, Joni Seko
Rule 8.4(g) comments and discussion	Tab 3	Steve Johnson, Simón Cantarero (subcommittee chair), Billy 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

May 15, 2017
DRAFT

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven G. Johnson (chair)
John H. Bogart
Daniel Brough
Joni Jones
Thomas B. Brunker
J. Simòn Cantarero
Cristie Roach
Gary G. Sackett
Hon. Trent Nelson
Billy L. Walker
Tim Merrill (phone)
Phillip Lowry, Jr. (phone)
Timothy Conde (recording secretary)

Excused:

Donald Winder
Gary Chrystler
Hon. Darold J. McDade

Staff:

Nancy Sylvester

Welcome and Approval of Minutes

Steve Johnson welcomed the committee to the meeting and requested a motion on the minutes. John Bogart moved to approve them and Billy Walker seconded the motion. The committee unanimously approved the March 6, 2017 minutes.

Attorney Advertising Subcommittee Report and Recommendation re Chairman Goodlatte's letter

Mr. Sackett reported that his subcommittee had reviewed and researched the issues surrounding Chairman Goodlatte's letter. Chairman Goodlatte had requested that Utah amend its Rules of Professional Conduct to make it unethical for a lawyer to advertise in a way that causes

medical patients to discontinue medications without first seeking the advice of a physician. Mr. Sackett said the subcommittee concluded that no change is necessary. There had been no complaints about issues in Utah as far as the subcommittee was aware and the subcommittee determined that the advertising rules the Supreme Court had adopted in the last few years were sufficient to foreclose deceptive advertising. The committee discussed the matter further and ultimately agreed to adopt the subcommittee's recommendation that no action be taken. Mr. Sackett moved to report the recommendation to the Utah Supreme Court. Tom Brunker seconded the motion and the committee unanimously joined it.

Report and Recommendation of ABA Model Rule 8.4(g) subcommittee

Mr. Cantarero reported on ABA Model Rule 8.4(g). The Utah Supreme Court had posed several questions and comments to the committee when Mr. Cantarero, Mr. Johnson, and Nancy Sylvester met with them. Their comments and questions were provided in the materials. Mr. Cantarero's subcommittee addressed each of them and recommended that the proposed rule be revised as shown in the draft attached as an exhibit to the agenda. The revisions included the following deviations from the ABA Model Rule 8.4(g): (a) a lawyer must know his conduct is harassing, and (b) the conduct must reflect adversely on the profession. The draft sparked discussion regarding what type of conduct reflects adversely on the profession, i.e., how that phrase should be defined and interpreted. The committee also discussed Comment 3 and whether "the substantive law" sentence is necessary in light of the addition of "unlawful." Ultimately, Cristie Roach moved to circulate the rule in a preliminary discussion period (as opposed to a full comment period) to get a feel for attorneys' thoughts on the proposed rule and its deviations from the Model Rule. Mr. Brunker seconded the motion and it passed unanimously. The subcommittee agreed to draft bullet points outlining the pros and cons of the revisions versus the Model Rule for the discussion period. Mr. Johnson requested that the committee review the subcommittee's document within one week. If there were no objections, the proposed rule would be sent to Bar members for discussion. Ms. Sylvester reminded the committee that she and Mr. Johnson would need to meet with the Supreme Court first to determine if the justices preferred a committee discussion before the full comment period. She said she would arrange a meeting with them sometime in the next few weeks.

Rules 1.0 and 3.3: Review Comments and final action

The committee reviewed comments regarding the proposed amendments to Rules 1.0 and 3.3 and determined that no changes were needed. Mr. Brunker moved to recommend the rule as drafted to the Supreme Court and Mr. Sackett seconded the motion. The committee unanimously approved it.

Paralegal Practitioner Rule Review

Committee members continue to review the Rules of Professional Conduct to determine what rules would impact paralegal practitioners. The committee deferred further discussion to a future meeting.

Next Meeting and Adjournment

The next meeting will be held on August 28, 2017 @ 5 p.m. in the Judicial Council Room of the Matheson Courthouse. The meeting adjourned at 7 p.m.

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

August 28, 2017
DRAFT

The meeting commenced at 5 p.m.

Committee Members Attending:
Steven G. Johnson (chair)
Thomas B. Brunker
Daniel Brough (phone)
J. Simòn Cantarero
Timothy Conde (recording secretary)
Joni Jones
Hon. Trent Nelson (phone)
Gary G. Sackett
Billy L. Walker (phone)
Phillip Lowry, Jr. (phone)

Guest:
John H. Bogart

Absent:
Vanessa Ramos, Padma Veeru-Collings, Tm Merrill, Hon. Darold McDade, Cristie Roach, Donald Winder

Staff:
Nancy Sylvester

Welcome and Approval of Minutes

No quorum was present. Approval of the minutes will be sought at the next meeting.

Announcements

Chairman Steven Johnson reminded members of the terms that apply to members who serve on the committee. Mr. Johnson read the rule that was adopted in 2015 and highlighted the provision that provides that members of this committee are limited to two four-year terms. Mr. Johnson also informed the committee that he plans to meet with the Utah Supreme Court soon to discuss filling two spots.

Mr. Johnson informed the committee that the Utah Supreme Court approved this committee's recommendations that no changes be made to Rule 7.1 in response to Chairman Goodlatte's letter regarding the American Medical Association's resolution on attorney advertising.

Mr. Johnson previewed an issue that may be upcoming concerning whether a licensed paralegal practitioner may be an owner of a law firm. The committee may consider this issue at a later date. He also raised concerns he learned regarding how ADA lawsuits are brought and the potential for abuse by the attorneys bringing them. The Court's legislative liaison is currently reviewing the issue, but this committee may elect to consider it before the next legislative session since it is likely that there will be legislation proposed on it.

Military Attorney Admissions Rule 14-804

Paul Burke, an attorney with Ray Quinney & Nebeker, reported on Utah's need for changes to its military attorney admissions rules ("MAAR"). According to Mr. Burke, most states have an MAAR. Many also have a military spouse attorney admission rule ("MSAAR"). The MAAR allows an attorney who is transferred to Utah to practice law in a limited way. An MSAAR allows a non-military spouse to practice law in the transferred state, without limitations, during the course of their spouse's military service in that state. Twenty-six states have adopted some version of an MSAAR. Mr. Burke has been advocating for the passage of an MSAAR in Utah. The rule he has proposed, in his opinion, attempts to balance the interests of military lawyers and non-military spouses of military personnel and the Bar's interest of maintaining high standards among the profession. Mr. Johnson asked Phil Lowry, an armed forces member, to chair a subcommittee to consider the issue and make recommendations. Tim Conde volunteered to serve on the subcommittee. Mr. Burke will also be involved.

Rule 8.4(g) Comments and Objections

Mr. Johnson discussed the many comments the committee received regarding Rule 8.4(g). He noted that most were negative and that they generally fell into the following categories: **Vagueness/Due Process/Overbreadth, Freedom of Speech/Conscience, Freedom of Religion, Freedom of Association, and the 6th Amendment.** Mr. Johnson suggested forming subcommittees for each constitutional concern. He proposed that each subcommittee would research and analyze the constitutional issues and provide recommendations regarding the constitutional objections that have been made by the public. The committee also discussed whether, in light of the imbalance of positive and negative comments, it would be best to withdraw the proposal and observe how other states' rules are enforced and litigated. The subcommittee suggested that, before forming the proposed subcommittees, that Mr. Johnson get further direction from the Utah Supreme Court regarding what it expects from the committee. Mr. Johnson agreed to do so and will provide the committee with further direction at the next meeting.

Next Meeting and Adjournment

The next meeting will be held on September 25, 2017 @ 5 p.m. in the Judicial Council Room of the Matheson Courthouse. The meeting adjourned at 6:20 p.m.

Tab 2

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Military Lawyers & Military-Spouse Lawyers

Paul C. Burke <pburke@rqn.com> Thu, Aug 24, 2017 at 5:45 PM
To: James Ishida <jamesi@utcourts.gov>, "Steven G. Johnson" <Stevejohnson5336@comcast.net>, Nancy Sylvester <nancyjs@utcourts.gov>, Elizabeth Wright <Elizabeth.Wright@utahbar.org>, Nicole Gray <nicoleg@utcourts.gov>

Thank you for the opportunity to contribute this process. I have continued to work with both the Judge Advocate General's Office (JAG) at Hill Air Force Base and Deiss Law's Karl Gerner, who is the Utah State Director of the Military Spouse J.D. Network, to further develop a Utah admissions rule for military-spouse lawyers. In addition, at the request of the military, we have also drafted an updated version of the existing rule for military lawyers.

Please find attached our most recent proposal for Rules 14-804 and 14-805. The updated version of Rule 14-804 for military lawyers is modeled on an analogous Virginia rule, which is considered by the military as the new gold standard. Meanwhile, Rule 14-805 is currently reserved so we propose to assign it for a military-spouse admissions rule that has been designed to mirror the rule for military lawyers.

As you might expect, the military is supportive of these proposals as they will support both the military and military families. I have been authorized by the JAG Office at Hill Air Force Base to convey its endorsement of the attached proposal.

I am planning attend the Committee meeting this coming Monday, and I respectfully ask that the attached proposal be circulated in advance to the Committee. Thank you again for your consideration of these proposed rules. Please let me know if you have any questions, comments, or concerns about this proposal.

Paul C. Burke

Paul C. Burke | General Counsel | Ray Quinney & Nebeker P.C. | 36 South State Street, Suite 1400 | Salt Lake City, Utah 84111
Direct: 801-323-3303 | Facsimile: 801-532-7543 | www.rqn.com | vCard

From: James Ishida [mailto:jamesi@utcourts.gov]
Sent: Wednesday, August 16, 2017 5:25 PM
To: Steven G. Johnson; Nancy Sylvester; Elizabeth Wright
Cc: Paul C. Burke; Nicole Gray; Docket
Subject: Proposal re Admission Rules for Military Spouse Lawyers

Dear Steve and Elizabeth,

This morning, during court conference, the Supreme Court considered the attached letter addressed to Justice Durham, supporting rule amendments that would permit military spouse attorneys to practice law in Utah under limited circumstances. The Court was favorably disposed, and asked that the proposal be referred to the Bar and its committee on professional responsibility for your consideration and recommendations.

The justices were also aware that Paul Burke has done a substantial amount of work in the area, and they hoped you would see Paul as a resource.

Pls let me know if you have any questions. I'll be on vacation from Aug 17-29, but I'll be monitoring email.

Many thanks,

James

--

James N. Ishida

Appellate Court Administrator

Administrative Office of the Courts

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Proposed Rule 14-804 & 14-805.pdf
30K

UTAH BAR ADMISSION RULES FOR MILITARY LAWYERS AND MILITARY-SPOUSE LAWYERS

Rule 14-804. Certification Rule for Military Lawyers.

(a) Eligibility. A lawyer admitted to the practice of law in a territory, district, or state of the United States other than Utah, who is serving in or employed by the armed services and is authorized to provide legal assistance by federal statute or military regulation, may obtain a certificate as a Registered Military Legal Assistance Attorney to represent authorized clients before courts and agencies in Utah.

(b) Application requirements. An applicant must be of good moral character and shall apply to the Bar by:

(1) filing an application in the form and manner prescribed by the Board;

(2) presenting proof the applicant holds a First Professional Degree in law from an Approved Law School;

(3) presenting proof of admission to the practice of law and current good standing as a member of the licensing bar in any state, district, or territory of the United States, and certification that the applicant is not currently subject to attorney discipline or the subject of a pending disciplinary matter in any jurisdiction;

(4) furnishing whatever additional information or proof is required in the course of processing the application;

(5) certifying the applicant has not failed the Utah Bar Examination or been previously denied admission to the Bar;

(6) submitting an affidavit from the applicant's commanding officer, staff judge advocate or chief legal officer of the military base in Utah attesting that the applicant will serve as a lawyer exclusively to provide legal services as authorized by the military, and that the applicant's commanding officer, staff judge advocate or chief legal officer will notify the Utah State Bar immediately upon the termination of the applicant's military employment or service in Utah; and

(7) paying a $10 processing fee.

(c) Processing of application. Upon receipt of a completed application, the Board must immediately process the application and may conduct investigations or hearings to ensure the applicant's compliance with the requirements of this rule. Upon a showing that strict compliance with any provision of this rule would cause the military or the applicant undue hardship, the Board may in its discretion waive or vary the application of such provisions and permit the applicant to furnish other evidence in lieu thereof. The Board must promptly act upon any application filed under this rule.

(d) Certificate. Upon determination by the Board that an applicant has satisfied the requirements of this rule, the applicant will be immediately issued a Registered Military Legal Assistance Attorney Certificate.

(e) Requirements. A lawyer practicing under this rule must not hold out to the public or to any person that the lawyer is entitled to practice generally in Utah or to provide legal services except as authorized through military service. The address of record for a military legal assistance lawyer is the military address in Utah of the commanding officer, staff judge advocate or chief legal officer who filed the affidavit on the lawyer's behalf.

(f) Scope of authorized representation. A Registered Military Legal Assistance Attorney Certificate authorizes a lawyer to appear before a court or agency in Utah as counsel for authorized clients in matters involving the following subject matter:

(1) Enforcement of rights under the Servicemembers Civil Relief Act, the Uniformed Services Employment and Reemployment Rights Act, or any other law respecting the military or military servicemembers or their dependents;

(2) Probate and family law, including adoption, guardianship, name or gender changes, divorce, paternity, child custody and visitation, and child and spousal support;

(3) Consumer advocacy, landlord-tenant disputes, and defense from garnishments; and

(4) Any other matter upon the authorization of the military legal assistance lawyer's commanding officer, staff judge advocate or chief legal officer and upon the consent of the applicable court or agency.

(g) Jurisdiction and authority. The practice of a lawyer under this rule shall be subject to the Utah Rules of Professional Conduct and Article 5, Lawyer Discipline and Disability, and to all other applicable laws and rules governing lawyers admitted to the Bar. Jurisdiction shall continue whether or not the lawyer retains the Military Legal Assistance Attorney Certificate and irrespective of the residence or domicile of the lawyer. A lawyer practicing under this rule will also be subject to the laws, rules, and regulations governing the military services.

(h) Mandatory disclosures. A lawyer practicing under this rule must report to the Bar within 90 days:

(1) any change in bar membership status in any state, district, or territory where the attorney has been admitted to the practice of law;

(2) the imposition of any permanent or temporary professional disciplinary sanction by any territory, district, state or by any territorial, district, state, or federal court or agency; or

(3) the lawyer's commanding officer, staff judge advocate or chief legal officer of the military base in Utah must advise the Bar and the Supreme Court of any change in status of the lawyer that may affect the lawyer's privilege to practice under this rule.

(i) Termination of certification. A lawyer's certification under this rule may be terminated upon completion of a disciplinary proceeding in Utah; or shall terminate upon any of the following events:

(1) the lawyer dies, separates, or retires from the United States Uniformed Services;

(2) the lawyer is no longer employed, stationed, or assigned at the military base in Utah from which the affidavit required by this rule was filed,

(3) the lawyer fails to remain in good standing as a member of a licensing bar of at least one other state, district, or territory of the United States;

(4) the lawyer resigns, requests termination, or otherwise disclaims certification as a military legal assistance lawyer;

(5) the lawyer is admitted to the Bar under any other rule.

(j) Reinstatement of Certificate. If a lawyer is re-employed or reassigned to the same military base or to another military base in Utah within six months after the termination of certification under this rule, the lawyer may submit an updated affidavit as required by this rule and the lawyer's Registered Military Legal Assistance Attorney Certificate will be reinstated upon evidence satisfactory to the Board that the lawyer remains in full compliance with all requirements of this rule.

(k) Service Time. The period of time a lawyer practices using a Registered Military Legal Assistance Attorney Certificate counts under all rules measuring a lawyer's time practicing law, including Rules 14-203 and 14-705.

Rule 14-806. Admission Rule for Military-Spouse Lawyers.

(a) Eligibility. A lawyer admitted to the practice of law in a territory, district, or state of the United States other than Utah, whose spouse is a servicemember of the United States Uniformed Services on active duty, as defined by the United States Department of Defense, may obtain a license to practice law under the terms of this rule, provided that the servicemember-spouse has received orders to serve in Utah or is domiciled or stationed in Utah.

(b) Application requirements. An applicant must be of good moral character and shall apply to the Bar by:

(1) filing an application in the form and manner prescribed by the Board indicating whether the applicant seeks (A) admission to the Bar, or (B) admission to the Bar as House Counsel;

(2) presenting proof the applicant holds a First Professional Degree in law from an Approved Law School;

(3) presenting proof of admission to the practice of law and current good standing as a member of the licensing bar in any state, district, or territory of the United States, and certification that the applicant is not currently subject to attorney discipline or the subject of a pending disciplinary matter in any jurisdiction;

(4) furnishing whatever additional information or proof required in the course of processing the application;

(5) certifying the applicant has not failed the Utah Bar Examination or been previously denied admission to the Bar; and

(6) paying a $10 processing fee.

(c) Processing of application. Upon receipt of a completed application, the Board must immediately process the application and may conduct investigations or hearings to ensure the applicant's compliance with the requirements of this rule. Upon a showing that strict compliance with any provision of this rule would cause the military or the applicant undue hardship, the Board may in its discretion waive or vary the application of such provisions and permit the applicant to furnish other evidence in lieu thereof. The Board must promptly act upon any application filed under this rule.

(d) License. Upon determination that an applicant has satisfied the requirements of this rule, the Board will immediately submit motions to the Supreme Court and the United States District Court of Utah for admission certifying that the applicant has satisfied all qualifications and requirements under this rule for admission to the Bar. After the motion is granted by the Supreme Court and the United States District Court for the District of Utah, the applicant will be eligible to take the required oath and thereafter be enrolled into the Bar and Utah's state and federal courts.

(e) Requirements and scope of authorized representation. A military-spouse lawyer licensed under this rule is entitled to all privileges, rights, and benefits and is subject to all duties, obligations, and responsibilities of active members of the Bar, including all ethical, legal, and continuing legal education obligations. A military-spouse lawyer admitted to the Bar other than as House Counsel must also enroll in the Bar's approved professional liability insurance program or obtain equivalent insurance coverage, and must not retain new clients or enter an appearance in any new matter after any of the events listed in subsection (h).

(f) Jurisdiction and authority. The practice of a lawyer under this rule shall be subject to the Utah Rules of Professional Conduct and Article 5, Lawyer Discipline and Disability, and to all other applicable laws and rules governing lawyers admitted to the Bar. Jurisdiction shall continue whether or not the military-spouse lawyer retains the privilege to practice in Utah and irrespective of the residence or domicile of the military-spouse lawyer.

(g) Mandatory disclosures. A lawyer practicing under this rule must report to the Bar within 90 days:

(1) any change in bar membership status in any state, district, or territory where the attorney has been admitted to the practice of law;

(2) the imposition of any permanent or temporary professional disciplinary sanction by any territory, district, state or by any territorial, district, state, or federal court or agency; or

(3) the occurrence of any event listed in subsection (h) of this rule.

(h) Termination of practice and licensure. A military-spouse lawyer's licensure under this rule may be terminated upon completion of a disciplinary proceeding in Utah; or shall terminate six months after any of the following events, unless the military-spouse lawyer has a pending application for admission to the Bar:

(1) the servicemember-spouse dies, separates or retires from the United States Uniformed Services; or is permanently transferred outside the State of Utah on military orders with dependents authorized;

(2) the military-spouse lawyer ceases to be a dependent as defined by the United States Department of Defense;

(3) the military-spouse lawyer permanently relocates to another state, district, or territory of the United States for reason other than the servicemember-spouse's permanent change of station outside the State of Utah;

(4) the military-spouse lawyer fails to remain in good standing as a member of a licensing bar of a state, district, or territory of the United States;

(5) the military-spouse lawyer resigns, requests termination, or fails to meet annual licensing requirements of the Bar; or

(6) the military-spouse lawyer is admitted to the Bar under any other rule.

(i) Reinstatement of License. If within six months after the termination of licensure under this rule, a military-spouse lawyer returns to Utah because the lawyer's servicemember-spouse is once again stationed in Utah, the military-spouse lawyer will be reinstated upon submission of evidence satisfactory to the Board that the lawyer remains in full compliance with all requirements of this rule.

(j) Service Time. The period of time a military-spouse lawyer practices under this rule counts under all rules measuring a lawyer's time practicing law or as a member of the Bar, including Rules 14-203 and 14-705.

UCLI UTAH CENTER FOR LEGAL INCLUSION

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August 2, 2017

VIA E-MAIL AND U.S. MAIL

The Honorable Justice Christine Durham
450 S. State Street, 5th Floor
Salt Lake City, UT 84111
jdurham@utcourts.gov

Dear Justice Durham and the Honorable Justices of the Utah Supreme Court,

The Utah Center for Legal Inclusion ("UCLI") has recently become aware of the Military Spouse JD Network's ("MSJDN") efforts to ensure that military spouse attorneys are able to practice law as they are transferred from one jurisdiction to another due to their spouses' military deployments. These frequent moves take a toll on military families, and particularly on those spouses trying to pursue careers in the law while moving from state to state every few years. Some military spouses, many of whom bring diverse perspectives to the bars in which they practice, end up leaving the legal profession (or sitting on the sidelines) because the daunting prospect of taking multiple bar exams is too burdensome and just not practicable given frequent moves.

To alleviate this burden, the MSJDN has successfully assisted 26 states as those courts and bars have adopted bar admission rules that accommodate the unique licensing needs of military spouses. A modified version of the MSJDN's model rule—which has been revised to address the specific needs and concerns of the Utah State Bar and the Utah State Courts—is attached for your reference.

While the number of military spouse attorneys who currently take advantage of these admissions accommodations throughout the country may be relatively small, the effect on military families is huge. With Utah's large military presence in the state, an appropriately crafted rule might attract applicants from this potential pool. These applicants and admittees would be a benefit to our legal community. For these reasons, we respectfully ask that the Utah Supreme Court inquire into the possibility of the Utah State Bar joining the 26 states which have adopted admissions rules to help accommodate military spouse attorneys. We are happy to

answer any questions you may have or provide more information about the MSJDN's efforts if you feel that will be helpful.

Thank you for your consideration of this issue.

Sincerely,

Kristen Olsen
Nathan D. Alder

Enclosure: MSJDN Model Rule

UTAH BAR ADMISSION RULE FOR MILITARY LAWYERS AND MILITARY SPOUSE LAWYERS

Rule 14-804. Special Admission Rule for Military Lawyers and Military Spouse Lawyers.

(a) Eligibility of military lawyers and military spouse lawyers.

(a)(1) A lawyer admitted to the practice of law in a state, district, or territory of the United States, who is a full-time active duty military officer serving in the Office of a Staff Judge Advocate of the United States Army, Air Force, Navy, Marines, or Coast Guard, a Naval Legal Service Office or a Trial Service Office, located in Utah, may, upon application to the Bar and Supreme Court certification, appear as a lawyer and practice law before the courts of Utah in any civil matter or civil litigation, or in a civil administrative proceeding, subject to the conditions and limitations set forth in this rule.

(a)(2) A lawyer whose spouse is a servicemember of the United States Uniformed Services on active duty, as defined by the United States Department of Defense, may obtain a license to practice law under the terms of this rule, provided that the servicemember-spouse has received orders to serve in Utah or is domiciled or stationed in Utah.

(b) **Application requirements.** An applicant must be of good moral character and shall apply to the Bar by:

(b)(1) filing an application in the form and manner prescribed by the Board indicating whether the applicant seeks (A) permission to practice law as a military lawyer, (B) admission to the Bar, or (C) admission to the Bar as House Counsel;

(b)(2) presenting proof the applicant holds a First Professional Degree in law from an Approved Law School;

(b)(3) presenting proof of admission to the practice of law and current good standing as a member of the licensing bar in any state, district, or territory of the United States, and certification that the applicant is not currently subject to attorney discipline or the subject of a pending disciplinary matter in any jurisdiction;

(b)(4) furnishing whatever additional information or proof that may be required in the course of processing the application;

(b)(5) certifying the applicant has not failed the Bar Examination or been previously denied admission to the Bar within five years of the date of filing an application under this rule; and

(b)(6) paying a $10 processing fee.

(c) **Processing of application from military lawyer or military spouse lawyer.** Upon receipt of a completed application from a military lawyer or a military spouse lawyer, the Board must immediately process the application and may conduct investigations or hearings to ensure the

applicant's compliance with the requirements of this rule. Upon a showing that strict compliance with any provision of this rule would cause the military or the applicant undue hardship, the Board may in its discretion waive or vary the application of such provisions and permit the applicant to furnish other evidence in lieu thereof. The Board must promptly act upon any application filed under this rule.

(c)(1) **Certification of military lawyer.** Upon determination by the Board that a military lawyer applicant has satisfied the requirements of this rule and upon certification by the Supreme Court, the applicant will be granted immediate permission to practice law in Utah.

(c)(2) **Licensing of military spouse lawyer.** Upon determination by the Board that a military spouse applicant has satisfied the requirements of this rule, the applicant will be licensed immediately to practice law in Utah and enroll as a member of the Bar.

(d) **Representation of status.** A military lawyer practicing under this rule must not hold out to the public or otherwise represent that the military lawyer is a member of the Bar or entitled to practice generally in Utah.

(e) **Requirements and scope of authorized representation**

(e)(1) A military lawyer authorized under this rule may represent active duty military personnel in enlisted grades E-1 through E-4 and their dependents, who are under substantial financial hardship, in non-criminal matters to the extent such representation is permitted by the supervisory Staff Judge Advocate or Commanding Officer of the Naval Legal Service Office or the Commanding Officer of the Trial Service Office. An authorized military lawyer may also engage in such other preparatory activity as is necessary for any matter in which the military attorney is involved. Other active duty military personnel and their dependents may be represented if expressly approved in writing by the Service Judge Advocate General or his or her designee.

(e)(2) A military spouse lawyer licensed under this rule is entitled to all privileges, rights, and benefits and is subject to all duties, obligations, and responsibilities of active members of the Bar, including all ethical, legal, and continuing legal education obligations. A military spouse lawyer must also enroll in the Bar's approved professional liability insurance program or obtain equivalent insurance coverage, and must not retain new clients or enter an appearance in any new matter after any of the events listed in subsection (i)(2).

(f) **Prohibition on compensation.** A military lawyer practicing under this rule may not demand or receive any compensation from any clients in addition to the military pay to which the military lawyer is already entitled.

(g) **Jurisdiction and authority.** The practice of a lawyer under this rule shall be subject to the Utah Rules of Professional Conduct and Article 5, Lawyer Discipline and Disability, and to all other applicable laws and rules governing lawyers admitted to the Bar. Jurisdiction shall continue whether or not the military lawyer or military spouse lawyer retains the privilege to practice in Utah and irrespective of the residence or domicile of the military lawyer or military spouse lawyer.

(h) **Mandatory disclosures.** A lawyer practicing under this rule must report to the Bar within 90 days:

(h)(1) any change in bar membership status in any state, district, or territory where the attorney has been admitted to the practice of law;

(h)(2) the imposition of any permanent or temporary professional disciplinary sanction by any federal or state court or agency;

(h)(3) in the case of a military spouse lawyer, the occurrence of any event listed in subsection (i)(2) of this rule; or

(h)(4) in the case of a military lawyer, the military lawyer's Commanding Officer must advise the Bar and the Supreme Court of any change in status of the military lawyer that may affect the military lawyer's privilege to practice under this rule.

(i) **Termination of practice and licensure.**

(i)(1) A military lawyer's privilege to practice under this rule may be terminated by the Supreme Court at any time with or without cause; or shall terminate when the military lawyer ends active duty military service in Utah.

(i)(2) A military spouse lawyer's licensure under this rule may be terminated upon completion of a disciplinary proceeding in Utah; or shall terminate six months after any of the following events:

(i)(2)(A) the servicemember-spouse dies, separates or retires from the United States Uniformed Services; or is permanently transferred outside the State of Utah on military orders with dependents authorized;

(i)(2)(B) the military spouse lawyer ceases to be a dependent as defined by the United States Department of Defense;

(i)(2)(C) the military spouse lawyer permanently relocates to another state, district, or territory of the United States for reason other than the servicemember-spouse's permanent change of station outside the State of Utah;

(i)(2)(D) the military spouse lawyer fails to remain in good standing as a member of a licensing bar of a state, district, or territory of the United States;

(i)(2)(E) the military spouse lawyer resigns, requests termination, or fails to meet annual licensing requirements of the Bar; or.

(i)(2)(F) the military spouse lawyer is admitted to the Bar under any other rule.

Rule 14-804. Special admission exception for military lawyers and military spouse lawyers.

(a)(1) Exception for military lawyers and military spouse lawyers to practice in Utah. A lawyer admitted to the practice of law in a state or territory of the United States or of the District of Columbia, who is a full-time active duty military officer serving in the Office of a Staff Judge Advocate of the United States Army, Air Force, Navy, Marines, or Coast Guard, a Naval Legal Service Office or a Trial Service Office, located in Utah, may, upon application to the Bar and Supreme Court certification, appear as a lawyer and practice law before the courts of Utah in any civil matter or civil litigation, or in a civil administrative proceeding, subject to the conditions and limitations set forth in this Rule.

(a)(2) A lawyer whose spouse is a servicemember of the United States Uniformed Services on active duty, as defined by the United States Department of Defense, may obtain a license to practice law under the terms of this rule, provided that the servicemember-spouse has received orders to serve in Utah or is domiciled or stationed in Utah.

(b) Application requirements. The applicant must be of good moral character and shall apply to the Bar by:

(b)(1) filing an application in the form and manner that may be prescribed by the Board ~~of Bar Commissioners~~ indicating whether the applicant seeks (A) permission to practice law as a military lawyer, (B) admission to the Bar, or (C) admission to the Bar as House Counsel;

(b)(2) presenting ~~satisfactory~~ proof ~~of admission to the practice of law and current good standing as a member of the licensing bar in any state or territory of the United States or the District of Columbia~~ the applicant holds a First Professional Degree in law from an Approved Law School;

(b)(3) presenting proof of admission to the practice of law and current good standing as a member of the licensing bar in any state, district, or territory of the United States, and certification that the applicant is not currently subject to attorney discipline or the subject of a pending disciplinary matter in any jurisdiction;

~~(b)(3)~~ (b)(4) furnishing whatever additional information or proof that may be required in the course of processing the application; ~~and~~

(b)(5) certifying the applicant has not failed the Bar Exam or been previously denied admission to the Bar within five years of the date of filing an application under this rule; and

~~(b)(4)~~ (b)(6) paying a $10 processing fee.

(c) ~~Certification. Permission for an applicant to practice law shall become effective upon approval by the Bar and certification by the Supreme Court.~~

Processing of application from military lawyer or military spouse lawyer. Upon receipt of a completed application from a military lawyer or a military spouse lawyer, the Board must immediately process the application and may conduct investigations or hearings to ensure the applicant's compliance with the requirements of this rule. Upon a showing that strict compliance with any provision of this rule would cause the military or the applicant undue hardship, the Board may in its discretion waive or vary the application of such provisions and permit the applicant to furnish other evidence in lieu thereof. The Board must promptly act upon any application filed under this rule.

(c)(1) **Certification of military lawyer.** Upon the determination by the Board that a military lawyer applicant has satisfied the requirements of this rule and upon certification by the Supreme Court, the applicant will be licensed immediately to practice law in Utah and enroll as a member of the Bar.

(c)(2) **Licensing of military spouse lawyer.** Upon determination by the Board that a military spouse applicant has satisfied the requirements of this rule, the applicant will be licensed immediately to practice law in Utah and enroll as a member of the Bar.

(d) ~~Prohibition on holding forth. Military lawyers admitted to practice pursuant to this Rule are not, and shall not represent themselves to be, members of the Bar nor represent that they are licensed to generally practice law in Utah.~~ **Representation of status**. A military lawyer practicing under this rule must not hold out to the public or otherwise represent that the military lawyer is a member of the Bar or entitled to practice generally in Utah.

(e)(1) ~~Scope of representation permitted~~ Requirements and scope of authorized representation. ~~Military lawyers~~ A military lawyer authorized under ~~admitted pursuant to~~ this rule may represent active duty military personnel in enlisted grades E-1 through E-4 and their dependents, who are under substantial financial hardship, in non-criminal matters to the extent such representation is permitted by the supervisory Staff Judge Advocate or Commanding Officer of the Naval Legal Service Office or the Commanding Officer of the Trial Service Office. ~~They~~ An authorized military lawyer may also engage in such other preparatory activity as is necessary for any matter in which the military attorney is involved. Other active duty military personnel and their dependents may be represented if expressly approved in writing by the Service Judge Advocate General or his or her designee.

(e)(2) A military spouse lawyer licensed under this rule is entitled to all privileges, rights and benefits and is subject to all duties, obligations, and responsibilities of active members of the Bar, including all ethical, legal, and continuing legal educations obligations. A military spouse lawyer must also enroll in the Bar's approved professional liability insurance program or obtain equivalent insurance coverage, and must not retain new clients or enter an appearance in any new matter after any of the events listed in subsection (i)(2).

(f) Prohibition on compensation. ~~Military lawyers~~ A military lawyer ~~admitted pursuant to~~ practicing under this rule may not demand or receive any compensation from clients in addition to the military pay to which they are already entitled.

(g) Jurisdiction and authority. The practice of a lawyer ~~admitted~~ under this rule shall be subject to the Utah Rules of Professional Conduct and Article 5, Lawyer Discipline and Disability, and to all other applicable laws and rules governing lawyers admitted to the Bar. Jurisdiction shall continue whether or not the military lawyer or military spouse lawyer retains the privilege to practice in Utah and irrespective of the residence or domicile of the military lawyer or military spouse lawyer.

(h) Mandatory disclosures. A lawyer practicing under this rule must report to the Bar within 90 days:

(h)(1) any change in bar membership status in any state, district, or territory where the attorney has been admitted to the practice of law;

(h)(2) the imposition of any permanent or temporary professional disciplinary sanction by any federal or state court or agency;

(h)(3) in the case of a military spouse lawyer, the occurrence of any event in subsection (i)(2) of this rule; or

(h)(4) in the case of a military lawyer, the military lawyer's Commanding Officer must advise the Bar and the Supreme Court of any change in status of the military lawyer that may affect the military lawyer's privilege to practice under this rule.

Termination of ~~privilege and certification~~ practice and licensure.

(h) (i)(1) ~~The~~ A military lawyer's privilege to practice under this rule~~: (1)(A)~~ may be terminated by the Supreme Court at any time with or without cause; or ~~(h) (1)(B)~~ shall ~~be terminated~~ terminate when the military lawyer ends active duty military service in Utah.

~~(h)(2) The lawyer admitted under this rule and his or her supervisory Staff Judge Advocate or his or her Commanding Officer are responsible to advise~~

~~the Bar and the Supreme Court of any change in status of the lawyer that may affect his or her privilege to practice law under this rule.~~

(i)(2) A military spouse lawyer's licensure under this rule may be terminated upon completion of a disciplinary proceeding in Utah; or shall terminate six months after any of the following events:

(i)(2)(A) the servicemember spouse dies, separates or retires from the United States Uniformed Services, or is permanently transferred outside the State of Utah on military orders with dependents authorized;

(i)(2)(B) the military spouse lawyer ceases to be a dependent as defined by the United States Department of Defense;

(i)(2)(C) the military spouse lawyer permanently relocates to another state, district, or territory of the United States for reason other than the servicemember-spouse's permanent change of station outside the State of Utah;

(i)(2)(D) the military spouse lawyer fails to remain in good standing as a member of a licensing bar of a state, district, or territory of the United States;

(i)(2)(E) the military spouse lawyer resigns, requests termination, or fails to meet annual licensing requirements of the Bar; or

(i)(2)(F) the military spouse lawyer is admitted to the Bar under any other rule.

Tab 3

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.

(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.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to 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.

[1a] A violation of paragraph (a) based solely on the lawyer’s violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

[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 confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. 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).

[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).

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

[5] 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).

[46] 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.

Synopsis of Public Comments to Proposed Rule 8.4(g)

1	2	RobRoy Platt	unconstitutional, no legitimate professional purpose, conflicts with other RPC, rule will harm clients, rule will suppress politically incorrect speech, trespass on lawyer conscience rights
2	5	Martin Gravis	may be unconstitutionally vague, but OK with rule
3	5	Kurt Laird	agree with 1
4	5	Russ Weekes	agree with 1
5	5	RobRoy Platt	credit to Bradley Abrahamson
6	6	Ronald Rotunda	1st Amendment issues
7	6	Ricky Nelson	rule goes too far
8	6	Eric Johnson	unnecessary—already covered by other rules
9	8	Bryan Booth	add back in "prejudicial to the administration of justice"
10	8	Erin Byington	socioeconomic status is troublesome
11	9	Dale Sessions	too broad—right to choose clients
12	9	David Jardine	forcing a social and political agenda
13	9	Axel Trumbo	sufficient definitions?
14	10	David Knowles	may deny a lawyer the right to decline representation
15	10	Ralph Tate	may open up frivolous litigation
16	10	Vance	tramples on the right of the non-politically correct
17	11	Glen Thomas	dumbest rule ever read
18	11	Anonymous	unnecessary; insufficient definitions; burden on disciplinary committee w/o benefits
19	12	Joseph Chambers	vague ("in conduct related to the practice of law"); forces social and political agenda; agree with 12
20	13	Charles Schultz	lack of definitions; assault on fundamental rights
21	14	Evan James	unconstitutional
22	14	James Retallick	diminishes free speech
23	16	Richard King	free speech (unconstitutional); vague; interferes with equal access to the courts; conflicts with other RPC; will harm clients; suppresses unpopular speech
24	16	Trevor Casperson	limit ability of lawyers to zealously represent their clients; rule works against people whose opinions are not politically correct
25	17	Samantha Smith	agrees with 1, 8 and 12

26	17	Andrew McCullough	imposes political correctness at the expense of free speech
27	17	Grant Morrison	agrees with others
28	17	TJ Tsakalos	Bar shouldn't focus om political correctness, but on competency and integrity
29	18	Paul Wake	doesn't merit analysis
30	18	Jenifer Hawks	non-attorney comment about the Bar discriminating against her
31	18	Mark Woodbury	poorly drafted, unconstitutional, imposes undue burden on practitioners; 1st Amendment
32	20	John Nielsen	unconstitutional
33	21	National lawyers Association	violates attorney free speech, free association, free exercise rights; unconstitutionally vague; unconstitutionally overbroad
34	30	CJ Kyler	free speech
35	30	Vance	free speech
36	31	David Todd	overbroad
37	31	Michael Coombs	why the need for political correctness?
38	32	Michael Coombs	no need shown; financial cost to enforce
39	34	ofcourse	anti-affirmative action
40	35	Christian Legal Society	no jurisdiction has adopted Model Rule 8.4(g) [is this true?]; free speech, free exercise of religion, freedom of association, due process rights (vagueness); the Bar shouldn't pursue discrimination claims unless another court has found that the lawyer discriminated under state or federal law
41	45	William Duncan (Sutherland Institute)	no one else has adopted it; free speech
42	47	Jean Hill	constitutional issues
43	48	Larry Jenkins	overbroad and vague; free speech
44	50	Alan Reinach	free speech freedom of religion
45	52	Alexander Dishku	rule is a solution in search of a problem; freedom of speech [offers language to protect constitutional rights]
46	54	Eugene Volokh	freedom of speech
47	55	Eugene Volokh	"related to the practice of law" is too broad
48	56	Mary Corporon	impact on 6th amendment—creates problem when you try to discredit witness
49	57	Rob Latham	supports earlier opposition

50	57	Michael Esplin	1st and 6th Amendment concerns
51	57	Anonymous	free exercise, establishment clause of the constitution
52	58	Michael Erickson	freedom of speech, association and religion; subjects lawyers to discipline for lawful conduct when much criminal conduct is not subject to discipline
53	61	Kenneth Prigmore	promotes new bias
54	61	National Legal Foundation and Congressional Prayer Caucus Foundation	constitutional deficiencies as expressed by others
55	68	Charisma Buck	freedom of religion, speech and association
56	70	Liisa Hancock	vagueness; free speech
57	70	Susan Griffith	opposed
58	70	Robert Breeze	political correctness
59	71	Bradley DeSandro	free speech; vagueness; overbroad; free exercise of religion; freedom of association; goes beyond legitimate interests of the legal profession; attacks lawyer's right of lawyers to decide if they will represent client; conflicts with other RPC
60	89	Bradley DeSandro	rule will harm clients; no demonstrated need; suppresses politically incorrect speech and protects politically correct speech; freedom of conscience

Blocked comment: "This rule is an effort to force homosexual and other deviant acceptance down the throats of the public–this time targeting lawyers. Who is responsible for proposing this rule? They should be outed."

[letters submitted by Michael Erickson and William Duncan are already included as comments with numbers 4=52 and 421, respectively.]

62	Mark Morris Letter	
63	Robert Rice Letter (expressing the views of the Bar Commission)	in support of the rule

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July 10, 2017

Utah Supreme Court
450 S. State Street
P.O. Box 140210
Salt Lake City, UT 84114-0210

Re: Support for Proposed Rule of Professional Conduct 8.4(g)

Dear Justices:

The Board of Bar Commissioners supports the proposed amendments to Rule of Professional Conduct 8.4 which provide that it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

The legal profession, notwithstanding 30 years of efforts to diversify itself, remains one of the least diverse American professions. The Board of Bar Commissioners is committed to full and equal participation by all persons in the justice system and elimination of bias in the profession. In furtherance of this goal, in 2011, the Bar Commission adopted the Utah State Bar Statement on Diversity and Inclusion. This Statement makes it the Bar's mission to engage "all persons fully, including persons of different ages, disabilities, economic status, ethnicities, genders, geographic regions, national origins, sexual orientations, races and religions in the practice of the law." Proposed 8.4(g) helps further the Commission's goal.

Comment 3 to the current version of Rule 8.4 states that a lawyer engages in conduct prejudicial to the administration of justice when he or she engages in discriminatory conduct. However, comments are only guidance for compliance with a rule and do not obligate a lawyer as a rule does. 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. Twenty-two states already incorporate similar anti-discrimination and anti-harassment provisions into their rules.

The proposed amendments are a reasonable, limited and necessary addition to the Rules of Professional Conduct. It will make it clear that it is professional misconduct to harass or discriminate while engaged in conduct related to the practice of law. As has already been shown in the jurisdictions that have adopted such a rule, it will not impose an undue burden on lawyers. The proposed amendment permits lawyers to decline representation without violating the rule, which allows lawyers to continue to exercise appropriate discretion in their decisions to engage new clients. Additionally, by limiting its application to "conduct related to the practice of law," the proposed amendment does not infringe on the right of free speech, thought, association or religious practice.

Lawyers have a unique position in society as officers of the court essential to the primary governmental function of administering justice. Because of our unique position as officers of the court, we are the standard by which all should aspire. Our rules of professional conduct require more than mere compliance with the law. Proposed Rule 8.4(g) 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.

Very truly yours,

Robert O. Rice

Robert O. Rice
President

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July 26, 2017

Ms. Nicole Gray
Clerk of Court
Utah Supreme Court
Matheson Courthouse
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Re: Proposed Amendment to Rules of Professional Conduct: RPC 08.04

Dear Ms. Gray:

I am writing in connection with the public comment period for the above proposed amendment to the Utah Rules of Professional Conduct. I am writing this letter to you, in your capacity both as the clerk of the Utah Supreme Court, as well as a conduit to Justice Durrant as head of the Utah Judicial Council. I recognize that there is an opportunity for public comment on the court's website, which I have reviewed with great interest. I write this letter, however, because the website comment opportunity does not provide me with the ability to share with you an article authored by some highly esteemed colleagues of mine, and titled New Model Rule of Professional Conduct 8.4 (GN): Legislative History, Enforceability Questions, and a Call for Scholarship.

I join in the opposition to adopting this rule, not because I disagree with its objectives, which are laudable. I oppose it and urge the Court to reject it in its current form for the many reasons already expressed by those posting their comments online, as well as the many cautions set for in the enclosed very scholarly piece.

If and when the Supreme Court determines to have a more public airing of any debate about this, I would welcome an opportunity to participate in that as well.

I appreciate your attention to this and forwarding my letter and enclosure to Justice Durrant in his dual role as Chief Justice and Head of the Judicial Council.

Kind regards.

Very truly yours,

Mark O. Morris

MOM:bt

Attachment

ORIGINAL

NEW MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G): LEGISLATIVE HISTORY, ENFORCEABILITY QUESTIONS, AND A CALL FOR SCHOLARSHIP

Andrew F. Halaby and Brianna L. Long·

· Andrew F. Halaby, a partner at Snell & Wilmer L.L.P. and Chair of its Ethics Committee, serves as an Adjunct Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University teaching, *inter alia*, Professional Responsibility. A graduate of the University of Kansas (B.S., 1990, M.S. 1992, J.D., 1996), he is a longtime active member of the American Bar Association's Business Law Section, currently chairing the Ethics, Professional Responsibility, and Civility Subcommittee of its Business & Corporate Litigation Committee, and serving as Membership Director of its Professional Responsibility Committee. He also is a member of the ABA's Intellectual Property Section and Center for Professional Responsibility; a member of the Arizona Supreme Court Task Force on Lawyer Ethics, Professionalism, and the Unauthorized Practice of Law; and a member of the State Bar of Arizona Ethics Committee.

Brianna L. Long is an associate at Snell & Wilmer L.L.P. in Phoenix, Arizona. She graduated from the University of Iowa (B.B.A. 2011, J.D. 2014) and clerked for Arizona Supreme Court Justice Ann Scott Timmer.

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I. INTRODUCTION

New Model Rule of Professional Conduct 8.4(g)'s passage marks the triumph of certain constituencies within the American Bar Association (ABA) in elevating the subject of lawyer bias to ethical significance on par with other subjects with which the Model Rules have long been concerned, even the administration of justice itself. Whatever its symbolic significance, the new model rule suffers from substantive infirmities; the rush to secure passage of an anti-bias rule at the August 2016 ABA annual meeting left many issues unresolved. Until scholars and other interested parties resolve these issues satisfactorily, if they can, there exists considerable doubt whether the new model rule could be enforced in a real world setting against a real world lawyer.

With limited qualifications, the new model rule provides that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[1]

Now, for the first time, this content has attained the status of a rule within the Model Rules. Before, the only bias-specific content appeared in

1. MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (AM. BAR ASS'N 2016).

a comment. The new rule reaches much more broadly than the old comment, which addressed knowingly "manifest[ing]. . .bias or prejudice" in the course of "representing a client" so as to "prejudic[e]. . . the administration of justice" in violation of Model Rule 8.4(d).[2] Now, the rule reaches to all conduct a lawyer knows "or reasonably should know" is "harassment or discrimination" in any "conduct related to the practice of law."[3] The proscribed conduct constitutes a violation even if it does not prejudice the administration of justice in any way.

Any jurisdiction considering adopting the new model rule should be aware of its legislative history,[4] which Part II of this article recounts. As that history shows, the new model rule's afflictions derive in part from indifference on the part of rule change proponents,[5] and in part from the hasty manner in which the rule change proposal was pushed through to passage.[6] Indeed, though the proposal evolved through three separate versions in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public.[7] In this last-minute pother, the model rule change process differed from past substantial ABA model rule change efforts such as Ethics 2000 and Ethics 20/20.[8]

The recent history being what it is, Part III of this article touches on several of the salient legal issues that beset the new model rule: terminology uncertainties, questions of interplay between the new model rule and other provisions of the Model Rules, what disciplinary sanction should apply to the new model rule, and constitutional issues of Due Process and First Amendment free expression.[9] These and other issues cry

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2. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2010).

3. *Id.*

4. Generally, the term "legislative history" fits the rulemaking process only uncomfortably, because rulemaking is not legislating as those terms conventionally are understood. *See Legislative History*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining legislative history as the "background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates."). As recounted below, however, the ABA's process of agreeing to and passing the new model rule was quite legislative in character. *See id.*

5. *See Infra* Section II.D. As recounted below, *see infra* Part II, certain constituencies within the ABA pushed for adoption of an anti-bias rule and prevailed on the Standing Committee on Ethics and Professional Responsibility to spearhead the rule change effort. As further recounted below, the proposal evolved substantially during its journey to passage, including changes which some of the initiating entities advocated against. Nevertheless, given the initiating ABA entities', the Standing Committee Chair's, and other support after July 2014, for adoption of an anti-bias rule in some form, we use the term "proponents" herein to refer categorically to that group.

6. *See infra* Part II.D.

7. *See infra* Part II.D.

8. *Id.*

9. The line between legal and political is not always clear, especially where, as here, the nation's largest lawyer organization is the protagonist; that organization has sought to alter the rules of professional conduct governing what lawyers can say, *see infra* Section III.E.2; and what lawyers say about the law and its application is central to ensuring that the law remains the will of the governed and

to be explored, and explored in more depth, than our space constraints here permit. Interested scholars, and others who must grapple with the new model rule, should analyze carefully all the pertinent aspects of the new model rule in its final form. Absent rigorous resolution of the many questions, the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected.

II. MODEL RULE 8.4(G)'S LEGISLATIVE HISTORY

A. Overview

This section describes the anti-bias provision of the Model Rules as it existed before the recent amendment effort, as well as the history that led to the adoption of the new model rule's predecessor. This section then presents the five versions of the anti-bias proposal as it evolved from its genesis in mid-2014 through its passage on August 8, 2016, by the ABA House of Delegates, including the legislative history made by participants in the rule development process within and without the ABA.

As recounted in more detail below, the new model rule and its corresponding comments were adopted only after substantial modifications to an original July 2015, rule change proposal ("Version 1") the ABA Standing Committee on Ethics and Professional Responsibility (the "Standing Committee") had advanced.[10] The ensuing December 2015 version of the proposal ("Version 2")[11]—the only one presented to the ABA's broader membership, the bar at large, and the public for input—generated many dozens of comments, the vast majority of which expressed opposition.[12] Led by the Standing Committee, the rule change proponents responded with an April/May 2016 modified proposal embodied in "Resolution 109" ("Version 3")[13] which, due to continuing opposition by substantial constituencies within the ABA, was again modified, with the resulting proposal ("Version 4") circulated on July 25, 2016.[14] Further horse-trading occurred in the ensuing days, resulting in the circulation on

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not merely those who would govern. *See infra* Part III.E.2; *see generally* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed"); AKIL R. AMAR, AMERICA'S UNWRITTEN CONSTITUTION 37 (2012) ("The entire Constitution was based on the notion that the American people stood supreme over government officials, who were mere servants of the public, not masters over them."). Regardless of the policy or politics of the new model rule, these subjects are legal in character.

10. *See infra* Part II.D.1.
11. *See infra* Part II.D.2.
12. *See infra* Part II.D.3.
13. *See infra* Part II.D.4.
14. *See infra* Part II.D.5.

August 3, 2016, of a further modified proposal, "Revised 109" ("Version 5"), which the House ultimately adopted on August 8, 2016.[15]

B. Model Rule 8.4 Comment [3].

Until the recent amendment, the Model Rules contained no anti-bias rule as such. Rather, a comment provided:

> 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.[16]

This comment accompanied Rule 8.4, which provided:

> 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[.][17]

As is apparent, then-comment [3]'s anti-bias content was tied explicitly to Model Rule 8.4(d)'s proscription of lawyer conduct that prejudices the administration of justice. The comment's approach was consistent with the entirety of then-Rule 8.4, all subsections of which went directly (as in

15. *See infra* Part II.D.6-7.
16. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015).
17. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2015).

Rules 8.4(d) and (f)) or indirectly (as in Model Rules 8.4(a), (b), (c), and (e)) to the effective administration of justice.

C. *Pre-History: The ABA's Journey to Pre-Amendment Model Rule 8.4(g) Comment [3].*

The ABA's adoption of Comment [3]'s text followed several unsuccessful efforts to add anti-bias content to the Model Rules.[18] In 1994, the Young Lawyers Division recommended an amendment to Rule 8.4 in its Report 101, but, due to opposition, withdrew the proposal before the House of Delegates could consider it at the February 1994 ABA Midyear Meeting.[19] That proposed amendment read:

> It is professional misconduct for a lawyer to:
> (g) commit a discriminatory act prohibited by law or to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status, where the act of discrimination or harassment is committed in connection with a lawyer's professional activities.[20]

The Standing Committee also submitted a proposed amendment to Rule 8.4 that same year, but, like the Young Lawyers Division, withdrew the proposal before the House of Delegates could consider it.[21] The Standing Committee's proposal included a subsection (g), as well as Comment [5].

> It is professional misconduct for a lawyer to:
> (g) knowingly manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. This paragraph does not apply to a lawyer's confidential communications to a client or preclude legitimate advocacy with respect to the foregoing factors.[22]
> Comment

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18. *See generally* Andrew Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996) (recounting early efforts to introduce anti-bias content to Model Rules).

19. AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 812 (2006) [hereinafter A LEGISLATIVE HISTORY]; *see also* Standing Comm. on Ethics & Prof'l Resp. *et. al*, Am. Bar Ass'n., Report to House of Delegates, at 2 (Aug. 2016).

20. *Id.*

21. *Id.* at 813-14.

22. *Id.* at 813.

[5] Paragraph (g) of this Rule identifies the special importance of lawyers' words or conduct, in the course of the representation of clients, that knowingly manifest bias or prejudice against others based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. When lawyers act as officer of the court and the judicial system, their conduct must reflect a respect for the law. Discriminatory conduct toward others on bases that are generally viewed as unacceptable manifests a lack of respect for the law and undermines a lawyer's professionalism. Excluded from paragraph (g), however, are a lawyer's confidential communications to a client. Also excluded are those instances in which a lawyer engages in legitimate advocacy with respect to these factors. Perhaps the best example of this is when a lawyer employs these factors, when otherwise not prohibited by law, in selection of a jury.[23]

Four years later, the ABA Criminal Justice Section submitted a proposed amendment to Rule 8.4 and comments which were intended to "correct some of the problems that were inherent in the previous proposals."[24] That proposal:

(g) It is professional misconduct for a lawyer to:
(1) commit, in the course of representing a client, any verbal or physical discriminatory act, on account of race, ethnicity or gender, if intended to abuse litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage; or
(2) engage, in the course of representing a client, in any continuing course of verbal or physical discriminatory conduct, on account of race, ethnicity, or gender, in dealings with litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, if such conduct constitutes harassment.[25]
Comment
[5] Paragraph (g) of this Rule identifies the special importance of lawyers' verbal or physical discriminatory acts, based on race, ethnicity, or gender, in the course of client representation, where those acts either : (a) intentionally seek to abuse litigants, jurors, witnesses, court personnel, opposing counsel, or other lawyers, or to gain a tactical advantage, or (b) involve a continuing course of

23. *Id.* at 813.
24. A LEGISLATIVE HISTORY, *supra* note 19, at 816.
25. *Id.* at 814.

conduct, in dealing with such persons, that rises to the level of harassment. When lawyers act as officers of the court and the judicial system, their conduct must reflect respect for that system and for all those who participate in it. Harassing or intentionally abusive conduct toward others or abuses that are generally viewed as unacceptable manifests a lack of respect for the judicial system and undermines a lawyer's professionalism.

[6] "Intent" means purpose (desiring to bring about the results of either intimidation or a tactical advantage) or knowledge (being practically certain that such results will come about). "Knowledge" includes "willful blindness," acting with awareness of a high probability that the prohibited results will come about, yet failing to confirm that awareness in the hope of cheating the administration of justice. "Harassment" refers to so severe or pervasive a course of conduct that the person affected subjectively perceives, and a reasonable person would perceive, the conduct as abusive because of that person's race, gender, or ethnicity. Harassment is to be determined by a case-by-case consideration of all the circumstances. Those circumstances include, but are not limited to: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating or merely offensive; (4) whether it unreasonably interferes with the administration of justice; and, (5) as a relevant but non-essential factor only, whether the victim's psychological well-being was impaired.

[7] The listing of three protected categories—race, ethnicity and gender—is also not meant to limit intersectional claims. Thus, for example, a complaint that a lawyer discriminated against another lawyer with the intent to intimidate her because she is an African American woman, rather than because she is a woman or an African American, would be within the ambit of this rule.

[8] Excluded from paragraph (g), however, are a lawyer's advocating the racist, sexist, or otherwise discriminatory views of a client, in or out of court, or the lawyer's advocating his own discriminatory views, no matter how offensive, in bar speeches, corporate board meetings, church meetings, published writings, civic association functions, or other avenues of expression in the lawyer's personal life, or in his professional life outside of client representation. Nor would a lawyer's freedom to choose which client the lawyer will represent be affected. Similarly, confidential attorney-client communications are fully protected. Nor could a lawyer be disciplined for a single thought-less or callous remark, if not intended to abuse or to gain a tactical advantage, even if

> directed to a protected individual in the course of representing a client. These limitations protect lawyers' and clients' freedom to speak their views, limiting regulation to those circumstances most likely to interfere with the fair and efficient workings of the justice system. Judicial findings made during the course of litigation or matters arguable covered by this rule would *not* automatically subject a lawyer to discipline. For example, a trial peremptory challenge during jury selection, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1989), and its progeny would not necessarily violate this rule. That determination would be made by the appropriate state disciplinary authority acting de novo, after full and fair procedures, in which the *Batson* findings of the trial court would be irrelevant.
>
> [9] Attorneys are further cautioned not to view discriminatory conduct outside the limits of this rule as acceptable. Much conduct not within the precise scope of the disciplinary rules is nevertheless inconsistent with what it means to be an officer of the court. In particular, reference is made to the ABA's Resolution Against Bias and Prejudice, adopted August 1995, as setting forth a range of disfavored discriminatory conduct that is not within the ambit of Rule 8.4(g).[26]

According to the Criminal Justice Section's Report 107A, the new proposal was sufficiently narrow to pass constitutional muster and still prohibit discriminatory conduct.[27] It included multiple proposed comments that sought to define several terms used in its proposed model rule.[28] This proposal also limited the bases of proscribed conduct to race, ethnicity, and gender, and tied the rule to attorneys' conduct "in the course of representing a client."[29] This proposal too was withdrawn prior to any consideration by the House of Delegates at the February 1998 Midyear Meeting.[30]

At the same time, the Standing Committee proposed an amendment in its Report 117, prior to the February 1998 Midyear Meeting.[31] This proposal sought to add a comment to Model Rule 8.4, instead of a new model rule.[32] Report 117 noted prior attempts to "develop a clear and constitutionally enforceable black-letter rule of the professional conduct on

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26. *Id.* at 815-16.
27. *Id.* at 814-16.
28. *Id.*
29. A LEGISLATIVE HISTORY, *supra* note 19, at 813.
30. *Id.* at 814.
31. *Id.* at 816.
32. *Id.*

this subject proved difficult, controversial and divisive."[33] "Thus, because manifestations of bias and prejudice sometimes include protected speech and because race, gender and other factors are sometimes legitimate subjects of consideration and comment in the legal process, the Model Rules have not been amended to prohibit such conduct."[34] The Standing Committee's proposed amended comment was tied directly to Model Rule 8.4(d) and had already been adopted in the Model Code of Judicial Conduct. This precursor to Comment [3] also was withdrawn before the House of Delegates considered the proposal at the Midyear Meeting. The text of that proposed amendment read:

> Comment
> [2] 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).[35]

For the August 1998 ABA Annual Meeting, the Standing Committee and the Criminal Justice Section advanced in their Report 117 a new proposal for an anti-bias comment to Model Rule 8.4. This proposed comment was identical to the Standing Committee's latest proposal, save for one additional sentence addressing a judge's finding related to improper use of preemptory challenges in jury selection:

> [2] 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 preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[36]

As summarized in the ABA's official "legislative history" of the Model Rules,

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33. *Id.* at 817 (quoting Standing Committee Report 117).
34. A LEGISLATIVE HISTORY, *supra* note 19, at 817.
35. *Id.* at 816.
36. *Id.* at 817.

> The last sentence was in deference to the criminal bar, which was wary that a decision by a lawyer to use a peremptory challenge to a juror might be viewed as discriminatory rather than one based on "instinct" or some other subjective reason. The amendment was meant to address three important issues: 1) the context in which expressions of bias or prejudice will be subject to possible discipline; 2) the specific characteristics that must not be the basis for bias or prejudice; and 3) a guarantee that the Rule is not intended and will be ineffective to diminish a lawyer's advocacy where a listed characteristic is at issue in a matter. The Report also emphasized the fact that single incidents of discriminatory conduct may not rise to the level of prejudicing the administration of justice.[37]

The House of Delegates debated and adopted, by voice vote, this comment at the 1998 Annual Meeting. That comment stood as the only anti-bias provision within the Model Rules until the recent rule change.[38]

D. Intra-ABA Politicking Finally Yields a New Anti-Bias Model Rule

1. Version 1.

In 2008, the ABA officially adopted four goals to serve its mission "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession:"[39]

> Goal I: Serve Our Members[40]
> Goal II: Improve Our Profession[41]
> Goal III: Eliminate Bias and Enhance Diversity,[42] and
> Goal IV: Advance the Rule of Law.[43]

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37. *Id.* at 818.

38. In 2001, an additional comment was added to Rule 8.4, and the anti-discrimination comment was renumbered as Comment [3]. *Id.* at 817.

39. *ABA Mission and Goals*, AMERICAN BAR ASSOCIATION (Feb. 13, 2017), http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

40. The ABA identified the following objective under Goal I: "Provide benefits, programs and services which promote members' professional growth and quality of life." *Id.*

41. In order to achieve Goal II, the ABA identified three objectives: (1) "Promote the highest quality legal education," (2) "Promote competence, ethical conduct and professionalism," and (3) "Promote pro bono and public service by the legal profession." *Id.*

42. Goal III has two objectives: "Promote full and equal participation in the association, our profession, and the justice system by all persons," and "Eliminate bias in the legal profession and the justice system." *Id.*

In May 2014, the ABA's Goal III Commissions—the Commission on Women in the Profession ("CWP"), the Commission on Racial and Ethnic Diversity in the Profession ("CREDP"), the Commission on Disability Rights ("CDR"), and the Commission on Sexual Orientation and Gender Identity ("CSOGI")—asked the Standing Committee "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."[44] The Goal III Commissions complained that current Model Rule 8.4(d) "d[id] not facially address bias, discrimination, or harassment and d[id] not thoroughly address the scope of the issue in the legal profession or legal system."[45]

The Standing Committee formed a Working Group, which included representatives from the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and each of the Goal III Commissions.[46] From the fall of 2014 to May 2015, the Working Group developed a memorandum to the Standing Committee, which advocated elevating anti-discrimination content from the comment to a rule.[47] After reviewing the Working Group's memorandum, the Standing Committee prepared a draft proposal to amend Model Rule of Professional Conduct 8.4.[48]

That draft, issued by the Standing Committee as a "Working Discussion Draft" dated July 8, 2015, proposed to modify Model Rule 8.4 by adding a new section (g), as follows:

> It is professional misconduct for a lawyer to:
> (g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic

43. The ABA identified five objectives under Goal IV: (1) "Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," (2) "Hold governments accountable under law," (3) Work for just laws, including human rights, and a fair legal process," (4) "Assure meaningful access to justice for all persons," and (5) "Preserve the independence of the legal profession and the judiciary." *Id.*

44. Standing Comm. on Ethics & Prof'l Resp., Am. Bar. Ass'n, Working Discussion Draft-Revisions to Model Rule 8.4: Language Choice Narrative, at 1 (July 16, 2015), *available at* https://talegalethics.org/wp-content/uploads/2015-07-16-ABA-Proposed-Amendment-to-Rule-8.4-re-Harassment.pdf?x16384 [hereinafter *Language Choice Narrative*]; Standing Comm. on Ethics & Prof'l Resp.*et al.*, Am. Bar Ass'n., Report to the House of Delegates Revised Resolution 109, at 3 (Aug. 2016) [hereinafter "Revised 109"].

45. Letter from Goal III Commissions' Chairs to Paula J. Frederick, Chair, ABA Standing Comm. on Ethics & Prof'l Resp. (May 13, 2014).

46. *Id.*

47. *Language Choice Narrative, supra* note 44, at 2.

48. *Id.* at 3.

status, while engaged [in conduct related to] [in] the practice of law.[49]

The Comment language would be modified as follows:

> [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. Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies.[50]

This, Version 1 of the proposal, which eventually became the new model rule, was noteworthy in several respects. First, it sought to move the anti-bias principle from the comment to the rule. Second, it expanded the ambit of covered lawyer activity from conduct "in the course of representing a client" to any conduct "related to" or "in" "the practice of law."[51] Third, it added the "factors"; that is, the bases or characteristics on which lawyer harassment or discrimination would be barred, of "gender

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49. Working Discussion Draft: Amendment to Model Rule 8.4 and Comment [3] (July 8, 2015) [hereinafter "July 8, 2015 Working Discussion Draft"], *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/draft_07082015.authcheckdam.pdf.; *see also* Peter Geraghty, *ABA adopts new anti-discrimination Rule 8.4(g)*, AMERICAN BAR ASSOCIATION (Feb. 13, 2017), http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g—at-annual-meeting-in-.html.

50. *Id.*

51. *Id.*

identity" and "marital status."[52] Fourth, it changed the proscribed conduct from "manifest[ing] by words or conduct, bias or prejudice," to "harass[ment]" and "discriminat[ion]."[53] Fifth, it adopted the existing comment's qualifier that only "knowing[]" harassment or discrimination would be proscribed.[54] Sixth, it relegated to the comment limitations, including the limitation that "legitimate" advocacy "respecting any of these factors"—apparently meaning the bases on which harassment or discrimination would be barred—would not constitute a violation; that limiting the lawyer's practice to "underserved populations" of clients would not constitute a violation; and that discriminatory peremptory challenges alone would not establish a violation.[55] Seventh, it purported to "incorporate[] by reference" "relevant" holdings by "applicable" courts and administrative agencies.[56] Otherwise, Version 1 did not define "harassment" or "discrimination."

Finally, Version 1 excised existing Comment [3]'s connection to Model Rule 8.4(d), which proscribes lawyer "conduct that is 'prejudicial to the administration of justice.'"[57] The anti-bias proposal, as reflected in Version 1, thus was intended to stand on its own, unmoored from the impact the targeted conduct might have on the administration of justice.

2. Version 2.

The Standing Committee, having received input on Version 1 from at least the ABA Standing Committee on Professional Discipline, issued a revised proposal styled as a "Draft Proposal" dated December 22, 2015. This version of the proposal, hereinafter "Version 2," would have modified Model Rule 8.4 by adding this as a new subsection(g):

> 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.[58]

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52. *Id.*
53. *Id.*
54. July 8, 2015 Working Discussion Draft, *supra* note 49.
55. *Id.*
56. *Id.*
57. *Id.*
58. Memorandum from Standing Comm. on Ethics & Prof'l Resp., Am. Bar Ass'n, Draft Proposal to Amend Model Rule 8.4, at 2 (December 22, 2015) [hereinafter "Memo re: Dec. 22, 2015 Draft"], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf.

With Version 2, the Standing Committee proposed changing the Comment as follows:

> [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. ~~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.~~[59]

Version 2's proposed rule thus settled upon "conduct related to the practice of law" as the expanded ambit of covered lawyer activity.[60] That change would remain fixed, through ensuing versions of the proposal, to the final version passed on August 8, 2016. The knowledge qualifier was removed from harassment in the proposed rule, and applied only to discrimination.

Version 2's comment fleshed out the meaning of "conduct related to the practice of law," providing that it "includ[ed] the operation and

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59. Notice of Pub. Hearing, Standing Comm. on Ethics & Prof'l Resp., Am. Bar. Ass'n, at 2-3 (December 22, 2015), https://americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf; *see also* Memo re: Dec. 22, 2015 Draft, *supra* note 58, at 2-3.

60. *Id.*

management of a law firm or law practice."[61] The comment included new exclusions for "conduct protected by the First Amendment" and for lawyer references to "any particular status or group when such references are material and relevant. . . ."[62] The comment also included new provisions dealing with the prospect of a lawyer's declining representation based on one or more of the object factors, adding that a lawyer "usually" is not required to represent any specific person or entity, and that the proposed rule "does not alter the circumstances stated in Rule 1.16" governing withdrawal from or declining to accept representation.[63]

3. Reactions to Version 2.

The Standing Committee solicited public comment on this version of the proposal, both by publication of a "Notice of Public Hearing" set for February 7, 2016, at the ABA's 2016 Midyear Meeting, and by soliciting written comments.[64]

a. Public Hearing at the February 2016 ABA Midyear Meeting.

The hearing lasted only two hours.[65] Representatives of three of the four Goal III Commissions appeared to testify: Debi Perluss of CDR; Wendi Lazar and Michele Coleman Mayes of CWP; Kristen Galles, Margaret Finerty, and Dredeir Roberts of CSOGI.[66] Proponent testimony also was taken from ABA President Paulette Brown; Drucilla Ramey, Dean Emerita of the Golden Gate University School of Law; Robert Weiner from the Section of Civil Rights and Social Justice; former ABA President Laurel Bellows; and Matt Mecoli of the ABA Law Student Division.[67]

Only one witness, ABA Delegate Ben Strauss, questioned the rule change effort.[68]

The proponents' testimony dominated the hearing. It focused upon examples and perceptions of biased statements and conduct;[69] "implicit

61. *Id.*
62. *Id.*
63. *Id.*
64. *See* Notice of Pub. Hearing, Standing Comm. on Ethics & Prof'l Resp., Am. Bar. Ass'n, at 2-3 (December 22, 2015), https://americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf
65. Am. Bar. Ass'n Public Hearing Transcript, at 3, 78 (Feb. 7, 2016) [hereinafter "Transcript"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf (last reviewed Oct. 16, 2016).
66. *Id.*
67. *Id.*
68. *Id.*

bias" and the proponents' corresponding desire that any knowledge qualifier be removed from the proposed model rule;[70] and the desire that the ambit of covered lawyer conduct be broad.[71]

Ramey, for example, testified that the Standing Committee "are the ones who determine what every single lawyer in this country perceives to be ethical, and you have the power to incentivize them and to be what is called a bias interrupter. To incentivize us to educate ourselves about the implicit biases every single one of us carries around. . .."[72] She also testified that "bias and prejudice pervade our profession at every level: some conscious, perhaps much unconscious, but very damn near the conscious level, I would postulate, with little or no adverse consequences on the perpetrators."[73] Weiner testified, "Many people who are racists or misogynists or anti-gay don't realize they are. . .."[74] Galles testified, "The American Bar Association is not just a trade association of lawyers. There are some members who think that's all we are, but we are not. If we're going to retain our credibility and our prestige, we have to stand for something much more."[75] And Standing Committee Chair Myles Lynk, presiding over the hearing, commented that "the notion that we don't have a rule in the black letter dealing with discrimination is embarrassing to all of us, to be candid."[76]

Strauss, on the other hand, noted the one-sidedness of the testimony,[77] questioned whether the cited examples of biased conduct were representative of the profession as a whole,[78] and questioned extending the rule to avenues unrelated to the delivery of legal services "because we're not regulating social behavior. We're regulating a legal profession."[79] Strauss continued, "I'm just not sure that we're serving the purpose by going overboard to the point where the vast majority of our membership may think that we've gone too far."[80]

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69. *Id.* at 19-21, 31-32, 51-53, 69-70, 76-77.
70. Transcript, *supra* note 65, at 7-8 (Brown); *id.* at 22 (Ramey); *id.* at 32-34 (Weiner); *id.* at 38-39 (Lazar), 59-61 (Bellows), 67 (Finerty).
71. *Id.* at 41-43, 62.
72. *Id.* at 17.
73. *Id.* at 20.
74. *Id.* at 33.
75. Transcript, *supra* note 65, at 47.
76. *Id.* at 75.
77. *Id.* at 72.
78. *Id.*
79. *Id.* at 74.
80. Transcript, *supra* note 65, at 74.

b. Written Comments from ABA Entities.

Written comments submitted in response to Version 2 came from the Goal III Commissions and from other ABA entities.

i. Goal III Commissions

Version 2 of the proposal drew supportive but mixed reactions from the Goal III Commissions—CWP, CDR, CSOGI, and CREDP.[81] CREDP and CDR supported adoption of Version 2, albeit with additional modification suggestions;[82] CWP and CSOGI were more critical.[83] Each continued to urge that any knowledge qualifier be deleted,[84] and that the ambit of covered lawyer conduct be broad.[85] The ABA Center for Professional Responsibility Diversity Committee, the ABA Standing Committee on Legal Aid and Indigent Defense, the ABA Section on Civil Rights and Social Justice,[86] and the Law Student Division[87] also expressed support.

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81. *See* Memorandum from Michelle C. Mayes to Myles V. Lynk re Proposed Amendment of Rule 8.4 of Model Rules of Professional Conduct (Mar. 10, 2016) [hereinafter "CWP Comment"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/commission_on_women_final_comment.authcheckdam.pdf; Memorandum from Will A. Gunn to Myles V. Lynk re Proposed Amendment of Rule 8.4 of the Model Rules of Professional Conduct (Mar.11, 2016) [hereinafter "CREDP Comment"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_commission_racial_ethnic_diversity.authcheckdam.pdf; Letter from Mark D. Agrast to Myles V. Lynk re Proposed Revisions to Model Rule 8.4 (Mar. 14, 2016) [hereinafter "CDR Comment"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_commission_on_disability_rights.authcheckdam.pdf; Memorandum from ABA Commission on Sexual Orientation and Gender Identity to Standing Committee on Ethics & Professional Responsibility re Proposed Amendment to ABA Model Rule of Professional Conduct 8.4 (Feb. 7, 2016) . [hereinafter "CSOGI Comment"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/sogi_comments_2_7_16.authcheckdam.pdf.

82. Both CREDP and CDR, for example, pushed for "color" and "gender expression" to be added as "protected categories." CREDP Comment, *supra* note 81, at 1; CDR Comment, *supra* note 81, at 3. CSOGI advocated adding "gender expression" as well. CSOGI Comment, *supra* note 81, at 2. CDR also advocated clarification that the proposed rule would cover refusal to grant accommodations. CDR Comment, *supra* note 81, at 3.

83. *See* CWP Comment, *supra* note 81, at 2 (criticizing the First Amendment limitation in Version 2's comment); *see* also CSOGI Comment, *supra* note 81, at 3 (criticizing elimination of the concepts of "bias" and "prejudice," and pushed against permitting lawyers to decline representation based on an otherwise prohibited "discriminatory basis.").

84. *See* CWP Comment, *supra* note 81, at 2; CREDP Comment, *supra* note 81, at 1; CDR Comment, *supra* note 81, at 2; CSOGI Comment, *supra* note 81, at 1.

85. *See* CWP Comment, *supra* note 81, at 2; CREDP Comment, *supra* note 81, at 2; CDR Comment, *supra* note 81, at 2; CSOGI Comment, *supra* note 81, at 1.

86. Memorandum from ABA Standing Comm. on Legal Aid & Indigent Defense, ABA Section on Civil Rights & Social Justice, and Equal Rights Advocates to Standing Comm. on Ethics & Prof'l Resp. re Draft New Model Rule of Professional Conduct 8.4(g) and Draft Amended Comment [3] (Mar. 11, 2016), http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%20

ii. Other ABA Entities

Reactions from other ABA entities—entities focused not on promoting Goal III, but on particular areas of legal practice—also were mixed and, on the whole, far less supportive than those of the Goal III Commissions.

While supporting the proposal conceptually, the Section of Real Property, Trust and Estate Law questioned including a knowledge qualifier on discrimination, but not harassment. Given some of its members' focus on serving "wealthy individuals and families," the section also opposed a discrimination bar based on "socioeconomic status."[88]

While similarly supporting the proposal conceptually, the Section of Labor and Employment Law recommended that the comment explicitly tie interpretation of the proposed rule to federal Title VII disparate treatment and harassment standards, and that the terms and conditions of law firm employees be referenced explicitly in the comment's reference to "the operation and management of a law firm or law practice."[89]

Other ABA entities expressed a still more jaundiced view of the proposal.

The ABA Business Law Section ("BLS") Ethics Committee observed that "[n]o matter how salutary the motivation. . . codifying this position into the Model Rules is fraught with difficulties."[90] The committee expressed a variety of concerns, including whether any need had been demonstrated for the proposed rule, its vagueness and uncertainty in application, potential due process concerns, and the proposed rule's potential weaponization.[91]

8_4_comments/aba_standing_committee_legal_aid_indigent_defendants.authcheckdam.pdf. This memorandum was written by Ramey, who testified in favor of the proposal at the Midyear Meeting.

87. Memorandum from Mathew Mecoli on behalf of the ABA Law Student Division to Standing Comm. on Ethics & Prof'l Resp. (Mar. 16, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_law_student_division.authcheckdam.pdf.

88. Memorandum from Section of Real Property, Trust and Estate Law to Standing Comm. On Ethics & Prof'l Resp. re Proposed Model Rule 8.4(g), at 4 (Feb. 25, 2016), http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/real_property_trust_estate_law_2_25_2016.authcheckdam.pdf.

89. Letter from Wayne Outten on behalf of the Section of Labor and Employment Law to Myles V. Lynk (Mar. 11, 2016), http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_section_labor_and_employment_law.authcheckdam.pdf.

90. Letter from Keith R. Fisher & Nathan M. Crystal to Myles V. Lynk, at 3 (Mar. 10, 2016) [hereinafter "BLSEC Comment I"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_business_law_ethics_committee_comments.authcheckdam.pdf.

91. *Id.*

The Section of Litigation, the ABA's largest, similarly observed that the proposal's objectives "are not easily translated into the Model Rules."[92] The Litigation Section voiced concerns over the lack of definitions for key terms "conduct related to the practice of law," "harassment," and "discrimination"; the absence of a universally applicable knowledge qualifier; vagueness; and the inability of the comment to define key terms since many states do not adopt model comments.[93]

Version 2 also drew mixed reactions from ABA entities focused on regulation of the legal profession.

While the Center for Professional Responsibility Diversity Committee voiced unequivocal support, the Standing Committee on Client Protection expressed concern over whether the proposed rule could be interpreted to compel representation or prohibit withdrawal even where a lawyer's bias might materially limit the effectiveness of representation.[94]

While declining to oppose elevation of an anti-bias provision from the comment to the rule, as it had in response to Version 1,[95] the Standing Committee on Professional Discipline questioned whether there existed any empirical evidence that such a model rule was needed, and expressed concerns over the vagueness of key terms such as "conduct related to the practice of law," "harassment," "discrimination," and "socioeconomic status"; corresponding questions of enforceability and constitutionality;[96] overbreadth in potentially reaching to cover employment discrimination; the absence of a universally applicable knowledge qualifier; possible limitation on the lawyer's ability to decline representation; the absence of a legitimate advocacy exception; and the absence of a peremptory challenge exception.[97]

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92. Letter from Steven A. Weiss to Myles V. Lynk re Section of Litigation Comments to Draft Proposal to Amend Rule 8.4 and Related Comments of the ABA Model Rules of Professional Conduct (May 5, 2016) [hereinafter "Litigation Section Comment"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_section_of_litigation_comment.authcheckdam.pdf. This letter post-dates the initial publication of Version 3, addressed below, but its contents show that it was addressed to Version 2.

93. *Id.*

94. Memorandum from ABA Standing Committee on Client Protection to Myles V. Link (Mar. 11, 2016), http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_standing_committee_client_protection.authcheckdam.pdf.

95. Letter from Arnold R. Rosenfeld to Myles V. Lynk re Standing Comm. on Ethics & Prof'l Resp. Working Discussion Draft Model Rule 8.4 (October 8, 2015) [hereinafter "SCPD Comment I"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

96. "We fear that without resolution of these questions and concerns and more precise definitions, lawyers and regulators will be left to guess what conduct may be covered under the proposed Rule." *Id.* at 5.

97. Letter from Arnold R. Rosenfeld to Myles V. Lynk re Standing Comm. on Prof'l Discipline Comments on Draft Proposal to Amend Rule 8.4 of the ABA Model Rules of Professional Conduct

Among all the commenting ABA entities, only the Standing Committee on Professional Discipline invoked any other ABA Goal besides Goal III; specifically, Goal II, "Improve Our Profession," and its Objective 2, to "[p]romote competence, ethical conduct and professionalism."[98] Other ABA Goals—which also include serving the organization's members and advancing the rule of law—were not invoked.

c. Other Written Comments

Version 2 generated 481 filed comments beyond those described above.[99] Overwhelmingly, these comments were negative.

The vast majority (474) were filed by individuals.[100] Of these, sixty-one were filed by ABA members, while thirty-four explicitly disclaimed any affiliation with the ABA.[101]

Of commenting ABA individual members, forty-five (74 percent) opposed the proposal outright;[102] twelve opposed or, in the alternative, supported modifications proposed by the Christian Legal Society ("CLS");[103] none supported the proposal outright, and four expressed amenability to the proposal subject to resolution of certain concerns.

Of those individual commenters explicitly disclaiming ABA affiliation, twenty-five (again, 74 percent) opposed the proposal outright; none supported it outright; eight opposed or, in the alternative, supported CLS's proposed modifications; and one expressed amenability to the proposal subject to resolution of certain concerns.

(Mar. 10, 2016) [hereinafter "SCPD Comment II"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

98. *Id.*

99. *See Comments to Model R. of Prof'l Conduct 8.4*, AM. BAR ASS'N (Feb. 13, 2017), http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html (last visited Oct. 17, 2016) (on file with the authors).

100. *Id.*

101. *Id.*

102. *See* Letter from Andrew F. Halaby to ABA Standing Comm. on Ethics & Prof'l Resp. re December 2015 Draft Proposal to Amend ABA Model Rule of Professional Conduct 8.4 and Comment [3] (Dec. 30, 2015), for a comment by one of the authors, *available at* http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/halaby_12_30_2015.authcheckdam.pdf; *see also* Letter from Andrew F. Halaby to Keith R. Fisher re Revised Draft Proposal to Amend ABA Model Rule of Professional Conduct 8.4 (June 15, 2016) (on file with the authors).

103. Letter from David Nammo to ABA Ethics Comm. re Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment (3) (Mar. 10, 2016) [hereinafter "Christian Legal Society Comment"], http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf.

Of the 379 individual commenters who did not express affiliation (or lack of it) with the ABA, 316 (83 percent) opposed the proposal outright; four supported it outright; thirty-nine opposed or, in the alternative, supported CLS's proposed modifications; and twenty expressed amenability to the proposal subject to resolution of certain concerns.

Six organizations filed comments besides CLS: Coleman Law & Consulting PLLC;[104] the Great Lakes Justice Center;[105] Santa Barbara Women Lawyers;[106] the Thomas More Society;[107] the United States Conference of Catholic Bishops;[108] and the Regent University School of Law Students and Alumni.[109] Of these, the Santa Barbara Women Lawyers supported the proposal outright,[110] two opposed the proposal outright,[111] and three opposed the proposal or, in the alternative, supported CLS's proposed modifications.[112]

Together, these commenters raised several additional issues with Version 2:

1. Whether the experience of states which had adopted some form of anti-bias rule justified the ABA's adoption of such a model rule.[113]

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104. Memorandum from Coleman Law & Consulting, PLLC to The Standing Comm. on Ethics & Prof'l Resp. (Mar. 10, 2016) [hereinafter "Coleman Law Comment"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/coleman_3_14_16.authcheckdam.pdf (opposing proposal outright).

105. Letter from David A. Kallman, Senior Legal Counsel, Great Lakes Justice Center, to ABA Ethics Comm. (Mar. 11, 2016) [hereinafter "Great Lakes Comment"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/kallman_3_11_16.authcheckdam.pdf (opposing proposal outright).

106. Letter from Elvia Garcia, President, Santa Barbara Women Lawyers, to Standing Comm. on Ethics & Prof'l Resp. (Mar. 16, 2016) [hereinafter "SBWL Comment"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/santa_barbara_women_lawyers.authcheckdam.pdf (supporting proposal outright).

107. Letter from Jocelyn Floyd, Associate Counsel, Thomas More Society, to Standing Comm. on Ethics & Prof'l Resp. (Mar. 11, 2016) [hereinafter "TMS Comment"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/thomas_more_society.authcheckdam.pdf (opposing proposal unless modified).

108. Letter from Anthony R. Picarello, Jr. *et al.*, United States Conference of Catholic Bishops, to ABA Standing Comm. on Ethics & Prof'l Resp. (Mar. 10, 2016) [hereinafter "Catholic Bishops Comment"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/moses_3_11_16.authcheckdam.pdf (opposing proposal unless modified).

109. Letter from Cassandra M. Payton et al., 39 law students and alumni, Regent University School of Law, to Standing Comm. on Ethics & Prof'l Resp. (Mar. 9, 2016) [hereinafter "Regent Comment"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/regent_law_students_alumni_comment.authcheckdam.pdf (opposing proposal unless modified).

110. SBWL Comment, *supra* note 106, at 1.

111. Coleman Law Comment, *supra* note 104, at 1; Great Lakes Comment, *supra* note 105, at 1.

112. Regents Comment, *supra* note 109, at 2-3; TMS Comment, *supra* note 107, at 1; Catholic Bishops Comment, *supra* note 108, at 7-8.

113. Standing Comm. On Ethics & Prof'l Resp., Am. Bar Ass'n, Joint Comment Regarding Proposed Changes to ABA Model Rule of Professional Conduct 8.4, at 12 [hereinafter "52 ABA Members Comment"],

2. Whether the proposed model rule suffered from First Amendment freedom of expression,[114] freedom of religion,[115] freedom of association, or freedom of assembly infirmities[116]—particularly given its arguable reach to activities such as board service, membership in religious organizations, and speech on "political, social, religious, and cultural issues."[117]
3. Whether state constitutional protections analogous to those of the First Amendment might be implicated.[118]
4. Whether adding "Specially Protected Classes to Discrimination Provisions" is desirable as a policy matter, as well the potential impact of inconsistent enumeration of such classes as between "Legal Conduct Codes."[119]
5. Whether Model Code of Judicial Conduct Rule 2.3 supplies a workable analog for an anti-bias lawyer rule.[120]
6. Whether an exception for workplace rules regarding "grooming and garb, or the reservation of restrooms or locker rooms, based on biological sex," should be included.[121]
7. "The wisdom of imposing a 'cultural shift' on all attorneys."[122]

4. Version 3.

In response to the many comments received on Version 2, and in view of testimony at the Midyear Meeting, the Standing Committee issued a revised draft, hereinafter "Version 3," first published in April 2016 and formally submitted as a proposed ABA Report and Resolution, to be

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http://americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf (last visited Feb. 13, 2017).

114. *Id.* at 13-14.

115. Catholic Bishops Comment, *supra* note 108, at 1.

116. Christian Legal Society Comment, *supra* note 103, at 5, 13.

117. *Id.* at 7-8.

118. *Id.* at 13.

119. 52 ABA Members Comment, *supra* note 113, at 19, 21.

120. *Id.* at 27.

121. Catholic Bishops Comment, *supra* note 108, at 6.

122. Christian Legal Society Comment, *supra* note 103, at 2. This comment reacted to the following assertion by the Standing Committee in support of Version 2: "Recently representatives from the Oregon New Lawyers Division drafted a similar proposal for the ABA Young Lawyers Division Assembly to consider. The authors of that resolution explained the need for change eloquently. They wrote: 'There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.'" Memo re: Dec. 22, 2015 Draft, *supra* note 58, at 1-2.

considered at the upcoming House of Delegates meeting, the following month.[123]

The proposed addition to Model Rule 8.4 read:

> It is professional misconduct for a lawyer to:
> . . .(g) 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 does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.[124]

The new proposed comment read:

> [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,~~

123. MODEL RULES OF PROF'L CONDUCT R. 8.4(G) (AM. BAR ASS'N, Proposed Draft, April 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/draft_redline_04_12_2016.authcheckdam.pdf

124. *Id.*

~~sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

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

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

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

~~[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.[125]

Version 3 reflected significant changes from Version 2.

As advocated by the Goal III Commission representatives at the February 2016 public hearing, as well as by the Goal III Commission's submission of written comments in response to Version 2, any knowledge qualifier was omitted entirely from the proposed model rule. The issue of declining representation was elevated from the comment to the proposed model rule, providing, "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16."[126]

The proposed comment of Version 3 expanded the ambit of "conduct related to the practice of law" to include virtually anything a working lawyer might do: "[r]epresenting clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law;. . . and participating in bar association, business or social activities in connection with the practice of law."[127]

Version 3's comment attempted for the first time to expound—though not define—the meaning of the terms "discrimination" and "harassment." "Discrimination" would "include[] 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" the proposed rule.[128] "Harassment" would "include[] 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," with "[s]exual harassment includ[ing] unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."[129]

Proposed Version 3's comment resurrected Version 1's reference to other law (dropped from Version 2). But, perhaps in recognition that the proposed rule included groups or statuses not protected under current law,

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125. *Id.*
126. *Id.*
127. *Id.*
128. April 2016 Draft Proposal, *supra* note 123.
129. *Id.*

proposed Version 3's comment provided instead that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may"—not must—"guide"—not determine—"application of paragraph (g)."[130]

In apparent recognition that, applied facially, the proposed rule might be applied to bar activities designed to promote diversity or inclusion based on the beneficiaries' membership in any of the enumerated statuses or groups, Version 3 added to the comment, for the first time, a diversity exception: "Paragraph (g) does not prohibit conduct undertaken to promote diversity."[131]

Version 3's comment amalgamated the concept of a "legitimate" advocacy (still undefined) exclusion from Version 1's comment, and a "relevancy" exclusion from Version 2's comment, now providing: "Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation."[132]

Version 3's comment resurrected from Version 1's comment a limitation omitted from Version 2's: that limiting the lawyer's practice to "underserved populations" of clients would not constitute a violation.

Finally, Version 3's proposed comment dropped from Version 2's the limitation that discriminatory peremptory challenges alone would not establish a violation.

5. Version 4.

The rapid approach of the House of Delegates meeting set for August 8-9, 2016, at which proponents hoped to secure approval of the proposal, generated a rush of activity as various constituencies within the ABA considered whether they would support it. As the end of July approached, it appeared uncertain whether the proposal would garner sufficient support to pass. The BLS Ethics Committee, for example, continued to oppose it, noting, "Not a single member. . . has offered any favorable comments or expressions of support for the Proposed Rule."[133]

To overcome substantial opposition based on the absence of a knowledge qualifier,[134] the proponents advanced on July 25, 2016, a modified draft proposal—styled a "Current Working Re-Draft."[135] This

130. *Id.*

131. *Id.*

132. *Id.*

133. Memorandum from Business Law Section Committee on Prof'l Resp. to Section Delegates and Section Leadership on Res. & Rpt. 109, at 1 (Submitted for ABA Annual Meeting 2016) [hereinafter "BLSEC Comment II"] (on file with the authors).

134. Email from Myles Lynk to John Bouma et al. (regarding Resolution 109) (July 24, 2016) (on file with the authors).

135. Am. Bar Ass'n, Current Working Redraft: r. 8.4 (July 25, 2016) [hereinafter "current working redraft"] (on file with the authors).

version, Version 4, re-introduced a knowledge qualifier, albeit one that included, for the first time, an alternative "reasonably should know" standard.[136]

As circulated on July 25, 2016, the proposed rule read as follows:

> 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 Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.[137]

The proposed comment read, in pertinent part,

> [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. 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. Lawyers may engage in conduct undertaken to

136. *Id.*
137. *Id.*

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 advice or advocacy, including in jury selection as allowed by law, which 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 this rule. 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).[138]

Among other things, the basis of the proscribed discrimination or harassment—"because of their membership or perceived membership in one or more of the groups listed in paragraph (g)"—was omitted from Version 4's comment.[139]

More significantly, the attempted "diversity exception" of Version 3 was expanded, both to include "inclusion" efforts, and by identifying examples of such approved conduct: "implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations."[140]

Version 4's comment expanded Version 3's attempted "advocacy exception" to legitimate "advice *or* advocacy," and clarified that "jury selection as allowed by law" fell within the exception's ambit.[141] (emphasis added)

Finally, Version 4's comment resuscitated Version 2's comment's statement, "A trial judge's finding that peremptory challenges were

138. *Id.*
139. *Id.*
140. Current Working Re-Draft, *supra* note 135.
141. *Id.*

exercised on a discriminatory basis does not alone establish a violation of this rule," which had been dropped from Version 3.[142]

6. Version 5.

Furious lobbying by proponents of the proposal[143] led to bargaining over terms on which, at a minimum, the Standing Committee on Professional Discipline and the Litigation Section would support it.[144] The bargaining process yielded still another version, framed as a "Revised Resolution," on August 3, 2016. As then proposed, and ultimately adopted following further lobbying by rule change proponents,[145] the rule provided:

> 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

142. *Id.*

143. *See, e.g.*, Email from Myles Lynk to Don Bivens *et al.* (regarding Some of the Letters Received in Support of Res. 109) (attaching Letter from Diane Karpman, Beverly Hills Bar Association, to Myles Lynk; Letter from Linda Bray Chanow, Center for Women in Law, to Myles V. Lynk (regarding Support of Resolution 109 to Amend Model Rule of Professional Conduct 8.4 to Prohibit Discrimination or Harassment in Conduct Related to the Practice of Law) (July 29, 2016); Letter from Elizabeth Kristen, Legal Aid Society – Employment Law Center, to Myles Lynk, (regarding Support for ABA Resolution 109) (July 21, 2016); Letter from Rachelle A. Tasher, Ms. JD, to Myles V. Lynk (regarding Support of Resolution 109 to Amend Model Rule of Professional Conduct 8.4 to Prohibit Discrimination or Harassment in Conduct Related to the Practice of Law) (July 29, 2016); Letter from Robert M. Maldonado *et al.*, Hispanic Nat'l Bar Ass'n *et al.*, to Myles V. Lynk (regarding Support of Resolution 109 to Amend Model Rule of Professional Conduct 8.4 to Prohibit Discrimination or Harassment in Conduct Related to the Practice of Law) (July 22, 2016); Letter from Hon. Lisa Walsh, National Association of Women Judges, to Myles V. Lynk, (regarding Support of Resolution 109 to Amend Model Rule of Professional Conduct 8.4) (July 28, 2016); Letter from Marsha L. Anastasio, National Ass'n of Women Lawyers, to Myles V. Lynk (regarding Support of Resolution 109 to Amend Model Rule of Professional Conduct 8.4 to Prohibit Discrimination or Harassment in Conduct Related to the Practice of Law) (July 21, 2016); Letter from Elvia P. Garcia, Santa Barbara Women Lawyers, to Standing Comm. on Ethics & Prof'l Resp. (Mar. 16, 2016); Letter from Jayne R. Reardon, ABA Standing Comm. on Professionalism, to Myles V. Lynk (regarding Support of Resolution 109 to Amend Model Rule of Professional Conduct 8.4 to Prohibit Discrimination and Harassment in Conduct Related to the Practice of Law) (July 29, 2016); Letter from South Asian Bar Ass'n of N. Am. *et al.* to Myles V. Lynk (regarding Resolution 109 to Amend Model Rule of Professional Conduct 8.4 to Prohibit Discrimination or Harassment in Conduct Related to the Practice of Law) (July 27, 2016); Letter from Lindsey D. Draper to Myles V. Lynk (regarding Resolution 109) (July 26, 2016)) (on file with the authors); Email from Myles Lynk to John Bouma *et al.* (regarding List of Co-Sponsors and Supporters of Res. 109) (Aug. 2, 2016) (on file with the authors).

144. *See* Email from Keith R. Fisher to ABA Business Law Section Prof'l Resp. Comm. (regarding Forwarding Request for Comments on 8.4(g) from Lucian Pera) (Aug. 3, 2016) (on file with the authors).

145. *See* Email from Lucian Pera to ABA House of Delegates (regarding Revision to House Resolution 109 (Anti-Discrimination Rule)) (Aug. 3, 2016) (on file with the authors); Email from Myles Lynk to Lynne B. Barr (regarding Revisiting the Business Law Section Council's Decision) (Aug. 3, 2016) (on file with the author); Email from Myles Lynk to ABA House of Delegates re Please Vote for Resolution 109 (Aug. 6, 2016) (on file with the authors).

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.

The upshot was the elevation of the "legitimate advice or advocacy" exception from the comment, as in Version 4, to the rule. The proposed comment otherwise was left unchanged substantively from Version 4's comment.[146]

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146. As redlined, the Version 5 comment read:

[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 confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. 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. 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] 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

7. *Negotiated Changes Smother Remaining Opposition; the House of Delegates Passes Version 5 by Voice Vote.*

With the Standing Committee on Professional Discipline and the Litigation Section coming onboard, the prospect that any substantial constituency within the ABA would publicly oppose the proposal melted away. The ABA Board of Governors voted to support it.[147] On August 7, BLS, whose council previously had voted twice not to support the proposal, released the delegates to vote in accordance with their individual preferences.[148] The Association of Professional Responsibility Lawyers, which had participated in the Working Group, voted on August 4 to support it.[149]

Notwithstanding that substantial constituencies within the ABA had expressed outright opposition to or substantial concerns with a prior version of the proposal (Version 3) that was like Version 5 in multiple respects, by the time of the vote on the afternoon of August 8, not a single delegate had asked to speak in opposition. The proposal passed on a voice vote.[150]

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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.

Revised Resolution, (August 3, 2016) *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

147. Email from Myles Lynk to William Johnston *et al.* (regarding Revisiting the Business Law Section Council's Decision) (Aug. 5, 2016) (on file with the authors).

148. Email from Charles McCallum to Keith Fisher (regarding Resolution) (Aug. 7, 2016) (on file with the authors).

149. Email from Lucian T. Pera to Meg Milroy *et al.* (regarding Revisiting the Business Law Section Council's Decision) (Aug. 5, 2016) (on file with the authors).

150. Lorelei Laird, *Discrimination and Harassment Will Be Legal Ethics Violations Under ABA Model Rule*, ABA J., (Aug. 8, 2016), *available at* http://abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

III. THE NEW MODEL RULE'S HASTY PRE-PASSAGE EVOLUTION LEFT SUBSTANTIAL QUESTIONS UNRESOLVED: THESE CRY FOR ANALYSIS

A. Overview

As shown, new Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.

By comparison, the ABA Ethics 2000 Commission, formed in 1997 to review the Model Rules, labored for nearly five years before its proposals were approved by the House of Delegates.[151] During the course of its work, the Ethics 2000 Commission held fifty-one full days of meetings, held more than twelve public hearings, communicated regularly with its 250-member advisory council, consulted with special-interest groups, and made its discussion drafts and meeting minutes available on the internet.[152] Its proposals were debated at two ABA meetings, the August 2001 Annual Meeting and the February 2002 Midyear Meeting, before most of the Ethics 2000 Commission's proposals were adopted.[153]

By comparison, the ABA Ethics 20/20 Commission took two years before it rolled out initial proposals throughout the second half of 2011.[154] The Ethics 20/20 Commission had seven working groups, held thirteen open meetings, conducted public hearings and roundtables, and received and reviewed over 400 comments on its proposals.[155] The proposals went through multiple drafts before they were finalized and filed with the House of Delegates for consideration at the August 2012 Annual Meeting.[156]

There is no guarantee that a more deliberative process would have resolved the many questions that remain for those who might be asked to

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151. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002).

152. *Id.*

153. *Id.*

154. Am. Bar Ass'n. Comm. on Ethics 20/20, *Introduction and Overview of Report and Resolutions*, AM. BAR ASS'N (Feb. 2013), *available at* http://americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf; see also Am. Bar Assoc., Commission on Ethics 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited on Aug. 28, 2016).

155. *Id.*

156. *Id.*

adopt the new model rule as a real world rule governing real world lawyers. These questions include, among others:

- Was (or is) there any need for the rule change at all, given the existence of then-extant Rule 8.4 and the Model Rules' traditional reluctance to give ethics heft to desired conduct norms unrelated to the administration of justice or lawyers' fitness to see to it?[157]
- What are the similarities and differences between the new model rule and the anti-bias rules that have been adopted in various jurisdictions? What do the experiences of those jurisdictions teach?[158]
- Do state constitutional principles—separation of powers, at a minimum—undermine state court systems' abilities to reach beyond the administration of justice, all the way to any and all conduct "related to the practice of law," by judicial decree?[159]

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157. Litigation Section Comment, *supra* note 92, at 2 (pointing out the dearth of data presented to support a need for this rule change); MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 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.").

158. 52 ABA Members Comment, *supra* note 113, at 7, 12.

159. *See, e.g.*, ARIZ. CONST. art. III ("The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."); *compare, e.g.*, Hunt v. Maricopa County Employment Merit Sys. Comm'n, 619 P.2d 1036, 1038-39 (Ariz. 1980) ("The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court."), *with* State ex rel. Woods v. Block, 942 P.2d 428, 435 (Ariz. 1997) (articulating "test to determine if one branch of government 'is exercising "the powers properly belonging to either of the others"'" (quoting J.W. Hancock Enters. v. Ariz. State Reg. of Contractors, 690 P.2d 119, 124-25 (Ariz. Ct. App. 1984)), as requiring a "'search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented'" (quoting Schneider v. Bennett, 547 P.2d 786, 792 (Kan. 1976))), *and* ARIZ. REV. STAT. § 41-1463 (2016) (defining unlawful employment practices under state law); *see also* ARIZ. REV. STAT. § 41-1493.04 (2016) (providing that "Government shall not deny, revoke or suspend a person's professional or occupational license . . . for . . . [d]eclining to provide or participate in any service that violates the person's sincerely held religious beliefs . . . [or e]xpressing sincerely held religious beliefs in any context, including a professional context as long as the services provided otherwise meet the current standard of care or practice for the profession . . . [or m]aking business related decisions in accordance with sincerely held religious beliefs such as: (a) Employment decisions, unless otherwise prohibited by state or federal law [and] (b) Client selection decisions," and further providing that "[f]or purposes of this section, 'government' includes all courts and administrative bodies or entities under the jurisdiction of the Arizona supreme court").

- Does the advice or advocacy exclusion of the model rule—such as it is[160]—include other lawyer functions, such as speaking for a client in a negotiation setting, or advocating for changes in the law?[161]
- Assuming *arguendo* the existence of some groups or statuses that deserve the protection of an anti-bias ethics rule, why were some but not other such "factors"[162] (such as height, weight, or veteran status) excluded?[163]
- Does such a rule's potential weaponization against lawyers[164] call for a change to the general rule that bar complainants are insulated from liability for making a charge[165] (or, for that matter, that a bar complainant needs no standing, as that term is understood in civil litigation terms,[166] in order to make out a bar complaint[167])?
- Does it matter that the model rule can be read to proscribe mandatory retirement policies at law firms and corporations,[168] as well as law practices focusing on populations identified by one or more of the model rule's "factors," unless "underserved"?[169]

The proponents of the ABA model rule change thought public comment important when distinguishing Version 3 from Version 2.[170] Yet,

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160. *See infra* notes 174-78; *see also supra* notes 151-53 and accompanying text.

161. *See* Memo re: Dec. 22, 2015 Draft, *supra* note 58, at 3 (suggesting the language "'related to' the practice of law" invokes the Preamble and Scope of the Model Rules' description of "the practice of law" and reaches any conduct related to lawyers acting as "advisors, advocates, negotiators, [] evaluators for clients, [and] third-party neutrals"); *see* Litigation Section Comment, *supra* note 92, at 5 (expressing concern regarding the broad scope of "conduct related to the practice of law").

162. *See infra* Section III.D.1 (noting use of term "factors" to encompass objects of proscribed "harassment" or "discrimination").

163. *See* 52 ABA Members Comment, *supra* note 113, at 23 (noting efforts to include height and weight as recognized and protected characteristics). In December 2015, the Standing Committee's explanation for the included categories was that the protected groups listed "reflect current concerns regarding discriminatory practices." Memorandum from Standing Committee on Ethics and Professional Responsibility at 4. Plainly, this explanation creates more questions than it answers.

164. *See generally* Andrew F. Halaby, *The (Mis)use of Lawyer Discipline in Civil Litigation*, ARIZONA ATTORNEY (Nov. 2014).

165. *See, e.g.*, ARIZ. R. SUP. CT. 48(l) (providing that communications to the state bar and other actors in attorney discipline process "shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness").

166. *See, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 37 (1976).

167. *See, e.g.*, ARIZ. R. SUP. CT. 55(a) ("The state bar shall evaluate all information coming to its attention, in any form, by charge or otherwise, alleging unprofessional conduct, misconduct or incapacity.").

168. BLSEC Comment II, *supra* note 90, at 6; Litigation Section Comment, *supra* note 133, at 5.

169. BLSEC Comment II, *supra* note 90, at 8-9 (discussing problems with the "underserved" language); *Language Choice Narrative*, *supra* note 44, at 4 (acknowledging that "if a lawyer represents only wives in family law matters, that is not an 'underserved' population").

170. The Chair of the Standing Committee asserted in support of Version 3 that "most of the frequently cited, comments" on the proposal "were commenting on an earlier, December 2015 draft of the proposal.... After these comments were received and in light of the testimony at the public

central features of the final version—Version 5—never were subjected to such hearing or comment. These include:

- the rule's inclusion of a "reasonably should know" qualifier;
- the concept of excluding certain kinds of lawyer expression—variously, "legitimate" if in the context of advocacy, advice, or both; or if material or relevant enough; or if going to "factual or legal issues or arguments"—from the rule's reach;
- the comment elucidating but not defining "conduct related to the practice of law";
- the comment elucidating but not defining "discrimination" and "harassment";
- the significance—not governance—ascribed in the comment to other substantive law;
- the comment's treatment of diversity and inclusion efforts;
- the comment's subjection of client-type limitations to "underserved populations"; and,
- perhaps obviously, but critically to any lawyer or court, the selection and arrangement of words in capturing these issues and concepts.[171]

Here, we delve into a handful of issues that particularly call for further analysis. Until these issues, at a minimum, are resolved with rigor, there exists a serious question: In a discipline regime requiring clear and convincing evidence of a violation before the attorney can be disciplined,[172] how could *any* attorney be disciplined for violating a real world ethics rule mirroring Model Rule 8.4(g)?

B. What Do Key Terms in New Model Rule 8.4(g) Mean?

According to the Standing Committee, proffering Version 1, "Drafting rules requires [sic] writers to consider the meaning and possible effect of every word. When precisely crafted, every word choice reflects the intent of the drafter."[173] Yet, as noted above, the model rule that ultimately emerged from the House of Delegates left key terms undefined, including not only the proscribed "discrimination" and "harassment," but also

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hearing, the proposed new black letter rule and Comment were substantially revised." Email from Myles Lynk to John Bouma *et al.*(regarding ABA Resolutions 109) (July 24, 2016) (on file with the authors).

171. *Id.*

172. *See, e.g.*, AM. BAR ASS'N. MODEL R. FOR LAWYER DISCIPLINARY ENFORCEMENT 18(c); ARIZ. SUP. CT. R. 58(j)(3).

173. *Language Choice Narrative, supra* note 44, at 3.

"socioeconomic status,"[174] "conduct related to the practice of law," and "legitimate" advice or advocacy.

Some of these terms have analogs in other substantive law.[175] The analogs need to be stress-tested, and the terms defined for professional conduct purposes. This is true not only to be fair to those who might be accused of violations, but also to avoid unexpected consequences.

On the fairness point, consider the new rule's exclusion for "legitimate"[176] advice and advocacy. Since a word, particularly in a rule of professional conduct, must mean something other than what an attorney discipline complainant, enforcement body, or court wants it to mean in the moment,[177] and given the clear and convincing standard of proof, the word "legitimate" cries for definition.[178]

Consider, for example, the litigation in *Blackhorse v. Pro-Football, Inc.*[179] (regarding commercial use of the term "redskins") and *In re Tam*[180]

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174. According to the Standing Committee, proffering Version 1, "Research failed to reveal either a definition for the term ["socioeconomic status"] or its application in any disciplinary context." *Language Choice Narrative*, *supra* note 44, at 4.

175. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012) (prohibiting employment discrimination based on race, color, religion, sex, or national origin); Davis v. Monroe Cty. Bd of Educ., 526 U.S. 629, 633 (1999) (defining harassment in the Title IX context as "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); *see generally* Taslitz & Styles-Anderson, *supra* note 18 (noting federal law analogs). State laws also offer definitions of discrimination and harassment. *See, e.g.*, ARIZ. REV. STAT. § 13-291 (2016) (defining criminal harassment); ARIZ. REV. STAT. § 41-1463 (2016) (defining employment discrimination). Courts have interpreted socioeconomic status as "objective criteria such as education, income, and employment," where Congress required that the federal Sentencing Guidelines must be neutral as to socioeconomic status, among other enumerated categories. United States v. Lopez, 938 F.2d 1293, 1297 (D.C. Cir. 1991); 28 U.S.C. § 994(d); *see* BLSEC Comment II, *supra* note 90, at 12. The American Psychological Association has a similar definition: "Socioeconomic status is commonly conceptualized as the social standing or class of an individual or group. It is often measured as a combination of education, income and occupation." *Socioeconomic Status*, AM. PSYCHOL. ASS'N, http:// apa.org/topics/socioeconomic-status (last visited Feb. 14, 2017).

176. BLACK'S LAW DICTIONARY (9th ed. 2009), defines legitimate as "1. Complying with the law; lawful. 2. Genuine; valid." WEST'S ENCYCLOPEDIA OF AMERICAN LAW, (2d ed. 2008), similarly defines legitimate as, "That which is lawful, legal, recognized by the law, or in accordance with the law, such as legitimate children or legitimate authority; real, valid, or genuine."

177. *See Infra* Section III.E.1; *see also* City of Phoenix v. Yates, 208 P.2d 1147, 1149 (Ariz. 1949) ("Each word, phrase, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." (footnote omitted)).

178. In December 2015, the Standing Committee agreed. *See* Memo re: Dec. 22, 2015 Draft, *supra* note 58, at 5 (explaining its revision from "legitimate advocacy" to "material and relevant to factual or legal issues or arguments in a representation" because the latter was "a clearer standard than 'legitimate advocacy' for disciplinary counsel and state courts to apply, as it incorporates concepts already known in the law — 'material' and 'relevant'").

179. Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014), *aff'd*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

180. *In Re* Tam, 808 F.3d 1321 (Fed. Cir. 2015) (en banc), *as corrected* (Feb. 11, 2016), *cert. granted sub nom.* Lee v. Tam, 15-1293, 2016 WL 1587871 (U.S. Sept. 29, 2016).

(regarding commercial use of the term "slants"). Detractors of the Washington, D.C., National Football League franchise's persistence in using the former term as its mascot persuaded the United States Trademark Trial and Appeal Board ("TTAB") to cancel registration of the franchise's federally registered "REDSKINS" marks under Section 2(a) of the federal Lanham Act, which bars registration of any mark which "disparage[s]. . . persons,. . . institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. . .."[181] Meanwhile, the Federal Circuit overruled, on First Amendment grounds, the TTAB's refusal to register "THE SLANTS" as a trademark for the Asian-American dance-rock group of that name.[182]

It is unclear whether a discipline enforcement agency or court would view advice or advocacy in support of Pro-Football, Inc., to be "legitimate" under the new model rule. Viewed through the lens of Federal Rule of Civil Procedure 11,[183] there is a substantial argument that the case for the REDSKINS mark's registrability became stronger after the Federal Circuit's decision in *In re Tam*—and stronger still, if only temporarily, after the United States Supreme Court's subsequent grant of *certiorari* in that case.[184] This fluidity marks one difficulty with the "legitimate" qualifier—lawyers need to make the arguments in order to change the law, yet the new model rule obstructs novel legal arguments.[185] The difficulty is especially pronounced where, as here, the subject matter is socially, culturally, and politically sensitive. Detractors of the REDSKINS mark would almost certainly argue that arguments supporting Pro-Football, Inc.'s use of the mark are not "legitimate";[186] others might disagree.[187]

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181. *See Blackhorse*, 111 U.S.P.Q.2d at *1.

182. *See In re* Tam, 808 F.3d at 1327-28; *see also In re* Tam: *Federal Circuit Holds the Lanham Act's Antidisparagement Provision Unconstitutional*, 129 HARV. L. REV. 2265 (2016).

183. FED. R. CIV. P. 11(b)(2) (2016) (requiring of every paper filed with the court that "the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law").

184. *Lee*, 15-1293, 2016 WL 1587871. The case remains pending before the Supreme Court at this writing.

185. *See also infra* Section III.E.2.

186. *See, e.g.*, CHANGETHEMASCOT.ORG, http://www.changethemascot.org (last visited October 14, 2016); Scott Martelle, *Forget the poll: 'Redskin' offends, and the NFL should drop the name*, LOS ANGELES TIMES (May 16, 2016), http://www.latimes.com/opinion/la-ol-washington-redskins-racism-nfl-native-american-20160525-snap-story.html; *see also* J. Gordon Hylton, *Before the Redskins Were Redskins: The Use of Native American Team Names in the Formative Era of American Sports, 1857-1933*, 86 N. DAKOTA L. REV. 879, 881-82 (2010).

187. *See, e.g.*, John W. Cox *et al.*, *New Poll finds 9 in 10 Native Americans aren't offended by Redskins name*, THE WASHINGTON POST (May 19, 2016), https://www.washingtonpost.com/local/new-poll-finds-9-in-10-native-americans-arent-offended-by-redskins-name/2016/05/18/3ea11cfa-161a-11e6-924d-838753295f9a_story.html?utm_term=.d55d0346a24b.

Some would argue that use of THE SLANTS is reappropriative,[188] and therefore different than Pro-Football, Inc.'s use of REDSKINS; others might argue that such a defanging enterprise reflects acquiescence in bias, rather than a challenge to it.[189]

In any event, one wonders how the lawyers asked to represent Pro-Football, Inc., or, for that matter, The Slants, *ever* comfortably could represent their clients while laboring under the cloud of a potential disciplinary complaint that their position is not "legitimate." This uncertainty is unfair to the lawyers, not to mention their clients and the integrity of the judicial system.[190]

On the unexpected consequences point, consider the term "discrimination," which too is undefined in the new model rule. At its most basic level, this term means only to treat differently based on something.[191] We almost all of us discriminate, often and properly, based on such things as morality, decorum, cleanliness, and capability. Such discrimination is not wrong in any legal sense. It is only when the law—or, here, context—supplies the basis of the proscribed discrimination that the term acquires a pejorative gloss.[192]

This reality creates a conundrum for those who would at once support adoption of the new model rule, while at the same time championing diversity and inclusion initiatives.

With Version 3, as noted above, the rule change proponents apparently recognized that the model rule's discrimination bar would threaten efforts to promote diversity and inclusion. They therefore included an exception for those concepts in Version 3's proposed comment. That exception, in modified form, emerged as part of the Version 5 (final) comment.

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188. *See In re* Tam, 808 F.3d at 1327 ("Mr. Tam named his band The Slants to 'reclaim' and 'take ownership' of Asian stereotypes."); *see also* Adam D. Galinsky *et al.*, *The Reappropriation of Stigmatizing Labels: The Reciprocal Relationship Between Power and Self-Labeling*, 24 PSYCHOLOGICAL SCIENCE 2020, 2029 (2013).

189. *See* Adam M. Croom, *How to do Things with Slurs: Studies in the Way of Derogatory Words*, 33 LANG. & COMM'N 177, 190 (2013) ("[S]ome that reject in-group uses of slurs are usually concerned that their use is somehow symptomatic of the internalization of white racism." (citations omitted)).

190. *See also infra* Section III.E.

191. *See, e.g.*, *Discrimination*, WEBSTER'S THIRD NEW INT'L DICTIONARY (UNABRIDGED) (2002) ("1a: to mark or perceive the distinguishing or peculiar features of: recognize as being different from others").

192. *See Discrimination*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("2. The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability. . . . 3. Differential treatment; [especially], a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."); ROBERT K. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY 11 (1980) ("The dictionary sense of the word 'discrimination' is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currency, the opportunity for confusion in arguments about racial discrimination is enormously multiplied.").

But even were it possible for a comment to contradict the plain meaning of the ethics rule it accompanies—and it is not[193]—the terms "diversity" and "inclusion" themselves were left undefined. Attempting to define them now demonstrates the quandary that the proponents of the model rule change left for those who might be asked to implement and enforce it in a real world lawyer discipline setting.

The term "inclusion" means nothing without an object of the inclusion. "Diversity" supplies that object—presumably, those who are, somehow, different or distinctive.[194] But, applying the foregoing definition of "discrimination," the new model rule prohibits treating persons differently based on the factors of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.[195] Under new Model Rule 8.4(g), this is true even if done for "benevolent" reasons—assuming that benevolence could be defined objectively for purposes relevant here.[196]

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193. *See* MODEL RULES OF PROF'L CONDUCT pmbl. 15 (2015) ("Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."); *id.* pmbl. 21 ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."). The Standing Committee, in advancing Version 2, acknowledged as much, offering the absence of an anti-bias rule, as opposed to comment, as a rationale for its effort. *See* Memo re: Dec. 22, 2015 Draft, *supra* note 58, at 1 ("[S]tatements in the Comments are not authorative.").

194. *See* Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2416 (2013); Grutter v. Bollinger, 539 U.S. 306, 328 (2003); Regents of Univ. of California v. Bakke, 438 U.S. 265, 314 (1978). *See generally* Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75 (2012).

195. MODEL RULES OF PROF'L CONDUCT R. 8.4(g), *supra* note 1.

196. It is well known that the federal courts have struggled to determine whether and under what circumstances laws designed to benefit direct or indirect victims of invidious race-based classifications are to be viewed differently, in equal protection terms, than the classifications themselves. *See, e.g.*, *Metro Broad., Inc.*, 497 U.S. at 631, 639 (1990) (Kennedy, J., dissenting) (criticizing the majority's refusal to apply strict scrutiny to a race-based classification on the basis that "broadcast diversity" is an important government interest as "exhuming *Plessy [v. Ferguson*'s] deferential approach to racial classifications"), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 64 (2013) ("[Justice] Kennedy expressed doubt regarding the Court's capacity to distinguish suitably between malign and benign racial discrimination. This very case displayed the difficulty, Kennedy maintained, since the preference in question stemmed from what he saw as the stereotypical assumptions that the race of broadcast owners is linked to broadcast content—assumptions that, he said, the government should be forbidden to make."); Stephen R. McAllister, *One Anglo-Irish American's Observations on Affirmative Action*, 5 KAN. J.L. & PUB. POL'Y 21, 23 (1995-96) (noting divergent opinions in *Metro Broadcasting v. F.C.C.*, 497 U.S. 547 (1990), and *Adarand Constructors v. Pena*, 515 U.S. 200 (1995)); Fisher v. Univ. of Texas, 133 S. Ct. 2411, 2418 (2013) ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . .' (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)); Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Roberts, C.J., plurality op.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *see generally* Andrew F. Halaby & Stephen R. McAllister, *An Analysis of the Supreme Court's Reliance on Racial 'Stigma' as a Constitutional Concept in Affirmative Action Cases*, 2 MICH. J. RACE & L. 235 (1997). The ABA did not undertake to resolve the tension between invidious and well-meant discrimination in crafting the new model rule, but chose instead to put the discrimination bar in the rule, and references to diversity and inclusion in the comment.

The new model rule, then, casts a pall over law firm practices such as a Women's Initiative ("sex"), pipeline initiatives in law firms and corporate legal departments designed to promote the entry of poverty-stricken youth into the educational and commercial mainstream ("socioeconomic status"), and perhaps even recognition programs such as Hispanic Heritage Month ("race" or "ethnicity"[197]). This would be true for both jurisdictions that do not adopt the Model Rules' comments[198] and because comments cannot contradict rules, jurisdictions that do. It is no answer that a disciplinary agency might readily dismiss a complaint brought on these grounds. Prosecutorial whim is not the rule of law.

Serious study regarding how to define these terms in this context is called for. Were a state supreme court to adopt the new model rule in its current form, the result would be to have adopted an ethics rule that could not be enforced—precisely because, absent sufficient clarity to give lawyers clear notice of what conduct is and is not proscribed, there would be no way for an enforcement agency to prove by clear and convincing evidence that the lawyer knew or reasonably should have known that the lawyer was engaging in the proscribed conduct.

C. How Does New Model Rule 8.4(g) Interplay with Other Model Rules? What Guidance Do They Supply as to How It Should Be Applied and Enforced?

Many questions exist as to how the new model rule and its comments interplay with the other model rules and their comments.

Consider, for one example, the new model rule's exclusion allowing lawyers to "accept, decline or withdraw from a representation in accordance with Rule 1.16."[199] Model Rule 1.16 governs declining or terminating representation. The elevation of this content from the Version 2 comment to the Version 3 rule, where it remained until passage, suggests that under the new model rule, the lawyer remains compelled ethically to decline representation, even on bases constituting discrimination in

197. *See* Ana Gonzalez-Barrera & Mark H. Lopez, *Is being Hispanic a matter of race, ethnicity, or both?*, PEW RESEARCH CENTER FACT TANK (June 15, 2015), http://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both/ ("Federal policy defines "Hispanic" not as a race, but as an ethnicity. And it prescribes that Hispanics can in fact be of any race. But these census findings suggest that standard U.S. racial categories might either be confusing or not provide relevant options for Hispanics to describe their racial identity."); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 461 (2014) ("Although there is no biological basis for race, race exists as a social construct and has been developed according to both social meanings and physical attributes.") (citations omitted).

198. *See, e.g.*, MICH. RULE PROF'L CONDUCT R. 1 CMT.; N.H. RULES PROF'L CONDUCT STMT. OF PURPOSE; MAINE RULES PROF'L CONDUCT pmbl. 1A.

199. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

violation of the new model rule, where the lawyer could not provide effective representation in the circumstances. That position derives from Model Rule 1.7 (conflict of interest, current clients)[200] and, perhaps, Model Rules 1.1 (competence)[201] and 1.4 (communication).[202] These rules all apply through Model Rule 1.16(a), which bars accepting representation that "will result in violation of the Rules of Professional Conduct"—necessarily excluding Model Rule 8.4(g) itself (or the new model rule would beg the question)—"or other law."[203]

Consider, for another example, the new model rule's exclusion of "legitimate advice or advocacy" that is "consistent with these Rules."[204] As noted above, the word "legitimate," taken in isolation, cries for definition in this context.[205] But cross-application issues involving the phrase "legitimate advice or advocacy" also abound.[206] Consider Model Rule 2.1,

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200. MODEL RULES PROF'L CONDUCT R. 1.7(a) ("[A] lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.").

201. MODEL RULES PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client.").

202. *See* MODEL RULES PROF'L CONDUCT R. 1.4:

> (a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

203. *See also* Brenda J. Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 10-15, 30-36 (2012) (discussing cross-application of anti-bias rule to other ethical limitations to accepting representation).

204. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

205. *See supra* notes 166-75 and accompanying text.

206. These include: Where does "representing a client," for purposes of Model Rule 2.1, stop, and "conduct related to the practice of law," for purposes of the new model rule, start? *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 and 8.4(g). Even assuming there exist reasonable methods to ensure that one's colleagues and subordinates comply with the new model rule, how would one "avoid[] or mitigate[]" the consequences of a lapse under Model Rule 5.1? *See* MODEL RULES PROF'L CONDUCT R. 5.1 and 5.3. For that matter, how would a lawyer go about ratifying such conduct under Model Rule 5.1? *Id.* Given the inherent amorphousness of the new rule, could any subordinate lawyer ever be subject to discipline by acquiescing in a superior's interpretation of it, under Model Rule 5.2? *See* MODEL RULES PROF'L CONDUCT R. 5.2(b). Lawyers do things besides advise and advocate. Does the exclusion apply to them? *See* Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 40 (2011) (arguing, "Lawyers are not paid to provide 'speech;' rather, their services are aimed at securing life, liberty, and property. This is as true for the transactional attorney (involved in creating legally recognized business organizations and contracts that have the potential to protect and enhance people's property, avoid liability, and bind themselves and others) as it is for the civil litigator and the criminal lawyer"). What is the difference between arguments that are "legitimate" under Rule 8.4(g) and arguments that are "not frivolous" under Rule 3.1? *See* MODEL

which provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice," and that, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[207] Reading the words "legitimate advice or advocacy consistent with these Rules" together with Model Rule 2.1, the "legitimate advice or advocacy" exclusion necessarily extends to *any* advice or advocacy deriving from "moral, economic, social and political factors," including factors that would violate the new model rule applied in isolation, which the lawyer ethically must, in candor, offer to the client.[208]

Finally, when is it that a lawyer "reasonably should know"[209] that the lawyer's conduct is harassment or discrimination related to the practice of law within the meaning of the new model rule, as compared to other things a lawyer "reasonably should know" under the Model Rules?[210] Almost all those model rules go to matters of objective fact or, at least, understanding, as opposed to matters of subjective perception.[211] The lone exception is Model Rule 3.6, which limits extrajudicial statements made by public communication which the lawyer reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[212] Almost all the other Model Rules featuring "reasonably should know" further, or at least seek to prevent mistakes regarding the existence of, the attorney-client relationship.[213] The lone exception is Model Rule 4.4, the inadvertent communication rule.

The meaning of "reasonably should know" in the new model rule appears particularly worthy of critical analysis given the rule change proponents' focus on implicit bias.[214] As noted above, the proponents repeatedly invoked that concept in arguing against any knowledge qualifier

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RULES OF PROF'L CONDUCT R. 3.1 and 8.4(g). When is a factual reference otherwise barred under Rule 8.4(g) required because it is "material" within the meaning of Rule 3.3(d)? *Id.*

207. MODEL RULES OF PROF'L CONDUCT R 2.1.

208. *Id.*

209. This term is defined in MODEL RULES OF PROF'L CONDUCT R. 1.0(j).

210. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (organization as client), 2.3(b) (evaluation for use by third persons), 2.4(b) (lawyer serving as third-party neutral), 3.6(a) (trial publicity), 4.3 (dealing with unrepresented person), and 4.4(b) (inadvertent transmission of document or electronically stored information).

211. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (organization as client), 2.3(b) (evaluation for use by third persons), 2.4(b) (lawyer serving as third-party neutral), 4.3 (dealing with unrepresented person), and 4.4(b) (inadvertent transmission of document or electronically stored information).

212. MODEL RULES OF PROF'L CONDUCT R. 3.6.

213. *See* MODEL RULES OF PROF'L CONDUCT r. 1.13(f) (organization as client), 2.3(b) (evaluation for use by third persons), 2.4(b) (lawyer serving as third-party neutral), 4.3 (dealing with unrepresented person).

214. *See supra* Section II.D.3.a.

at all.[215] When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative "reasonably should know" qualifier alongside.[216] That addition was not subjected to comment by the public or by the bar or the ABA's broader membership.

It matters. By definition, implicit bias means "relatively unconscious and relatively automatic features of prejudiced judgment and social behavior."[217] Many proponents of the rule change would in all likelihood agree with the National Center for State Courts that, "[a]lthough automatic, implicit biases are not completely inflexible: They are malleable to some degree and manifest in ways that are responsive to the perceiver's motives and environment."[218] As noted above, proponents animated by implicit bias concerns openly expressed their hope that, in effect, the new rule might serve as a device to affect lawyer motives and environment.[219]

Yet, proponents' failure to secure a model rule free of a knowledge qualifier means that the effort to secure a model rule against implicit bias-derived conduct also failed. Indeed, the "reasonably should know" qualifier in the new model rule, coupled with Model Rule 1.0's definition

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215. *Id.*

216. *See* text accompanying note 141.

217. *Implicit Bias*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/implicit-bias/ (last visited Feb. 15, 2017); *see also Helping Courts Address Implicit Bias: Frequently Asked Questions*, NATIONAL CENTER FOR STATE COURTS, http://ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx (last visited Feb. 15, 2017) ("*implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control."); *see also* Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 278, 280 (2014) ("our seemingly neutral, logical, and reasoned judgments are actually influenced by unconscious frameworks of thinking about the world that are triggered by our autonomic nervous system"); Natalie B. Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 100 (2010). It must be noted that "the scientific status of implicit-prejudice measures, such as the Implicit Association Test (IAT), is controversial, with some scholars maintaining that they detect subtle forms of prejudice but others contending that their validity is dubious." Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSPECTIVES ON PSYCH. SCI. 138, 138 (2017) (citations omitted) *see also* Frederick L. Oswald *et al.*, *Predicting Ethnic & Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCH. 183-84 (2013) (questioning the IAT's reliability in predicting real-world behavior); Hart Blanton *et al.*, *Strong Claims & Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCH. 567, 578, 580 (2009) (same); Gregory Mitchell & Philip E. Tetlock, *Implicit Attitude Measures*, in EMERGING TRENDS IN THE SOCIAL & BEHAVIORAL SCIENCES 10 (2015) ("The current popularity of implicit attitude measures appears to be driven more by their availability and novelty, and the never-ending quest by social psychologists to find a bona fide pipeline to 'true' attitudes, than by the scientifically demonstrated validity and utility of the new measures.").

218. *Helping Courts Address Implicit Bias: Frequently Asked Questions*, NATIONAL CENTER FOR STATE COURTS, http://ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx (last visited Feb. 15, 2017) ("*implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.").

219. *See supra* Section II.D.3.a.

of "reasonably should know," comes closer to *excluding* implicit bias-derived conduct than supplying a device to combat it.[220] "Reasonably should know" means that "a lawyer of reasonable prudence and competence would ascertain the matter in question."[221] An individual lawyer could never, for discipline purposes, have "reason to know" something most lawyers do not.[222]

This failure is for the best. Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.[223] It is one thing to say to a lawyer, "Be vigilant for instinctive reactions based on *X*'s appearance." It is quite another—indeed, nonsensical—to say, "You are subject to discipline for failing to ascertain that you were reacting instinctively."[224]

Implicit bias concerns aside, one wonders what a lawyer "reasonably should know" regarding "discrimination" based on one enumerated classification—say, "race"—as compared to what that lawyer reasonably should know about discrimination based on another factor—say, "socioeconomic status." Issues of this ilk abound. Since the ABA did not address them or give its broader membership or the public a chance to weigh in on them, they need to be addressed now.

D. What Type of Disciplinary Sanction Would Apply to a Violation?

Though proponents of the model rule change proposal repeatedly invoked its symbolic significance during the journey to passage,[225] the

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220. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(j) and 8.4(g).

221. MODEL RULES OF PROF'L CONDUCT R. 1.0(j).

222. *See* Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006) ("[Implicit biases] can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."); Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and "Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 76 (2015) ("implicit biases are actually an unconscious mirror of our ubiquitous societal biases").

223. There exists abundant authority that the purpose of lawyer discipline is not to punish the lawyer, but it often operates as punishment nonetheless. *See, e.g., In re* Abrams, 257 P.3d 167, 170-71 (Ariz. 2011); *see also* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1, 18 (1998) ("While most courts insist that the purpose of lawyer discipline is not to punish lawyers, this assertion is probably incorrect. In fact, many lawyer sanctions fit within classic definitions of 'punishment' . . . ." (footnotes omitted)).

224. Scholarship addressing the existence and detection of implicit bias is far more developed than that on how to mitigate it. Pamela M. Casey, et al., *Implicit Bias in the Courts*, 49 CT. REV. 64, 65 (2013). The most commonly suggested strategies for combatting implicit bias are based on enhancing awareness. *See, e.g., id.* at 65-69 (evaluating efficacy of implicit bias-eliminating strategies in judicial decision making); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169-70 (2012) (explaining that exposure to "countertypical associations"— a person exhibiting characteristics opposite of a typical stereotype — could be one strategy to combat implicit biases in the courtroom).

225. *See, e.g.*, Transcript, *supra* note 65, at 5-6, 17, 24.

result is more than a symbol: it is the ABA's proffer of an appropriate *rule* of lawyer professional *conduct* (including words),[226] with corresponding *disciplinary* implications.[227] Any jurisdiction considering adopting the new model rule must consider what sanction or sanctions would apply to a violation. And, since the new model rule proscribes conduct whether or not that conduct prejudices the administration of justice, analytical rigor requires that the question be answered as to conduct that violates the new model rule standing in isolation.

The ABA Standards for Imposing Lawyer Sanctions supply no answer. These standards do not track the Model Rules, but rather the particular lawyer duties embodied in those rules.[228] The standards do not identify any sanction that applies to a duty not to engage in discriminatory or harassing conduct, however those terms may be defined.[229] The same problem afflicts individual jurisdictions' sanctions standards that invoke or are otherwise based on the ABA Standards.[230]

Start with Standard 6.0, the category of standards governing "Violations of Duties Owed to the Legal System."[231] As noted above, the "harassment" and "discrimination" proscribed by the new model rule is proscribed whether or not it prejudices the administration of justice.[232] So Standard 6.1, which applies only to the latter category of conduct, misses "harassment" and "discrimination" that does not prejudice the administration of justice.[233] Otherwise, Standard 6.1 applies only to conduct that "involves dishonesty, fraud, deceit, or misrepresentation to a court."[234] Standard 6.2 nominally applies to "Abuse of the Legal Process."[235] But closer inspection reveals that it really applies only to "cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal."[236] Standard 6.3 nominally applies to "Improper Communications with Individuals in the Legal System," and thus superficially might reach to bad words.[237] But

226. *See infra* Section III.E.2.

227. *See* CENTER FOR PROF'L RESPONSIBILITY, AM. BAR. ASS'N, ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.3 (2015) [hereinafter "ABA STANDARDS"].

228. *See id.* § 3.0.

229. *See supra* Section III.B.

230. *See, e.g.*, ARIZ. R. SUP. CT. 58(k); FLA. STANDARDS FOR IMPOSING LAWYER SANCTIONS (2015); N.D. STANDARDS FOR IMPOSING LAWYER DISCIPLINE (1998).

231. ABA STANDARDS § 6.0.

232. *Id.*

233. *Id.* § 6.1.

234. *Id.*

235. *Id.* § 6.2.

236. ABA STANDARDS § 6.2.

237. *Id.* § 6.3.

here, closer inspection reveals that Standard 6.3 is directed at "attempts to influence a judge, juror, prospective juror or other official."

The "catch all" Standard 7.0, "Violations of Other Duties Owed as a Professional," too misses the mark.[238] None of the particular kinds of misconduct it lists is akin to "harassment" or "discrimination."[239]

Further, there is Standard 5.0, the category of standards applying to "Violations of Duties Owed to the Public,"[240] which includes Standard 5.1, "Failure to Maintain Personal Integrity."[241] This standard, though, reaches only to cases involving the commission of certain criminal acts or cases involving "dishonesty, fraud, deceit, or misrepresentation."[242]

Questions of this kind also exist for the remaining factors, besides duty, enumerated by the ABA Sanctions Standards: "(b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; (d) the existence of aggravating or mitigating factors."[243] For just one example of a live issue, the ABA Sanctions Standards make restitution (or the lack of it) a potentially mitigating (or aggravating) factor.[244] One wonders how to quantify a restitution interest extending beyond the representation of a client, into other aspects of "conduct related to the practice of law."[245]

Given that the new model rule is a proposed real world ethics rule, yet one that lacks an applicable and appropriate set of sanctions for its violation, the new model rule is not just a symbol; it is a cudgel. Any jurisdiction considering adopting the new model must, if it is to responsibly discharge its obligations to the lawyers it regulates, consider whether it has corresponding sanctions standards in place, or instead needs to adopt such standards. Selecting standards to discipline a lawyer for her words—particularly speech having no prejudicial effect on the administration of justice—may prove nettlesome.[246]

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238. *Id.* § 7.0.

239. ABA STANDARDS § 7.0 ("false or misleading communication about the lawyer or the lawyer's services improper communication of fields of practice, improper solicitation of professional employment . . ., unreasonable or improper fees, unauthorized practice of law, improper withdrawal . . ., or failure to report professional misconduct").

240. *Id.* § 5.0.

241. *Id.* § 5.1.

242. *Id.*

243. *Id.* § 3.0.

244. ABA STANDARDS §§ 9.2 and 9.3.

245. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

246. *See supra* Section III.A (noting state constitutional separation of powers issues); *infra* Section III.E.2 (noting federal constitutional due process and free speech issues).

E. Constitutional Issues

1. Due Process

An expansive treatment of constitutional due process is beyond the scope of this article. It is well understood, however, that there is a federal constitutional right to due process of law; that this right applies to the states through the Fourteenth Amendment; that this right applies in the context of lawyer discipline proceedings;[247] and that enforcement of a rule of lawyer professional conduct that is too vague can deny due process.[248]

The ABA BLS Ethics Committee, the Litigation Section, and the Standing Committee on Professional Discipline all raised concerns over whether Version 2 of the proposal was too vague to enforce. The BLS Ethics Committee invoked the Supreme Court's decision in *In re Ruffalo*[249] for the proposition that the disciplinary process is "quasi criminal," requiring application of at least some due process requirements including fair notice of the charges.[250] The Standing Committee on Professional Discipline devoted extensive treatment, in its comment to Version 2, to concerns over the vagueness of "conduct related to a lawyer's practice of law," "harass," and "discriminate," focusing as well on incongruities between the latter terms as they might have meaning in the employment law context as opposed to lawyer discipline context.[251] Commenters from outside the ABA raised similar concerns.

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247. *In re* Ruffalo, 390 U.S. 544, 550 (1968) ("Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge."); *see also, e.g.*, *In re* Best, 229 P.3d 1201, 1204 (Mont. 2010) (invoking *In re* Ruffalo, 390 U.S. 544 (1968), and Montana Constitution's due process clause); *Ex Parte* Case, 925 So. 2d 956, 961 (Ala. 2005) (invoking *Ruffalo* and United States and Alabama Constitution due process rights); Mark J. Fucile, *Giving Lawyers Their Due: Due Process Defenses in Disciplinary Proceedings*, 20 PROF'L LAWYER No. 4, 28 (2011); *see generally* Samuel T. Reaves, Comment, *Procedural Due Process Violations in Bar Disciplinary Proceedings*, 22 J. LEGAL PROF. 351 (1998).

248. "A regulation that 'either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST'L L.Q. 305, 382 (2001) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). *See also* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991); NAACP v. Button, 377 U.S. 415 (1963); Cramp v. Bd. of Pub. Instr. of Orange Cty., 368 U.S. 278, 287 (1961) ("The vices inherent in an unconstitutionally vague statute—the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct—have been repeatedly pointed out in our decisions."); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 903-04 (1991) ("Vagueness doctrine, in its most familiar form, holds that criminal prohibitions, at least, may not be enforced when they are so unclear that people of ordinary intelligence would need to guess at whether their conduct was or was not forbidden.").

249. *In re* Ruffalo, 390 U.S. at 544.

250. BLSEC Comment I, *supra* note 90, at 6.

251. SCPD Comment II, *supra* note 97, at 6-7.

These questions remain worthy of inquiry, for they were not resolved as the model rule change proposal evolved from Version 2 to Version 5. As noted above, the terms "harassment," "discrimination," "socioeconomic status," and "conduct related to the practice of law," among others, remain undefined. And for reasons explained above, and addressed still further below, the question of what "reasonably should know" means is an especially live one in the due process context.

So too, for reasons explained above, is the question of what sanctions might apply to a lawyer accused of violating the new model rule. That question may not have mattered much in determining whether to adopt a new model rule—nothing required that a new model rule and the suggested sanctions standard for violating it be developed in tandem. But it presumably matters immensely, in due process terms, to any lawyer who might be accused of violating an actual ethics rule,[252] to any bar counsel who might be asked to enforce such a rule, and to any court asked to determine whether a lawyer sanctioned under the rule was sanctioned consistently with due process.[253]

2. *First Amendment Free Expression*

The new model rule requires serious First Amendment analysis, as to freedom of religion, freedom of association or assembly, and free expression.[254] Though we focus on the last here, numerous commenters invoked substantial concerns in all these regards.[255]

Proponents of the model rule change at least appeared, at one point, to credit First Amendment concerns, by including, in the proposed comment of Version 2, an acknowledgment that First Amendment-protected conduct

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252. *See In re* Ruffalo, 390 U.S. at 551 ("These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence.").

253. *See* Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 542 (1994) ("Th[e] dependence of actual liability on official discretion is what links the two most commonly articulated normative principles behind the vagueness doctrine: fair notice and control of arbitrary enforcement."). Some proponents of the new model rule might contend, under the framework advanced by Hadfield, that the rule's vagueness is a good thing since it is likely to lead lawyers to err on the side of avoiding words or conduct that might cause offense to categories of persons affected by the rule. Free speech advocates would contend otherwise. *See, e.g.*, Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1304 (2005) ("Under nearly every theory of free speech, the right to free speech is at its core the right to communicate—to persuade and to inform people through the content of one's message. The right must also generally include in considerable measure the right to offend people through that content, since much speech that persuades some people also offends others."); *see also infra* Section III.E.2.

254. The First Amendment applies, through the Fourteenth Amendment, to state regulation of lawyer speech through ethics rules. *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 471 (1988).

255. *See, e.g.*, 52 ABA Members Comment, *supra* note 113, at 13-14; Christian Legal Society Comment, *supra* note 103, at 5-13; BLSEC Comment II, *supra* note 133.

could not violate the rule. This acknowledgment disappeared with Version 3.

The rule change's proponents offered only perfunctory First Amendment analysis thereafter. On July 24, 2016, the Chair of the Standing Committee circulated this presentation in support of Version 3:

> Does the Proposed Rule Violate the Frist [sic] Amendment Rights of Lawyers? No, It Does Not.
> Concern also has been expressed that proposed Rule 8.4(g) will violate the First Amendment rights of lawyers. That simply is not true, for the following reasons. First, harassment and discrimination are illegal. No one, lawyer or non-lawyer, has a "right" to engage in such conduct. This is one reason why SCEPR moved away from "manifest bias or prejudice" as the conduct to be proscribed, and focused instead on the terms harassment and discrimination, because while it could be argued that we each have a right to "manifest" (express) bias or prejudice against others, we do not have a similar right to harass others or discriminate against others. Second, this issue has been addressed by the courts. For example, in Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998), and Florida Bar v. Wasserman, 675 So. 2d 103 (Fla. 1996), the lawyer-respondents argued a similar Florida rule violated their First Amendment rights.The Florida Supreme Court rejected First Amendment challenges in both cases. Third, lawyers have always been subject to ethics rules that impinge on what otherwise would be their Frist [sic] Amendment rights. For example, Rule 1.6 requires lawyers to refrain from disclosing confidential client information; Rule 3.6 limits what a lawyer can say publicly about a trial in which the lawyer is or was engaged; and Rules 7.1 through 7.5 limit what a lawyer can say publicly about the lawyer's services and how such communications can be made. Thus, defining professional misconduct to include harassment and discrimination does not violate a lawyer's First Amendment rights.[256]

This presentation suffered from multiple flaws. Among others, the assertion that "harassment and discrimination are illegal" ignored the fact that *no* version of the proposal had defined the terms "harassment" or "discrimination" by reference to substantive law, notwithstanding the

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[256] Email from Myles Lynk to John Bouma et al. (regarding Resolution 109) (July 24, 2016) (on file with the authors).

suggestion that doing so might make the proposal more workable.[257] The presentation also ignored the Virginia Supreme Court's 2013 holding in *Hunter v. Virginia State Bar*[258] that the First Amendment protected lawyer Horace Hunter's blogging about past successful criminal defense representations, notwithstanding Virginia's version of Rule 1.6. The presentation also misportrayed the cited Florida cases.[259]

Later, on July 29, 2016, the Chair circulated a treatment titled, "Response to First Amendment Concerns Raised in Certain Comments to the Proposed Amendment to Model Rule 8.4."[260] But that treatment did not address any particular version of the proposal, let alone the most recent, and contained no reference to important Supreme Court jurisprudence governing content-based speech regulation—which regulatory limitations on the content of lawyer speech surely are[261]—such as *R.A.V. v. City of St. Paul*[262] or, more recently, *Reed v. Town of Gilbert*.[263] The treatment also invoked diversity, though it did not explicate the connection between that interest and First Amendment free speech rights.[264] This too: the proponents of the new model rule evidently thought they needed to rescue diversity initiatives from the new model rule, rather than that the new model rule would advance them.

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257. *See, e.g.*, Litigation Section Comment at 3. *But see* SCPD Comment I at 4 ("Although the Drafting Choice Memo states that 'the terms 'harassment' and 'discrimination' are defined terms under the law,' . . . [t]hese terms have different meanings under various federal and state laws . . . .").

258. Hunter v. Va. St. B., 744 S.E.2d 611 (Va. 2013).

259. *See* Florida B. v. Sayler, 721 So. 2d 1152 (Fla. 1998); Florida B. v. Wasserman, 675 So. 2d 103. *Sayler* involved a tacit physical threat against opposing counsel. The discipline respondent in that case did not invoke, let alone mount a First Amendment challenge to, Florida's Rule of Professional Conduct 4-8.4(d), and the Florida Supreme Court cited that rule only as "requir[ing] lawyers to refrain from knowingly disparaging or humiliating other lawyers." *Sayler*, 721 So. 2d at 1156. The case had nothing to do with the rule's anti-bias content at all. *Wasserman* involved a discipline respondent's angry, profane outbursts against a judge and staff. The case does not even mention Rule 4-8.4(d).

260. *See* Email from Mary McDermott to State Delegates (regarding ABA House of Delegates Res. 109) (on file with the authors).

261. *See* Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 862 (1998).

262. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

263. Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). *Reed* has been cited as "vastly expand[ing] the category of content-based regulations deemed presumptively unconstitutional. Before *Reed*, laws were content based when animated by disagreement with the regulated speech. *Reed*'s definition swept more broadly, including any law 'that depend[s for its application] on an evaluation of the content of the speech.'" *In re* Tam: *Federal Circuit Holds the Lanham Act's Antidisparagement Provision Unconstitutional*, 129 HARV. L. REV. 2265 (2016) (quoting Rebecca Tushnet, Essay, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 91 NOTRE DAME L. REV. ___ (then forthcoming)).

264. The lone Supreme Court case cited by the treatment, Grutter v. Bollinger, 539 U.S. 306 (2003), asserted a First Amendment institutional interest which helped justify Michigan Law School's admissions program taking race into account over an applicant's equal protection challenge. While that aspect of *Grutter* has drawn scholarly commentary, *see, e.g.*, Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461 (2005), any attempt to cross-apply *Grutter* to the context of lawyer regulation requires much deeper analysis than that offered.

A rich body of scholarship addresses the various ways in which lawyer rules of professional conduct have been allowed to restrict lawyer speech where, otherwise, such restrictions would be held invalid under the First Amendment's free speech guarantee.[265] These include, among others, restrictions on advertising,[266] solicitation[267] and trial publicity,[268] as well as rules governing decorum in courtroom and ancillary judicial proceedings.[269] Sometimes reviewing courts justify these restrictions by considering the lawyers' words as conduct rather than as content-laden speech deserving of First Amendment protection.[270] Sometimes the restrictions draw gentler First Amendment treatment because they are deemed "functional necessities in the administration of justice."[271]

The new model rule was intended to go much farther, however. Patently, the model rule is intended to reach words, and not just physical conduct.[272] But in extending its prohibitions not just to words "prejudicial

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265. *See, e.g.*, Wendel, *supra* note 248, at 305; Renee N. Knake, *Attorney Advice & the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011); *see also* Rodney A. Smolla, *Regulating the Speech of Judges & Lawyers: The First Amendment & the Soul of the Profession*, 66 FLA. L. REV. 961, 968-69 (2015); Tarkington, *supra* note 206, at 27; Volokh, *supra* note 253, at 1277; Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Chemerinsky, *supra* note 261, at 859; Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569 (1997); Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 688 (1997); Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627 (1996).

266. *See, e.g.*, Bates v. St. B. of Ariz., 433 U.S. 350 (1977).

267. Florida B. v. Went for It, Inc., 515 U.S. 618 (1995) (upholding prohibition on direct mail solicitation of personal injury or wrongful death clients within 30 days of accident); Gentile v. St. B. of Nev., 501 U.S. 1030 (1991); cf. Ohralik v. Ohio St. B. Ass'n, 436 U.S. 447 (1978) (upholding restriction on personal solicitation); *see generally* Wendel, *supra* note 248, at 305, n.1.

268. *See, e.g.*, *Gentile*, 501 U.S. at 1030; *see generally* Wendel, *supra* note 248, at 305, n.1.

269. *See, e.g.*, *In re* Snyder, 472 U.S. 634 (1985); *see generally* Wendel, *supra* note 248, at 305 n.1.

270. *See* Wendel, *supra* note 248, at 347, 360-66; Taslitz & Styles-Anderson, *supra* note 18, at 807-09.

271. Sullivan, *supra* note 265, at 569; *see also* Wendel, *supra* note 248, at 348, 366; Chemerinsky, *supra* note 261, at 876 (discussing application of Nevada's version of ABA Model Rule of Professional Conduct 3.6(a,), regarding extrajudicial statements regarding pending investigation or litigation, in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)).

272. In both the Language Choice Narrative accompanying Version 1 and the Draft Proposal accompanying Version 2 the Standing Committee noted that then-existing Model Rule 8.4 Comment [3] addressed "words," as well as conduct. Both documents otherwise avoided references to "words," let alone "speech," among the proposed new proscriptions. Similarly, the final version of the new model rule's comment avoids references to "words," yet includes multiple references to "verbal conduct." The intent to restrain speech is clear. *See also* Ronald Rotunda, *The ABA's Control Over What Lawyers Say Around the Water Cooler*, THE HARV. L. RECORD, Oct. 4, 2016, available at hlrecord.org/2016/10/the-abas-control-over-what-lawyers-say-around-the-water-cooler/ (last visited Oct. 15, 2016); Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities*, THE WASH. POST, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.d5cbeb08e600; Herbert W. Titus & William J. Olson, *'PC' Politics Drove ABA's Proposed Rules Changes*, NAT'L L.J., Aug. 8, 2016; Andrew Strickler, *Contentious ABA Anti-Bias Rule*

to the administration of justice," or even words spoken or written in courtroom or ancillary environs, but all the way to any and all conduct "related to the practice of law," the new rule left the safe harbor that, at least arguably, marks positively the First Amendment jurisprudence governing limitations on lawyer speech.[273] For example, the "officer of the court" rationale sometimes advanced to justify lawyer speech restrictions[274] would seem misplaced to justify the new model rule, where the lawyer may be subject to discipline for conduct that took place nowhere near a courtroom.

Even more starkly, with its inclusion of the "reasonably should know" term, the rule creates First Amendment free speech quandaries.[275] Again, under Model Rule 1.0, "[r]easonably should know" means "that a lawyer of reasonable prudence and competence would ascertain the matter in question." A lawyer of reasonable prudence and competence might well question whether any of a wide variety of statements might qualify as "harassment or discrimination" within the meaning of the rule, among other reasons because objectively defining those terms evaded even the new model rule's proponents, and because the First Amendment's free speech protections themselves cast doubt on what words are or are not protected, particularly outside the justice administration environs traditionally regulated by professional conduct rules.[276]

Consider, for example, a lawyer who, in her personal capacity, petitions her state supreme court for a rule barring the wearing of veils in court. This request unquestionably is "related to the practice of law," yet outside "advice or advocacy." As a policy matter, she might support such a

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Could Face Local Challenges, LAW360, Aug. 9, 2016, available at http://www.law360.com/articles/826423/contentious-aba-anti-bias-rule-could-face-local-challenges?article_related_content=1; David French, *A Speech Code for Lawyers*, NAT'L REVIEW, Aug. 11, 2016, http://www.nationalreview.com/article/438906/american-bar-association-lawyers-follow-these-speech-rules-or-else

273. *See* Wendel, *supra* note 248, at 313; *see also* Taslitz & Styles-Anderson, *supra* note 18, at 810-11 (defending 1996 conceptual anti-bias rule on ground that it would not cover lawyer speech "outside the courtroom and the law office").

274. *See* Knake, *supra* note 265 at 691.

275. No state anti-bias rule contained such a term when the House of Delegates voted to adopt the new model rule. The closest, at that time, was Washington State's:

> It is professional misconduct for a lawyer to . . . in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, lawyers, or LLLTs, other parties, witnesses, jurors, or court personnel or officers, *that a reasonable person would interpret* as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.

WASH. R. PROF'L CONDUCT r. 8.4(h) (emphasis added). As is obvious, whatever its other flaws, that rule at least circumscribes the reasonable person standard with the "in representing a client," "prejudicial to the administration of justice," and "manifesting bias or prejudice" limitations that once circumscribed ABA Model Rule 8.4 Comment [3]. The new rule abandons all these.

276. *See supra* note 160 and accompanying text.

petition by arguing that wearing these garments is inherently demeaning[277]—an argument consistent with the interest in combatting gender bias—or simply as a matter of courtroom decorum.[278] Yet, had our hypothetical jurisdiction adopted the new model rule as its own, the lawyer might well wonder whether she is subject to a charge of discriminating on the basis of religion or ethnicity or, for that matter, a charge that she "reasonably should have known" as much. Notwithstanding indifferent treatment by some of the new rule's proponents—who variously treated questions of what is or is not discrimination as self-evident,[279] or acknowledged but didn't credit the plight of the lawyer who might incur "significant financial, reputational, and other harm" by dint of such a charge, regardless of its merits[280]—these questions are neither simple nor trivial.

In short, the expanded terrain covered by the rule—reaching even to conduct a lawyer "reasonably should know" falls within the rule, and to all such conduct "related to practice of law"—is the very terrain in which the rule is most suspect, when considered in First Amendment free speech terms.[281] The new rule's shakiness under the First Amendment's free speech guarantee is exacerbated by the facts that, if anyone needs to be able to deliver controversial messages in settings that matter, it is lawyers,[282]

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277. *See* Wolfgang Wagner et al., *The Veil and Muslim Women's Identity: Cultural Pressures and Resistance to Stereotyping*, 18 CULTURE & PSYCH. 521, 530 (2012) ("Conceding to their traditional culture . . . [t]he function of the veil" to some women "is not to attract attention, but to 'visually withdraw' from public space. The underlying implication is that men need to be protected from women and if women are not covered then they are sinning, or inviting sin . . . ."). *But see id.* at 537 ("[W]earing the veil may result from diametrically opposed processes: conservativeness and protest. The end result, the veil, may be a consequence of different trajectories. Classifying Muslim women as a homogeneous entity by political right-wing and left-wing activists in the West is a fallacy. Depicting the veil as an overt sign of religiosity misconstrues the cultural and psychological realities of 'Others' and so denies these 'others' the right to an identity of their own.'"); *see also* Susan J. Rasmussen, *Re-casting the veil: Situated meanings of covering*, 19 CULTURE & PSYCH. 237, 255 (2013) (arguing, based on context-specific concerns, that "[i]n public policy, it is equally reprehensible to either forbid or require women (or anyone else) to cover").

278. *See* Jensen v. Superior Court, 201 Cal. Rptr. 275, 276-77 (holding wearing of turban permitted "unless the court can establish through proper procedure the turban interferes with or disrupts justice").

279. *See infra* notes 186-188 and accompanying text.

280. *See infra* notes 189-192 and accompanying text.

281. *See* Wendel, *supra* note 248, at 348-49 ("The hard cases are those in which the communications at issue occur outside formal proceedings, but which nevertheless create the evils of racial and gender bias in the legal system."); Fallon, Jr., *supra* note 248, at 904-05 (discussing First Amendment vagueness and overbreadth doctrines).

282. *See* AMAR, *supra* note 9, at xv (2012) (identifying freedom of speech as "America's preeminent right"); Knake, *supra* note 265, at 642-43 ("An attorney's advice makes law accessible to the client. . . . The role of an attorney in navigating and, when necessary, challenging the law is a critical component of American democratic government."); *see also id.* at 665-55 (quoting NAACP v. Button, 377 U.S. 415, 429-30 (1963), for proposition that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances," and noting that "[l]egal advice is a necessary component of litigation"); Cole & Zacharias, *supra* note 265, at 1663 ("The courts have recognized that, often, lawyers are in the best position to

and that if there is any aspect of our system of government that cannot afford to subject participants to fear of retribution over the content of their speech as such, it is the judicial system.[283] In making law, applying law, and administering justice, hard questions must first be asked in order to be answered, and the system cannot afford for those who might ask hard questions to be chilled from doing so by threats to their livelihood.[284] This chill on the expression of ideas—a chill which ultimately threatens our society's ability even to generate ideas[285]—elevates First Amendment concerns into transcendence over the due process interest of the individual lawyer.[286]

Accordingly, scholars and other interested persons now need to carefully evaluate the new model rule's free speech implications. Past scholarship regarding the free speech implications of anti-bias rules may

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expose newsworthy issues, both regarding society in general the legal process at issue in a particular case.").

283. *See* Tarkington, *supra* note 206, at 30 ("[b]because attorney speech is essential to the invocation and avoidance of government power and to the protection of life, liberty, and property, restrictions on such speech affect the overall administration of justice."). *But see* Schauer, *supra* note 265, at 689-90 (noting that many kinds of lawyer speech are restricted notwithstanding the First Amendment).

284. *See* JOHN STUART MILL, ON LIBERTY 4 (Dover Pubs. 2002) ("Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own."); Chemerinsky, *supra* note 261, at 866 (observing that "[p]rior restraints are regarded as particularly undesirable because they prevent speech from ever occurring"); Knake, *supra* note 265, at 671 (quoting Legal Services Corp. v. Velasquez, 531 U.S. 533 (2001), for proposition that "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge"); *see also* Fallon, Jr., *supra* note 248, at 867-68 (citing as "intolerable," under the "most common account" of First Amendment overbreadth doctrine, "[a]ny substantial chilling of constitutionally protected expression").

285. *See, e.g.*, Patricia Ewick & Austin Sarat, *Hidden in Plain View: Murray Edelman in the Law & Society Tradition*, 29 LAW & SOC. INQUIRY 439, 458 (2004) ("[L]anguage reinforces certain ways of thinking and acting. Ideological discourse is principally organized around practices of exclusion, of what is unsayable and, thus, unthinkable."); Werner J. Dannhauser, *The National Prospect*, COMMENTARY, Nov. 1995, at 45 ("[W]hat is unsayable becomes unthinkable for most human beings . . . .").

286. *See* MILL, *supra* note 284, at 27 ("This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects . . . . The liberty of expressing and publishing opinions may seem to fall under a different principle . . . but being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it."); Wendel, *supra* note 248, at 308 ("[R]egulation by courts of 'offensive personality' or 'conduct prejudicial to the administration of justice' implicates due process, vagueness, and overbreadth concerns. A court that considers only the First Amendment in analyzing a case arising under one of these standards risks overlooking significant constitutional issues."); *see also id.* at 383 ("[C]ourts have long maintained that the First Amendment is an independent basis upon which to find regulations void for vagueness."); Knake, *supra* note 265, at 685 ("There is free speech value in the professional interaction inherent in the attorney-client relationship").

shed light,[287] but because the new model rule's formulation is just that—new—and because the new model rule was not subjected to deep First Amendment free speech scrutiny, that analysis is needed now.[288] Analogies may be drawn to the multiverse of lawyer speech regulation categories to which the First Amendment has been applied—or, in contrast, one or more of these categories may be argued as inapposite.[289] These analogies may (or may not) shed light the level of scrutiny to be applied, as well as the competing interests at stake, and the "fit" between (or in contravention of) those interests, within those frameworks. Similarly, analogies may be drawn—or not—to other kinds of speech regulation drawn from outside the professional advice[290] and lawyer spheres.[291]

IV. CONCLUSION

New Model Rule 8.4(g) and its associated comments, adopted by the ABA House of Delegates more than twenty years after constituencies within the ABA first began seeking to introduce anti-bias content to the Model Rules, differ dramatically from the prior fruits of those efforts. From 1998 through the recent model rule amendment, the Model Rules contained only an anti-bias comment, which was tied to Model Rule 8.4(d)'s proscription of conduct prejudicing the administration of justice. Now there is a stand-alone rule. Before, the comment reached only to conduct, in the course of representing a client, that manifested of bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. Now, the rule reaches much further, to conduct the lawyer knows or reasonably should know is

287. *See, e.g.*, Taslitz & Styles-Anderson, *supra* note 18.

288. *See* Halberstam, *supra* note 265, at 834-35 (asserting that "courts have failed to develop a general method for reviewing restrictions on professional speech").

289. *See, e.g.*, Knake, *supra* note 265, at 647 (discussing Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324 (2010), involving "the constitutionality of a federal statute that prohibits attorneys from offering their clients legal advice regarding the accumulation of debt in contemplation of filing for bankruptcy," and Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010), involving "federal law that criminalize[d] material support, including legal advice, given to foreign terrorist organizations."); Volokh, *supra* note 272, at 1277 (discussing "speech as conduct" applications).

290. *See generally* Halberstam, *supra* note 265, at 836-43 (discussing physician advice cases and observing, "The State's permissible interest in licensing physicians is limited to practicing physicians and does not allow the State to require a license as a prerequisite for a physician to speak about medicine outside the context of professional practice.").

291. *See R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid."); *see also* Volokh, *supra* note 272, at 1339-1340 (discussing First Amendment treatment of various kinds of criminal speech); Chemerinsky, *supra* note 261, at 862 (arguing that "traditional First Amendment principles warrant the application of strict scrutiny because government restricts" on lawyer speech "are content-based limits on political speech"); *id.* at 866 (discussing prior restraints); *see generally* Jeannine Bell, *There are No Racists Here: The Rise of Racial Extremism, When No One Is Racist*, 20 MICH. J. RACE & L. 349 (2015) (discussing application of First Amendment to hate crime laws and campus speech codes).

harassment or discrimination on the basis of any of those categories, as well as ethnicity, gender identity, or marital status, in conduct related to the practice of law.

The model rule change proponents' success in securing its passage, however, does not mean that all substantial questions regarding the new model rule's feasibility as an actual, enforceable rule of professional conduct have been answered. Far from it. The new model rule is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanction should apply to a violation; as well as due process and First Amendment free expression infirmities, among others. Whatever the source of these unfortunate features of the new model rule—proponent indifference, the new model rule's rush to passage, the absence of bar and public input as the rule change proposal evolved, or a combination of these—these issues need to be addressed by legal scholars now. Absent searching scholarship on the new model rule as it emerged in final form, jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all, let alone without collateral consequences such as threatening extant diversity and inclusion initiatives or chilling lawyer argument. The individual lawyers who may be charged, investigated, and prosecuted under such a rule deserve better. Their clients do too.

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.

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March 10, 2016

Submitted via E-Mail

American Bar Association
Standing Committee on Ethics and Professional Responsibility
321 North Clark Street, 17th Floor
Chicago, IL 60654

Re: Comments on Proposed Amendment to Model Rule 8.4

Dear Committee Members:

The Committee has requested comments on a proposed amendment to Model Rule 8.4. Draft Proposal to Amend Model Rule 8.4 (Dec. 22, 2015) ("Draft Proposal"). The amendment would make it "professional misconduct for a lawyer to … 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." *Id*. at 2.

We are concerned that some applications of the proposed Model Rule would treat as professional misconduct legal advice from, and other conduct by, a lawyer that are not only *lawful* but, in many cases, *required* in the zealous representation of a client.[1]

1. **Lawyers employed by or representing a religious organization should not be covered by a rule forbidding employment discrimination on the basis of *religion*.**

Congress has expressly exempted religious organizations from claims of employment discrimination based on religion. 42 U.S.C. § 2000e-1(a), 42 U.S.C. § 2000e-2(e)(2). Most states have similar, and many have even broader, exemptions for religious organizations. 2 WILLIAM W. BASSETT, W. COLE DURHAM, JR., & ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 9.16 (2013) (compilation by state).

The U.S. Department of Justice ("DOJ") has gone a step further. In a formal opinion, DOJ's Office of Legal Counsel has concluded that, even in the *absence* of a statutory exemption for religious organizations, federal law is plausibly read to protect

[1] Some of the comments made in this letter about "discrimination" may apply as well to the rule barring "harassment" depending on how broadly or narrowly one construes the latter term.

the right of religious organizations to make employment decisions based on religion. Office of Legal Counsel, Memorandum Opinion, "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act" (June 29, 2007).[2] The DOJ opinion is based on the Religious Freedom Restoration Act, a federal statute that has been in place for over two decades. About 21 states have passed similar statutes. National Conference of State Legislatures, State Religious Freedom Restoration Acts (Oct. 15, 2015).[3]

This protection has both a common law and constitutional dimension. From an early date, the Court recognized that a person who voluntarily associates with a religious organization, whether as an employee or otherwise, implicitly consents to the religious and moral convictions that animate and underlie the organization's work.[4] Later cases make clear that the right of church autonomy, which includes the right of a religious organization to use religious criteria in making employment decisions, is protected under the Religion Clauses of the First Amendment.[5] This right is an essential component of the freedom such organizations enjoy to profess, teach, and practice their religion.[6]

To its credit, Draft Comment 3 states that proposed Rule 8.4 "does not apply to … conduct protected by the First Amendment." But this is insufficient for at least two reasons.

First, as the Committee has acknowledged, "statements in the Comments are not authoritative." Draft Proposal at 1. Indeed, the impetus for proposed Model Rule 8.4, as recited in the commentary accompanying it, is to provide an authoritative source for treating certain specified forms of harassment and discrimination as unprofessional conduct rather than relegate such norms to the comments, which the Committee acknowledges are not authoritative.

Second, as noted above, the right of religious organizations to consider religion in employment is not confined to the First Amendment. It is also grounded in federal and state statutes, state constitutional provisions, and other authority. It should not be

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[2] Available at www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf.

[3] Available at www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[4] *Watson* v. *Jones*, 80 U.S. 679, 729 (1872) ("All who unite themselves to [voluntary religious associations] do so with an implied consent" to ecclesiastical governance).

[5] *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church* v. *Mary E.B. Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969).

[6] *E.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COL. L. REV. 1373, 1408-09 (1981) ("[C]hurches are entitled to insist on undivided loyalty from [their] employees. The employee accepts responsibility to carry out part of the religious mission…. [C]hurches rely on employees to do the work of the church and to do it in accord with church teaching. When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.").

professional misconduct to act as the law—be it the First Amendment or some other provision—permits.

That is not only the law; it is common sense. No one complains when an organization committed to the advancement of a political or social cause requires that its employees, both on and off the job, share its commitments. Likewise there is no reason for complaint when a religious organization requires that its employees share its religious convictions as manifested in each employee's own speech and conduct. Religious organizations, and lawyers employed by or representing them, do not act unlawfully—and lawyers should not be deemed to have engaged in unprofessional misconduct—when they carry out those requirements.

For these reasons, the ABA should recognize an exemption from the proposed Model Rule forbidding discrimination on the basis of religion for lawyers employed by or representing religious organizations.

> Example: James is the general counsel of a religious denomination. The denomination has an opening for a deputy general counsel and prefers a co-religionist for the position. Under federal and state law, it may act on such a preference. James does not engage in professional misconduct when he tells applicants that a co-religionist is preferred.

2. Lawyers employed by or representing a religious organization should not be covered by a rule that, in its application, would impede the organization's right to adopt and enforce *religiously-based employee conduct standards*.

A religious organization may insist that persons it selects to further its mission and work—including its lawyers—share and live out the religious views of that organization, including views about marriage and human sexuality. That is, religious organizations may lawfully insist not only that their employees *profess* a set of beliefs, but that they actually *practice* them, for otherwise, the religious organization would be compelled to retain employees who undermine its religious mission by their conduct.[7]

A lawyer for a religious organization should not be subject to a charge of professional misconduct for implementing these conduct standards directly as a supervisor, or for facilitating their implementation as a legal advisor. If, for example, the term "sexual orientation" were construed to include same-sex sexual conduct,[8] or the

[7] *See* 42 U.S.C. 2000e(j) (defining "religion" to include both beliefs and practices). *See also Little* v. *Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding that parochial school could discharge teacher who, by divorcing and remarrying, had "publicly engaged in conduct regarded by the school as inconsistent with its religious principles"); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000) (New Jersey law forbidding discrimination based on sexual orientation was an unconstitutional infringement of the Boy Scouts' right of expressive association).

[8] Federal courts of appeals have uniformly held that Title VII does not forbid discrimination on the basis of sexual orientation. *Larson* v. *United Air Lines*, 482 Fed. App'x 344, 348 n.1 (10th Cir. 2012); *Gilbert* v.

term "marital status" were construed to include same-sex unions,[9] then the application of the proposed Model Rule to lawyers for a religious organization that has a moral or religious objection to sexual conduct outside of marriage between a man and a woman could infringe upon the organization's constitutional and statutory right to hire and retain staff, including legal staff, whose beliefs and practices are consistent with those of the organization.

> Example: Jill is a high school teacher at a private religious school. The school has employee conduct standards forbidding public advocacy in support of positions to which the school has a religious objection. In her free time, Jill publicly advocates in support of a right to abortion notwithstanding the school's religious objection to abortion. The school asks Bill, its lawyer, whether it can lawfully terminate Jill's employment based on her abortion advocacy. Bill does not engage in professional misconduct when he advises the school of legal authority in support of its position that it may lawfully terminate Jill's employment.[10] He has a professional and ethical duty to fully and correctly advise his client.

One solution to this problem would be to clarify—whether by narrowing the definition of the prohibition or by creating an exception to that prohibition—that the proposed Model Rule does not forbid lawyers from implementing, or providing legal advice in aid of implementing, moral conduct standards of religious organizations.

3. Lawyers do not engage in professional misconduct when they advise a client about otherwise protected categories that are lawfully considered in making employment and other decisions.

It is not professional misconduct to advise a client about what may lawfully be considered in making employment and other decisions (and, in fact, it may be malpractice not to so advise a client) even if they involve categories specified in Model

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Country Music Ass'n, 432 Fed. App'x 516, 520 (6th Cir. 2011); *Pagan* v. *Gonzalez*, 430 Fed. App'x 170, 171-72 (3d Cir. 2011); *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005); *Osborne* v. *Gordon & Schwenkmeyer Corp*., 10 Fed. App'x 554, 554 (9th Cir. 2001); *Richardson* v. *BFI Waste Sys.*, 2000 WL 1272455, *1 (5th Cir. Aug. 15, 2000); *Hamner* v. *St. Vincent Hospital & Health Care Center, Inc*., 224 F.3d 701, 704, 707 (7th Cir. 2000); *Higgins* v. *New Balance Athletic Shoe*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins* v. *Baltimore Gas & Elec. Co*., 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996); *Williamson* v. *A.G. Edwards and Sons*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum* v. *Gulf Oil Corp*., 597 F.2d 936, 938 (5th Cir. 1979) (binding on the Eleventh Circuit, as well as the Fifth, because it was decided before October 1, 1981, as held in *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)). Courts often do not differentiate between same-sex attraction and same-sex conduct, a critical moral distinction for many religious denominations and adherents. As it happens, none of the cited cases affirmatively suggests that either sexual attraction or sexual conduct is protected under Title VII.

[9] Although the proposed Model Rule is silent on the point, the commentary accompanying the proposed Rule implies that "marital status" was included in the Rule to protect same-sex unions. Draft Proposal at 5.

[10] *See Curay-Cramer* v. *Ursuline Academy of Wilmington*, 450 F.3d 130 (3rd Cir. 2006) (school did not engage in unlawful sex discrimination or retaliation when it fired teacher for abortion-related advocacy).

Rule 8.4. For example, when a protected category is a bona fide occupational qualification or, in a religious workplace, when consideration of a protected category is permissible because of the ministerial exception, the lawyer may, without risk of being charged with professional misconduct, advise the client accordingly. Indeed, under these circumstances, the lawyer may have a professional and ethical duty to do so.

> Example: Tom is in-house counsel to a private hospital. The hospital asks him whether, in hiring an orderly to serve female patients, it may lawfully consider the applicant's sex. Tom does not engage in professional misconduct when he correctly advises the hospital that there is case law, likely applicable in this case, allowing it to prefer a female applicant for female patients. Tom has a professional and ethical duty to fully and correctly advise his client.[11]

> Example: Mary is counsel to a church. The church has an opening for an ordained pastor. The denomination with which the church is affiliated ordains only men. The church asks Mary if its decision not to allow female applicants for the position violates the law. Mary does not engage in professional misconduct when she correctly advises the church of legal authority allowing it to consider only male candidates.[12] Mary has a professional and ethical duty to give the church correct legal advice. In addition, if Mary serves on the search committee for the position, she does not engage in professional misconduct by not interviewing female applicants.

The proposed Model Rule should include an exception stating that it is not professional misconduct to advise a client about categories that are lawfully considered in making employment and other decisions.

4. Lawyers do not engage in professional misconduct when they represent (or decline to represent) someone in a particular matter, or take (or decline to take) a particular position in advocacy.

Representing unpopular persons and causes is part of the historic heritage of the law and legal system in this country. No lawyer should be subject to a claim of

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[11] *See Jones* v. *Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987) (male patients in a hospital have a right to a hospital orderly who is male); *Local 567* v. *Michigan Council*, 635 F. Supp. 1010 (E.D. Mich. 1986) (patients in a state mental hospital have a right to a personal hygiene aide of the same sex); *Backus* v. *Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981) (ob-gyn patients have a privacy right to an obstetrical nurse who is female), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel* v. *Masonic Home of Delaware*, 447 F. Supp. 1346 (D. Del. 1978) (female residents of a retirement home have a right to a nursing aide who is female). In all the cited cases, the right to patient privacy trumped a law forbidding employment discrimination based on sex.

[12] *See Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 132 S. Ct. 694 (2012) (ministerial exception, grounded in the Religion Clauses of the First Amendment, bars application of employment discrimination law to minister).

professional misconduct because he or she represents an unpopular person or advances an unpopular cause.

Similarly, no lawyer should be subject to a claim of professional misconduct because he or she declines to represent someone on a particular matter. This would include situations in which the lawyer has a conflict of interest, including a religious or moral objection to the client's objective. For example, individual prosecutors do not run afoul of the rules of professional responsibility if, for religious or moral reasons, they decline to represent the government in death penalty sentencing proceedings.

> Example: Pam represents a baker in a proceeding in which discrimination based on sexual orientation has been alleged for the refusal to provide a wedding cake. Pam does not engage in professional misconduct by representing the baker in this matter or by advancing the position that the baker's conduct is non-discriminatory.

> Example: Sharon prepares prenuptial agreements. She declines, however, to provide such an agreement for her clients, Harry and Dennis, because she believes, on moral and religious grounds, that marriage is the union of one man and one woman. Serving as counsel in such a matter, Sharon believes, would be an unacceptable form of moral cooperation. Her decision not to provide this particular service to Harry and Dennis does not constitute professional misconduct, and in fact Sharon may have a duty to decline given her personal conflict of interest.

The proposed Model Rule should state that it is not professional misconduct to represent or decline to represent someone in a particular matter, or to take or decline to take a particular position in advocacy.

5. Lawyers should not be subject to a rule forbidding the adoption and enforcement of workplace rules regarding grooming and garb, or the reservation of restrooms or locker rooms, based on biological sex.

Advocates have increasingly argued that a law forbidding discrimination on the basis of "sex" or "gender identity" precludes the enforcement of workplace rules regarding grooming and garb, and the reservation of restrooms and locker rooms, based on biological sex. The law is to the contrary. Currently there is no federal statute forbidding discrimination based on gender identity. Although federal law bans employment discrimination based on sex, courts have held that workplace rules on dress, grooming, and restroom and locker room usage, when based on biological sex, do not violate federal law.[13] Such rules are lawful, and further basic and legitimate expectations

[13] Dress and grooming: *Jespersen* v. *Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) ("grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex" under title VII); *Nichols* v. *Azteca Rest. Enters.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001) ("there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards"), cited with approval in

of privacy.[14] Therefore they are not properly a basis for a finding of professional misconduct.

> Example: Jane is the managing partner of a law firm. Sarah and Tom are first-year associates. Sarah complains to Jane that Tom has been using the women's restroom and that Sarah and other women at the firm view this as a form of harassment and an invasion of their privacy. Though he is a biological male, Tom says that he identifies as a woman and therefore should be allowed to use the women's restroom. Jane does not engage in professional misconduct when she tells Tom that he must use the men's restroom or a private bathroom or be subject to discipline if he refuses. In fact, the firm may owe Sarah and other employees a legal duty to protect their reasonable expectations of privacy.

Accordingly, the Model Rule should include an exception to allow workplace rules regarding grooming and garb, or the reservation of restrooms or locker rooms, based on biological sex.

Conclusion

The Committee should make explicit in the text of the Model Rule that:

(a) the rule against discrimination based on religion does not apply to lawyers employed by or representing a religious organization;

(b) the rule against discrimination does not apply to lawyers employed by or representing a religious organization where application of the rule would

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Etsitty v. *Utah Transit Auth*., 502 F.3d 1215, 1224-25 (10th Cir. 2007); *Creed* v. *Family Express Corp*., No. 3:06-CV-465RM, 2009 WL 35237, at *8-10 (N.D. Ind. Jan. 5, 2009) (termination of transgender employee who refused to conform to dress code and grooming policy did not violate Title VII).

Restrooms: *Etsitty*, 502 F.3d at 1225 ("an employer's requirement that employees use restrooms matching their biological sex … does not discriminate against employees who fail to conform to gender stereotypes"); *Johnson* v. *Fresh Mark*, 98 Fed. App'x 461 (6th Cir. 2004) (an employer did not violate Title VII when it refused to allow an employee, born male but preparing for sex change surgery, to use the women's restroom). Title IX's ban on sex discrimination in education is to the same effect. *G.G*. v. *Gloucester County School Board*, No. 4:15cv54, 2015 WL 5560190 at *6-9 (E.D. Va. Sept. 17, 2015) (school did not violate Title IX by forbidding biological female identifying as male to use the boys' restroom); *Johnston* v. *Univ. of Pittsburgh*, 97 F.Supp.3d 657, 672-73 (W.D. Pa. 2015) ("University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination").

[14] The expectation of privacy has been recognized even in contexts when there are serious competing interests, such as prison security. *See Everson* v. *Mich. Dep't of Corr.*, 391 F.3d 737, 757 (6th Cir. 2004) ("[A] convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners.").

impede the organization's right to adopt and enforce religiously-based employee conduct standards;

(c) the rule against discrimination does not apply to lawyers who advise their clients about categories that are lawfully considered in making employment and other decisions;

(d) the rule against discrimination does not require a lawyer to represent someone in a particular matter or to take a particular position in advocacy; nor does it forbid a lawyer to decline representation on a particular matter or advancement of a particular position in advocacy;

(e) the rule against discrimination based on sex and gender identity does not preclude workplace rules regarding grooming and garb, or restroom or locker room usage, based on biological sex.

If the Committee is unable to modify the proposed Model Rule to take into account the scenarios we have described in this letter, then it should not proceed with its proposed revision to the Rule.

Thank you for considering these comments.

Respectfully submitted,

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REVISED 109

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

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

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

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

Comment

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

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

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

[3] Discrimination and harassment by lawyers in violation of paragraph (g) 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.

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.

[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

[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
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