

## CBA LPRC POSITION REQUEST FORM

August 21, 2020

The Connecticut Bar Association's Standing Committee on Professional Ethics, Diversity and Inclusion Committee, Young Lawyers Section, Human Rights and Responsibilities Section, LGBT Section, Women in the Law Section, Veterans and Military Affairs Section and Professionalism Committee make the following position request:

- 1) Proposed legislative concept:

The CBA Sections and Committees above strongly urge that the CBA propose to the Rules Committee of the Superior Court that Rule 8.4 (Misconduct) of the Connecticut Rules of Professional Conduct ("the RPC" or "the Rules") be amended to add a provision to the Rule making it professional misconduct for an attorney to engage in discrimination or harassment in the practice of law. As explained in the following section, the issue is already on the agenda for the September 14, 2020 meeting of the Rules Committee of the Superior Court, and prompt action is necessary so that the CBA is prepared to respond to the Rules Committee's request for comment.

Specifically, the proposal is to amend Rule 8.4, and the related Official Commentary, as follows (additions underlined; [deletions in brackets]):

### **Rule 8.4. Misconduct**

It is professional misconduct for a lawyer to:

...

(7) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital 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, or to provide advice, assistance or advocacy consistent with these Rules.

### **OFFICIAL COMMENTARY**

...

[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 subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4).]

Discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system. Discrimination includes harmful verbal or physical conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories. Not all conduct that involves consideration of these characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for the conduct.

Harassment includes severe or pervasive derogatory or demeaning verbal or physical conduct. Harassment on the basis of sex 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 antiharassment statutes and case law should guide application of paragraph (7), where applicable. Where the conduct in question is subject to federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate paragraph (7) when the conduct does not violate such law. Moreover, an administrative or judicial finding of a violation of state or federal antidiscrimination or antiharassment laws does not alone establish a violation of paragraph (7).

A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution.

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 professional activities or events in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (7). Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law. A lawyer does not violate paragraph (7) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to a particular segment of the population 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(1), (2) and (3). 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).

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A complete copy of Connecticut Rule 8.4 showing the proposed amendments is attached hereto.

2) Explanation and rationale for advancing this position:

In this watershed moment, when awareness of the destructive power of discrimination and harassment has reached a new and unprecedented level, it is time to make clear to our profession and the public that lawyers, as a self-regulating profession, do not, and will not, tolerate prejudice, bias, discrimination, or harassment in the practice of law.

In 2016, by voice vote with overwhelming support in the American Bar Association House of Delegates, including the unanimous support of the ten member Connecticut delegation, the ABA revised the Model Rules of Professional Conduct (MRPC) to add Rule 8.4(g), making discrimination and harassment in the practice of law a form of professional misconduct. In adopting Rule 8.4(g), the ABA was not, however, taking the rules governing professional conduct in a novel direction. It was, rather, following the lead of the states in adopting antidiscrimination and antiharassment provisions. Even before the ABA's adoption of MRPC 8.4(g), 24 states had some form of antidiscrimination and antiharassment provision within the black letter of their various versions of Rule 8.4. At least 12 states, including Connecticut, had no provision in the Rules, but included in the Commentary to their Rule 8.4 some version of the pre-2016 Comment [3] to MRPC 8.4.<sup>1</sup>

When the ABA adopted Rule 8.4(g), the Report in support of the amendment included the following to explain why the amendment of the Rules was so necessary:

It is important to acknowledge that the current provision [Comment [3]] 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

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<sup>1</sup> (“[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.”)

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.”

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 [the ABA Standing Committee on Ethics and Professional Responsibility]:

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 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.” 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.” 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.

...

. . . 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.

ABA Revised Resolution 109, with Report to the ABA House of Delegates (August 2016) (“ABA Report”), at 2-3, 4.

Acting on their own initiative, on June 5, 2020, Attorneys Aigné Goldsby and Megan Wade asked the Rules Committee of the Superior Court to adopt ABA Model Rule 8.4(g) as part of the Connecticut RPC. The minutes of the Rules Committee meeting include the following: “After discussion, the Committee decided to table this proposal to the September meeting to allow Attorney Wade to coordinate with the Connecticut Bar Association and to submit additional materials to the Committee for review.” Draft Minutes of the June 5, 2020 Meeting of the Rules Committee (retrieved on June 30, 2020, [https://www.jud.ct.gov/committees/rules/rules\\_minutes\\_060520.pdf](https://www.jud.ct.gov/committees/rules/rules_minutes_060520.pdf))

Attorneys Goldsby and Wade, along with Attorney Marcy Stovall of the Standing Committee on Professional Ethics, presented an update on the matter to the CBA House of Delegates on June 15, 2020. Thereafter, a working group, consisting of representatives from the CBA Executive Committee, Standing Committee on Professional Ethics, Diversity and Inclusion Committee, and Young Lawyers Section, developed the attached proposed amended Connecticut Rules of Professional Conduct 8.4(7).

More than half the states now include provisions addressing bias, prejudice, discrimination, and/or harassment in their black letter Rules. The Rules of Professional Conduct have been in effect in Connecticut since 1986. Thirty-four years later, it is time to amend Connecticut’s Rule 8.4 to squarely address discrimination and harassment as a matter of professional conduct.

The proposed amendment of Connecticut’s Rule 8.4 is substantively the same as MPRC Rule 8.4(g), with some adjustment to the structure and some additional terms for clarity, and the addition of some protected categories to make the Connecticut Rule consistent with state substantive law. The proposed amendment of the Commentary differs in a number of respects from MPRC 8.4(g). Those differences reflect the working group’s efforts to tailor the reach of the Rule so that it does not circumscribe lawyers’ rights under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution, and to make clear that only severe or pervasive conduct in a professional setting comes within the reach of the rule.

3) Is draft legislation or a proposed bill included?

Yes. Attached.

4) What is the date of any legislative hearing, if known?

Rules Committee Meeting September 14, 2020.

5) Was this position previously approved by the CBA? If so, when does/did it expire?

No.

6) Is the CBA section or committee seeking to join a previously approved CBA section or committee position?

No.

7) Potential or actual CBA opposition from another CBA section or committee?

Unknown. The sponsors of this LPRC request represent a broad coalition of CBA sections and committees, who strongly support the passage of Proposed Amended RPC 8.4(7).

8) Strength of Section and Committee positions (including process and results of section vote taken on issue):

**Diversity and Inclusion Committee:** The CBA Diversity and Inclusion Committee considered Proposed Amended Rule 8.4(7) on July 7, 2020 and voted unanimously in favor of the proposed amendment.

**Standing Committee on Professional Ethics:** The CBA Standing Committee on Professional Ethics considered Proposed Amended Rule 8.4(7) on July 15, 2020 and voted unanimously in favor of the proposed amendment.

**Young Lawyers Section:** The CBA Young Lawyers Section considered Proposed Amended Rule 8.4(7) on July 16, 2020 and voted unanimously in favor of the proposed amendment, with two abstentions.

**Human Rights and Responsibilities Section:** The CBA Human Rights and Responsibilities Section considered Proposed Amended Rule 8.4(7) from July 17, 2020 through July 24, 2020, and voted strongly in favor of the proposed amendment, with one vote in opposition.

**LGBT Section:** The CBA LGBT Section considered Proposed Amended Rule 8.4(7) from July 29, 2020 to July 31, 2020 and voted unanimously in favor of the proposed amendment.

**Women in the Law Section:** The CBA Women in the Law Section, acting through its Executive Committee, considered Proposed Amended Rule 8.4(7) from July 31, 2020 to August 4, 2020 and voted unanimously in favor of the proposed amendment.

**Veterans and Military Affairs Section:** The CBA Veterans and Military Affairs Section, acting through its Executive Committee, considered Proposed Amended Rule 8.4(7) at two meetings in July and August of 2020, and voted in favor of the proposed amendment on August 12 and 13<sup>th</sup> of 2020, with seven in favor, four opposed, and one abstention.

**Professionalism Committee:** The CBA Professionalism Committee considered Proposed Amended Rule 8.4(7) at a meeting on August 17, 2020, and voted strongly in favor of the proposed amendment.

9) Fiscal impact (on the state):

None.

10) Are you seeking “fast-track” approval?<sup>2</sup>

Yes.

11) In support of this request, the proponent Committees and Sections submit the following:

- A. **Proposed Amended RPC 8.4(7)**
- B. **Proposed Amended RPC 8.4(7) Showing Variations from Current CT RPC 8.4**
- C. **Proposed Amended RPC 8.4(7) Comparative to ABA Model Rule 8.4(g)**
- D. **Frequently Asked Questions**
- E. **ABA Model Rule 8.4(g) 50 State Survey**
- F. **ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 493 (July 15, 2020)**
- G. ***Iowa Supreme Court Disciplinary Board v Watkins*, 944 N.W.2d 881 (June 19, 2020).**

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<sup>2</sup> A “fast track” recommendation will be submitted to the House of Delegates (HOD) or Board of Governors (BOG) at its next scheduled meeting (or, if between meetings of the HOD or BOG and during the legislative session, to the Executive Committee), and is warranted only when the Legislative Policy & Review Committee concludes that further analysis and study is unnecessary and where there is legitimate time pressure to address pending legislation.

**Exhibit A. Proposed  
Amended RPC 8.4(7)**



1 **August 21, 2020**

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3 **Proposed Amendment of Connecticut Rule 8.4(7) and Official Commentary**  
4 **(CBA 8.4(7) Working Group)**

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6 **Rule 8.4. Misconduct**

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8 It is professional misconduct for a lawyer to:

9 . . .

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11 (7) Engage in conduct that the lawyer knows or reasonably should know is harassment or  
12 discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin,  
13 ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender  
14 expression or marital status in conduct related to the practice of law. This paragraph does not  
15 limit the ability of a lawyer to accept, decline or withdraw from a representation, or to provide  
16 advice, assistance or advocacy consistent with these Rules.

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19 **OFFICIAL COMMENTARY**

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23 Discrimination and harassment in the practice of law undermine confidence in the legal  
24 profession and the legal system. Discrimination includes harmful verbal or physical conduct  
25 directed at an individual or individuals that manifests bias or prejudice on the basis of one or  
26 more of the protected categories. Not all conduct that involves consideration of these  
27 characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for  
28 the conduct.

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30 Harassment includes severe or pervasive derogatory or demeaning verbal or physical conduct.  
31 Harassment on the basis of sex includes unwelcome sexual advances, requests for sexual favors  
32 and other unwelcome verbal or physical conduct of a sexual nature.

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34 The substantive law of antidiscrimination and antiharassment statutes and case law should guide  
35 application of paragraph (7), where applicable. Where the conduct in question is subject to  
36 federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate  
37 paragraph (7) when the conduct does not violate such law. Moreover, an administrative or  
38 judicial finding of a violation of state or federal antidiscrimination or antiharassment laws does  
39 not alone establish a violation of paragraph (7).

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41 A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected  
42 under the First Amendment of the Constitution of the United States or Article First, Section 4 of  
43 the Connecticut Constitution.

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45 Conduct related to the practice of law includes representing clients; interacting with witnesses,  
46 coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or

47 managing a law firm or law practice; and participating in bar association, business or  
48 professional activities or events in connection with the practice of law. Lawyers may engage in  
49 conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for  
50 example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse  
51 employees or sponsoring diverse law student organizations.

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53 A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does  
54 not alone establish a violation of paragraph (7). Moreover, no disciplinary violation may be  
55 found where a lawyer exercises a peremptory challenge on a basis that is permitted under  
56 substantive law. A lawyer does not violate paragraph (7) by limiting the scope or subject matter  
57 of the lawyer's practice or by limiting the lawyer's practice to members of a particular segment  
58 of the population in accordance with these Rules and other law. A lawyer may charge and  
59 collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be  
60 mindful of their professional obligations under Rule 6.1 to provide legal services to those who  
61 are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal  
62 except for good cause. *See* Rule 6.2(1), (2) and (3). A lawyer's representation of a client does  
63 not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

**Exhibit B. Proposed  
Amended RPC 8.4(7)  
Showing Variations from  
Current CT RPC 8.4**

**Proposed Amendment of Connecticut Rule 8.4 and Official Commentary, showing variations from current Rule 8.4 and related Commentary (additions to current version underlined; [deletions from current version in brackets])**

**Rule 8.4. Misconduct**

It is professional misconduct for a lawyer to:

- (1) 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;
- 2) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) Engage in conduct that is prejudicial to the administration of justice;
- (5) 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]
- (6) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or
- (7) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital 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, or to provide advice, assistance or advocacy consistent with these Rules.

Official Commentary:

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. Subdivision (1), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful 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, which 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. Counseling or assisting a client with regard to conduct expressly permitted under Connecticut law is not conduct that reflects adversely on a lawyer's fitness notwithstanding any conflict with federal or other law. Nothing in this commentary shall be construed to provide a defense to a presentment filed pursuant to Practice Book Section 2-41.

[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 subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4). A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.]

Discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system. Discrimination includes harmful verbal or physical conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories. Not all conduct that involves consideration of these characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for the conduct.

Harassment includes severe or pervasive derogatory or demeaning verbal or physical conduct. Harassment on the basis of sex 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 antiharassment statutes and case law should guide application of paragraph (7), where applicable. Where the conduct in question is subject to federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate paragraph (7) when the conduct does not violate such law. Moreover, an administrative or judicial finding of a violation of state or federal antidiscrimination or antiharassment laws does not alone establish a violation of paragraph (7).

A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution.

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 professional activities or events in connection with the practice of law. Lawyers may engage in

conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (7). Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law. A lawyer does not violate paragraph (7) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of a particular segment of the population 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(1), (2) and (3). 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).

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.

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 a lawyer. 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.

**Exhibit C. Proposed  
Amended RPC 8.4(7)  
Comparative to ABA  
Model Rule 8.4(g)**

1 August 21, 2020

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3 **Proposed Amendment of Connecticut Rule 8.4(7) and Official Commentary**  
4 **(Showing differences between MPRC 8.4(g) and proposed Connecticut RPC 8.4(7)**  
5 **(additions to MPRC 8.4(g) underlined;~~[deletions from MPRC 8.4(g) in brackets]~~), )**  
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7 **Rule 8.4. Misconduct**

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9 It is professional misconduct for a lawyer to:

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12 (7) Engage in conduct that the lawyer knows or reasonably should know is harassment or  
13 discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin,  
14 ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender  
15 expression or marital status [or socioeconomic status] in conduct related to the practice of law.  
16 This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a  
17 representation [in accordance with Rule 1.16. This paragraph does not preclude] or to provide  
18 [legitimate] advice, assistance or advocacy consistent with these Rules.  
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22 OFFICIAL COMMENTARY

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26 Discrimination and harassment[by lawyers in violation of paragraph (g)] in the practice of law  
27 undermine confidence in the legal profession and the legal system. [Such d]Discrimination  
28 includes harmful verbal or physical conduct directed at an individual or individuals that  
29 manifests bias or prejudice [toward others] on the basis of one or more of the protected  
30 categories. Not all conduct that involves consideration of these characteristics manifests bias or  
31 prejudice: there may be a legitimate nondiscriminatory basis for the conduct.  
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33 Harassment includes [sexual harassment and] severe or pervasive derogatory or demeaning  
34 verbal or physical conduct. [Sexual h]Harassment [on the basis of sex] includes unwelcome  
35 sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a  
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62 particular segment of the population[s] in accordance with these Rules and other law. A lawyer  
63 may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers  
64 also should be mindful of their professional obligations under Rule 6.1 to provide legal services  
65 to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments  
66 from a tribunal except for good cause. *See* Rule 6.2(1), (2) and (3). A lawyer's representation of  
67 a client does not constitute an endorsement by the lawyer of the client's views or activities. *See*  
68 Rule 1.2(b).

# **Exhibit D. Frequently Asked Questions**

**Proposed Amended Connecticut Rules of Professional Conduct 8.4(7)  
Frequently Asked Questions**

**Q. What is the purpose of the proposed amendment of Rule 8.4?**

- A. This is a watershed moment for addressing systemic racial injustice. The purpose of the proposed Rule change is to make clear to our profession and the public that lawyers, as a self-regulating profession, do not, and will not, tolerate prejudice, bias, discrimination, or harassment in the practice of law.

**Q. What is the difference between Connecticut’s current Rule 8.4 and the proposed amendment?**

- A. The key differences between Connecticut’s current Rule 8.4 and the proposed amended Rule 8.4 are:
1. The proposed amendment would move the provision concerning bias and prejudice from the Commentary to the Rule itself. The Commentary provides guidance in interpreting the Rule, but only the Rule itself is authoritative and enforceable.
  2. The current Rule 8.4 Commentary does not reference either harassment or discrimination. The proposed Rule would establish that it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or should know is discrimination or harassment.
  3. The scope of the amended Rule is broader than that of the current Commentary, which addresses only conduct occurring “in the course of representing a client.” By contrast, the amended Rule would address “conduct related to the practice of law,” which, as defined in the proposed new Commentary “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 professional activities and events in connection with the practice of law.”
  4. The proposed new Commentary to Rule 8.4 includes explanations of what types of conduct amount to “discrimination” and “harassment” within the meaning of the Rule.
  5. The mens rea element of the current Rule 8.4 Commentary uses the term “knowingly.” The mens rea element of proposed amended Rule 8.4 is “knows or reasonably should know.”

**Q. How does the proposed Connecticut Rule 8.4(7) differ from ABA MRPC 8.4(g)?**

- A. The proposed Connecticut Rule 8.4(7) is substantively the same as MRPC Rule 8.4(g). For the sake of clarity, there is a minor adjustment of the structure and some additional

terms. In addition, in order to make the Connecticut Rule consistent with state substantive law, there are changes to the list of protected categories contained in the Rule.

The proposed amendment of the Rule 8.4 Commentary differs in a number of respects from the Commentary to MRPC 8.4(g).

1. The primary criticism of MRPC 8.4(g) and its Commentary is that 8.4(g) is overbroad in ways that could potentially infringe on First Amendment rights. The proposed amendment of Connecticut's Rule 8.4 reflects the drafters' efforts to address those concerns. Unlike MRPC 8.4(g) and its Commentary, the proposed 8.4(7) Commentary provides that for discriminatory conduct to come within the reach of the Rule, it must be "conduct directed at an individual or individuals," and the definition of "harassment" clarifies that only severe or pervasive conduct comes within the reach of the rule. In addition, the 8.4(7) proposal expressly provides that conduct protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution will not violate the Rule.
2. The 8.4(7) proposal includes this additional language: "Not all conduct that involves consideration of these characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for the conduct."
3. The proposed Commentary to Rule 8.4(7) contains a fuller explanation of the interplay between the Rule and substantive law than does the Commentary to MRPC 8.4(g).
4. The 8.4(g) Commentary provides that "[c]onduct related to the practice of law includes . . . participating in bar association, business or social activities in connection with the practice of law." The proposed new Commentary deletes "social" and rephrases the definition to provide that "[c]onduct related to the practice of law includes . . . participating in bar association, business or professional activities or events in connection with the practice of law."

**Q. What is the history of ABA MRPC 8.4(g)?**

- A. In August 2016, by voice vote with overwhelming support in the 598-member American Bar Association House of Delegates, including the unanimous support of the ten member Connecticut delegation, the ABA adopted MRPC 8.4(g).

**Q. What have other states done in terms of addressing bias and prejudice in the Rules of Professional Conduct?**

- A. More than half the states addressed bias, prejudice, discrimination, and/or harassment in their Rules of Professional Conduct prior to the adoption of ABA MRPC 8.4(g). Five states (including Connecticut) and the District of Columbia currently are considering

adopting in substance ABA MRPC 8.4 (g). Four states have adopted ABA MRPC 8.4 (g) in full, in substance, or with revisions, including Maine and Vermont.

**Q. Doesn't this rule infringe on freedom of speech first amendment rights?**

- A. The ABA has addressed that concern about ABA MRPC 8.4(g). With multiple citations to case decisions, the ABA pointed to the following: (1) existing precedent in the states supports the MRPC 8.4(g); (2) the States' interest in this regulation is compelling; (3) 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; (4) MRPC 8.4(g) provides adequate notice of the proscribed conduct and is not overly broad, and vagueness and overbreadth challenges to similar ethical rules have generally failed; (5) attorneys have no significant interest in engaging in the proscribed conduct, especially as their conduct relates to the practice of law; (6) MRPC 8.4(g) does not infringe on attorneys' associational rights, if anything the Rule broadens those rights.

In addition, the proposed amendment of Connecticut's Rule 8.4 reflects the drafters' efforts to address concerns that a Rule concerning discrimination and harassment could infringe First Amendment rights. The proposed 8.4(7) Commentary provides that for discriminatory conduct to come within the reach of the Rule, it must be "conduct directed at an individual or individuals," and the definition of "harassment" clarifies that only severe or pervasive conduct comes within the reach of the Rule. In addition, the 8.4(7) proposal expressly provides that conduct protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution will not violate the Rule.

**Exhibit E. ABA Model  
Rule 8.4(g) 50 State  
Survey**

## **ABA Model Rule 8.4(g): A 50 State Survey**

## **Full Text**

2016 ABA Rule 8.4 (g): “It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”

[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 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).

## **Previous Comment 3 to ABA Rule 8.4:**

“[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.”



\*: Denotes that state had anti-discrimination and/or anti-harassment language in the text of their rule prior to the 2016 adoption of ABA Rule 8.4 (g)

Has not adopted ABA Rule 8.4 (g) and does not address discrimination or harassment in its rules or comments.

1. Alabama
2. Alaska
3. Georgia
4. Hawaii
5. Kansas
6. Kentucky
7. Louisiana
8. Mississippi
9. Montana
10. Nevada
11. North Carolina
12. Oklahoma
13. Virginia

Denied (or withdrew) a proposal to adopt ABA Rule 8.4

1. Arizona (August, 2018)
2. Idaho (September, 2018)
3. Louisiana (November, 2017)
4. Montana (April, 2017)
5. Nevada (withdrawn, 2017)
6. North Dakota (2017)
7. South Carolina (June, 2017)
8. South Dakota (2019-2020)
9. Tennessee (April, 2018)
10. Texas (December, 2016)

Has not adopted ABA Rule 8.4 (g) but addresses bias / prejudice in black letter rule (R), comment (C), or has adopted ABA comment [3]

1. Arizona – [3]
2. Arkansas – C

3. California\* - R, C
4. Colorado\* - R, C, [3]
5. Connecticut – [3]
6. Delaware – [3]
7. Florida\* - R, C
8. Idaho\* – R, [3]
9. Illinois\* – R, [3]
10. Indiana\* - R
11. Iowa\* – R, [3]
12. Maryland\* - R, C
13. Massachusetts\* - R
14. Michigan\* - R, C
15. Minnesota\* - R, C
16. Missouri\* - R, C
17. Nebraska\* – R, [3]
18. New Hampshire – R, C, [3]
19. New Jersey\* - R, C
20. New York\* - R, C
21. North Dakota\* - R, [3]
22. Ohio\* – R, C
23. Oregon\* - R
24. Rhode Island\* – R, [3]
25. South Carolina – [3]
26. South Dakota – [3]
27. Tennessee – [3]
28. Texas\* - R, C
29. Utah – C, [3]
30. Washington\* - R, C
31. West Virginia – [3]
32. Wisconsin\* – R, [3]
33. Wyoming – [3]

Currently considering a rule change.

1. Alaska (as of June, 2020)
2. Connecticut (June, 2020)

3. Illinois\* (August, 2017) – unresolved
4. Iowa (September, 2019) – unresolved
5. Utah (May, 2019) – unresolved
6. District of Columbia\* (April, 2019) - unresolved

Has adopted Rule 8.4 (g) in full / in substance / with revisions

1. Maine (June, 2019)
2. New Mexico\* (October, 2019)
3. Pennsylvania (June, 2020)
4. Vermont\* (July, 2017)

Has Revised Rule Further Addressing Discrimination/Harassment Since ABA 2016 Action

1. Colorado (September, 2019)
2. Maine
3. Missouri (July, 2019)
4. New Hampshire (July, 2019)
5. New Mexico\*
6. Pennsylvania
7. Vermont\*

State	Rule 8.4 Language	Notes/Other
Alabama	<p>“It is professional misconduct for a lawyer to: . . .(g) Engage in any other conduct that adversely reflects on his fitness to practice law.”</p> <p>Comment:</p> <p>“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 offense 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.</p>	<p>Has not adopted MR 8.4 (g) and does not discrimination or harassment in any of its rules or comments.</p> <p>Did not find any indication that this state has considered the adoption of ABA Rule 8.4 (g).</p>
Alaska	<p>It is professional misconduct for a lawyer to:</p> <p><b>(a)</b> 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;</p> <p><b>(b)</b> commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;</p> <p><b>(c)</b> engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;</p>	<p>In June, 2020, the Alaska Bar Associate provided notice that it is accepting comments on Rule 8.4 (f)-(g). The Rules committee in May 2019, sent proposed rule to the Board of Governors and then asked that the rule be remanded to the Committee for further review. The Committee finished its review and proposed new rules to the Board, which the Board voted to publish for comment. See <a href="#">published article</a>.</p>

State	Rule 8.4 Language	Notes/Other
	<p><b>(d)</b> state or imply an ability either to influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or</p> <p><b>(e)</b> knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.</p>	<p>Previous update: In the summer of 2019, Alaska considered adopting AK Rule 8.4 (f) which mirrored the ABA language. The Alaska Rules of Professional Conduct Committee remanded the proposal for additional revisions. It appears that some of the concern was that the protected classes did not track those protected under the State Commission for Human Rights, as well as the desire for more research on the mens rea requirement and definitions of “harassment and discrimination.”</p> <p><a href="#">Full Letter from AK Rules Committee</a></p>
Arizona	<p>“(d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary: “[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, gender identity or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.”</p>	<p>Has not adopted MR (g). Comment 3 addresses “manifesting bias or prejudice.”</p> <p>In August, 2018, the Arizona Supreme Court <b>denied</b> a proposal to amend its rules to adopt ABA Rule 8.4.</p> <p>See <a href="#">order</a>.</p>
Arkansas	<p>“(d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary: “[3] Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in</p>	<p>Has not adopted MR (g). Comment 3 addresses bias and prejudice.</p> <p>Did not find any indication that this state has considered the adoption of ABA Rule 8.4 (g).</p>

State	Rule 8.4 Language	Notes/Other
	<p>connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such discriminatory conduct, when directed towards litigants, jurors, witnesses, other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. 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. This subdivision does not prohibit a lawyer from representing a client accused of committing discriminatory conduct."</p>	
California	<p>Rule 8.4.1. Prohibited Discrimination, Harassment and Retaliation, adopted 11/1/2018</p> <p><b>(a)</b> In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:</p> <p>(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or</p> <p>(2) unlawfully retaliate against persons.*</p> <p><b>(b)</b> In relation to a law firm's operations, a lawyer shall not:</p> <p>(1) on the basis of any protected characteristic,</p> <p>(i) unlawfully discriminate or knowingly* permit unlawful discrimination;</p> <p>(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or</p> <p>(iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in</p>	<p>Has not adopted MR (g). Addresses lawyer harassment and discrimination in Rule 8.4.1. I have included the full text of Rule 8.4.1.</p> <p>Prior to the ABA adoption of MR 8.4 (g), the California Bar has been considering a proposal to amend its rules.</p> <p>See <a href="#">order from May, 2018</a>, adopting changes to Rule 8.4.1.</p>

State	Rule 8.4 Language	Notes/Other
	<p>compensation or in terms, conditions, or privileges of employment; or  (2) unlawfully retaliate against persons.*</p> <p><b>(c)</b> For purposes of this rule:  (1) “protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;  (2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);  (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and  (4) “retaliate” means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.</p> <p><b>(d)</b> A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.</p> <p><b>(e)</b> Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall:</p>	

State	Rule 8.4 Language	Notes/Other
	<p>(1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or</p> <p>(2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.</p> <p><b>(f)</b> This rule shall not preclude a lawyer from:</p> <p>(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;</p> <p>(2) declining or withdrawing from a representation as required or permitted by rule 1.16; or</p> <p>(3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.</p> <p>COMMENT</p> <p>[1] Conduct that violates this rule 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).) In relation to a law firm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.</p>	

State	Rule 8.4 Language	Notes/Other
	<p>[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Cal. Code Jud. Ethics, canon 3B(6) ["A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others."].) A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).</p> <p>[3] A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.</p> <p>[4] This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.</p> <p>[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice.</p>	

State	Rule 8.4 Language	Notes/Other
	<p>For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this rule.</p> <p>[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this rule should be abated.</p> <p>[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.</p> <p>[8] This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.</p> <p>[9] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent</p>	



State	Rule 8.4 Language	Notes/Other
	<p>authority to impose discipline, or other disciplinary standard.</p>	
<p>Colorado</p>	<p>“(d) engage in conduct that is prejudicial to the administration of justice; . . . (g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person’s race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; (h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law; or (i) engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer’s professional activities.”</p> <p>Commentary:  “[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.”</p> <p>“[5A] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide, but does not</p>	<p>Has not adopted MR (g). Addresses discrimination and harassment in (g), (h), and (i).</p> <p>Rule 8.4 (i) was adopted in September, 2019. <a href="#">See article.</a></p> <p>Prior to ABA Rule 8.4 (g), Colorado’s rules addressed bias. It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p> <p>Subsection (i), which most closely related to MR (g), is limited to conduct constituting sexual harassment.</p>

State	Rule 8.4 Language	Notes/Other
	limit, application of paragraph (i). “Professional activities” are not limited to those that occur in a client-lawyer relationship.”	
Connecticut	<p>“It is professional misconduct for a lawyer to . . . (4) engage in conduct that is prejudicial to the administration of justice.”</p> <p>Comment: “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 subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4).”</p>	January 2020 <a href="#">Law Tribune Article</a> About Expanding Rule 8.4 in Connecticut
Delaware	<p>“It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice.”</p> <p>Comment: [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.</p>	<p>Has not adopted MR (g). Addresses bias and prejudice in its comment [3].</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
Florida	Florida Rule 4–8.4: “A lawyer shall not: . . . (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation,	<p>Has not adopted MR 8.4 (g) and addresses discrimination in 4–8.4 (d).</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>

State	Rule 8.4 Language	Notes/Other
	<p>age, socioeconomic status, employment, or physical characteristic;”</p> <p>Comment:  “Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.”</p>	
Georgia	Full text of the rule is accessible <a href="#">here</a> . Because the rule is lengthy and does not touch on discrimination or harassment, I have omitted the full text.	<p>Has not adopted MR 8.4 (g) and does not discriminate or harassment in any of its rules or comments.</p> <p>See <a href="#">law review article</a> detailing the history of the Georgia rules and an argument for adoption of the ABA rule.</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
Hawaii	Full text of the rule is accessible <a href="#">here</a> . Because the rule is lengthy and does not touch on discrimination or harassment, I have omitted the full text.	Has not adopted MR 8.4 (g) and does not discriminate or harassment in any of its rules or comments.

State	Rule 8.4 Language	Notes/Other
		It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.
Idaho	<p>Idaho Rule 8.4 (d): “It is professional misconduct for a lawyer to: . . . <b>(d)</b> engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:  “[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.”</p> <p>Idaho Rule 4.4. Respect for rights of third persons.  “(a) In representing a client, a lawyer shall not: (1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person’s gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants”</p>	<p>In September, 2018, in a 3-2 vote, the Idaho Supreme Court decided not to amend the Idaho Rules of Professional Conduct to include the language of ABA Model Rule 8.4 (g) and invited the Idaho Bar to redraft and resubmit.</p> <p>See <a href="#">order</a>.</p> <p>Has not adopted MR (g). Addresses bias and prejudice in comment [3]. Idaho Rule 4.4 (a)(1) addresses conduct intended to appeal to or engender bias against a person.</p>
Illinois	Illinois Rule 8.4 (j): “It is professional misconduct for a lawyer to: . . . (j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer. Whether a discriminatory act	This state has not adopted MR (g). It addresses discrimination in 8.4 (j) and adopted Comment [3] addressing manifesting bias and prejudice.

State	Rule 8.4 Language	Notes/Other
	<p>reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.”</p> <p>Commentary:  “[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.”</p>	<p>In August, 2017, the Illinois Supreme Court Committee on Professional Responsibility considered a proposed rule change.</p> <p><a href="#">Illinois article.</a></p>
Indiana	<p>Indiana Rule 8.4: “It is professional misconduct for a lawyer to: . . . (g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.”</p>	<p>Has not adopted MR (g) but addresses bias and prejudice in (g).</p> <p>The Indiana Rule addressed bias and discrimination prior to the enactment of MR 8.4 (g).</p>

State	Rule 8.4 Language	Notes/Other
Iowa	<p>Iowa Rule 32:8.4: “It is professional misconduct for a lawyer to: . . . (g) engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer’s direction and control to do so.”</p> <p>Commentary:  “[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. For another reference to discrimination as professional misconduct, see paragraph (g).”</p>	<p>This state has not adopted MR (g). It addresses discrimination in 8.4 (g) and adopted Comment [3] addressing bias and prejudice.</p> <p>In September, 2019, the Iowa Supreme Court extended the public comment period for the proposal to adopt ABA Rule 8.4 (g). <a href="#">Extension order</a>. Original order <a href="#">requesting comments</a>.</p> <p>It does not appear that the Iowa Supreme Court has yet acted on the proposal.</p>
Kansas	<p>Full text of the rule is accessible <a href="#">here</a>. Because the rule is lengthy and does not touch on discrimination or harassment, I have omitted the full text.</p>	<p>Has not adopted MR 8.4 (g) and does not discrimination or harassment in any of its rules or comments.</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
Kentucky	<p>Full text of the rule is accessible <a href="#">here</a>. Because the rule is lengthy and does not touch on discrimination or harassment, I have omitted the full text.</p>	<p>Has not adopted MR 8.4 (g) and does not discrimination or harassment in any of its rules or comments.</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
Louisiana	<p>Full text of the rule is accessible <a href="#">here</a>. Because the rule is lengthy and does not touch on discrimination or harassment, I have omitted the full text.</p>	<p>Has not adopted MR 8.4 (g) and does not discrimination or harassment in any of its rules or comments.</p>

State	Rule 8.4 Language	Notes/Other
		<p>In November, 2017, the LSBA Rules of Professional Conduct Committee <a href="#">reported</a> that it would make “no recommendation” on ABA Rule 8.4 (g). See <a href="#">March 2017 report of that committee</a>.</p> <p>LSBA Rules Committee <a href="#">declined to send proposal</a> to House of Delegates or Louisiana Supreme Court.</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
Maine	<p>Maine Rule 8.4 (g): “It is professional misconduct for a lawyer to: . . . (g)</p> <p><b>(g)</b> engage in conduct or communication related to the practice of law 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, or gender identity.</p> <p>(1) “Discrimination” on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity as used in this section means conduct or communication that a lawyer knows or reasonably should know manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in this paragraph; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.</p> <p>(2) “Harassment” on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity as used in this section means derogatory or demeaning conduct or communication and includes, but is not</p>	<p>Effective June 2, 2019, Maine adopted in substance ABA MR 8.4 (g). It includes the same mens rea (knows or reasonably should know,” and omits the protected classes of “marital status or socioeconomic status” included in the Model Rule. The Maine rule also defines the terms “discrimination and harassment” as they apply to the rule.</p> <p>It also includes the limitation to include conduct and communication “related to the practice of law,” but does not define that clause the way the ABA Model Rule does.</p>

State	Rule 8.4 Language	Notes/Other
	<p>limited to, unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content.</p> <p>(3) “Related to the practice of law” as used in the section means occurring in the course of representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; or operating or managing a law firm or law practice.</p> <p>(4) Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g)”</p> <p>Commentary:</p> <p>“[3] Legitimate advocacy does not violate paragraph (d). However, by way of example, 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. Notwithstanding the foregoing, a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.”</p> <p>Guidance - - June 2019:          “This amendment, which adds new Rule 8.4(g), is intended to dispel uncertainty as to what conduct is prohibited. As with any mandate in a rule or a statute, the extent of enforcement or initiation of formal disciplinary proceedings will depend on the level of intentionality and seriousness of the reported violation.</p>	



State	Rule 8.4 Language	Notes/Other
	<p>Response to complaints and disciplinary actions initiated under the new Rule 8.4(g), as with disciplinary actions under the present Maine Rules of Professional Conduct, will be subject to similar reasonable and measured enforcement choices, particularly as experience with the new Rule and Continuing Legal Education programs promote better understanding within the Maine legal community of ethical obligations to achieve compliance with the Rule.”</p>	

<p>Maryland</p>	<p>Rule 8.4: “It is professional misconduct for an attorney to: . . . knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this section;”</p> <p>Commentary:</p> <p>[3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate section (d) or (e) of this Rule. This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. See <i>Attorney Grievance Commission v. Goldsborough</i>, 330 Md. 342 (1993). See also Rule 19-301.7 (1.7).</p> <p>[4] Section (e) of this Rule reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, an attorney who, while acting in a professional capacity, engages in the conduct described in section (e) of this Rule and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination.</p>	<p>This state has not adopted MR (g) but addresses bias and prejudice in (e) and Comments [3] and [4].</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
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	Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require attorneys to refrain from the conduct described in section (e) of this Rule. See Md. Rule 18-102.3”	
Massachusetts	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Rule 3.4 (i): “A lawyer shall not: . . . (i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.”</p>	<p>This state has not adopted MR (g) or comments on bias / prejudice. Addresses similar concerns in Mass Rule 3.4 (i), but only applies in connection with appearing before a tribunal.</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
Michigan	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (c) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Rule 6.5 (a): “<b>(a)</b> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.”</p> <p>Comment: “A lawyer must take particular care to avoid words or actions that appear to be improperly based upon a person's race, gender, or other protected personal characteristic. Legal</p>	<p>This state has not adopted MR (g). Addresses this conduct in Rule 6.5 (a).</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>

	institutions, and those who serve them, should take leadership roles in assuring equal treatment for all.”	
Minnesota	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . <b>(g)</b> harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities;</p> <p><b>(h)</b> commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:</p> <ol style="list-style-type: none"> <li>(1) the seriousness of the act,</li> <li>(2) whether the lawyer knew that the act was prohibited by statute or ordinance,</li> <li>(3) whether the act was part of a pattern of prohibited conduct, and</li> <li>(4) whether the act was committed in connection with the lawyer's professional activities;” <p>Commentary:</p> <p>“[4] Paragraph (g) specifies a particularly egregious type of discriminatory act-harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.</p> <p>[5] Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it</p> </li></ol>	This state has not adopted ABA MR 8.4 (g) but addresses harassment, discrimination, bias, and prejudice in (g) and (h), which were in place prior to the ABA’s 2016 MR.

	<p>in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).</p> <p>[6] Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.</p> <p>[7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).”</p>	
Mississippi	Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;”	<p>Has not adopted MR 8.4 (g) and does not discriminate or harassment in any of its rules or comments.</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>

<p>Missouri</p>	<p>Rule 8.4 (g): “It is professional misconduct for a lawyer to: . . . manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16.”</p> <p>Commentary:</p> <p>[4] Rule 4-8.4(g) identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice or constitute harassment against others based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. Rule 4-8.4(g) excludes those instances in which a lawyer engages in legitimate advocacy with respect to these factors. A lawyer acts as an officer of the court and is licensed to practice by the state. The manifestation of bias or prejudice or the engagement in harassment by a lawyer, in representing a client, fosters discrimination in the provision of services in the state judicial system, creates a substantial likelihood of material prejudice by impairing the integrity and fairness of the judicial system, and undermines public confidence in the fair and impartial administration of justice.</p> <p>Whether a lawyer's conduct constitutes professional misconduct in violation of Rule 4-8.4(g) can be determined only by a review of all the circumstances; e.g., the gravity of the acts and whether the acts are part of a pattern of prohibited conduct. For purposes of Rule 4-8.4(g), “bias or prejudice” means words or conduct that the lawyer knew or</p>	<p>Much of this state’s Rule 8.4 (g) was in place prior to adoption of the ABA MR. <a href="#">By order of the Supreme Court of Missouri in 2019</a>, (g) was re-written and Comment [4] was revised.</p> <p>Missouri departs from MR 8.4 (g) because it limits misconduct to that occurring “in representing a client.”</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
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	<p>should have known discriminate against, threaten, intimidate, or denigrate any individual or group. Examples of manifestations of bias or prejudice include, but are not limited to, epithets; slurs; demeaning nicknames; negative stereotyping; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. For purposes of Rule 4-8.4(g), “harassment” is verbal or physical conduct that shows hostility or aversion toward a person based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. “Harassment” includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:</p> <p>(a) submission to that conduct is made, either explicitly or implicitly, a term or condition of the individual's employment;</p> <p>(b) submission to or rejection of such conduct by an individual is used as a factor in decisions affecting such individual; or</p> <p>(c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile, or offensive environment.</p>	
Montana	<p>Rule 8.4 “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;”</p>	<p>Has not adopted MR 8.4 (g) and does not discrimination or harassment in any of its rules or comments.</p> <p>In December, 2016, the Montana Supreme Court was considering adopting MR 8.4 (g). In April, 2017, the Montana Legislature <a href="#">passed a joint resolution</a> condemning ABA MR 8.4 (g).</p>

		<p>No additional Montana Supreme Court orders appear to have been entered and Montana’s rule appears to remain unchanged.</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
Nebraska	<p>Nebraska Rule § 3-508.4: “It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.”</p> <p>Commentary:  “[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.”</p>	<p>Has not adopted MR (g) but addresses discrimination in (d) and Comment [3].</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
Nevada	<p>Rule 8.4 “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;”</p>	<p>Has not adopted MR 8.4 (g) and does not address discrimination or harassment in any of its rules or comments.</p>

		<p>In 2017, the Board of Governors <a href="#">filed a petition</a> with the Nevada Supreme Court to amend the rules to include ABA’s MR 8.4 (g). In September, 2017, the <a href="#">Board withdrew its petition</a> citing a lack of consensus of language used in other jurisdictions.</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
<p>New Hampshire</p>	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (g) take any action, while acting as a lawyer in any context, if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus against the other person based upon the other person’s race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules of Professional Conduct, nor does it preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer’s right to advocate for a client.”</p> <p>Supreme Court Comment:</p> <p>“Subsection (g) is intended to govern the conduct of lawyers in any context in which they are acting as lawyers. The rule requires that the proscribed action be taken with the primary purpose of embarrassing, harassing or burdening another person, which includes an action motivated by animus against the other person based upon the other person’s race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.”</p>	<p>In July, 2019, the <a href="#">NH Supreme Court issued an order</a> adopting NH 8.4 (g). It declined to adopt ABA Rule 8.4 (g) as written because of ongoing discussing regarding the model rule.</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>



	<p>2004 ABA Model Code Comment Rule 8.4 Misconduct:  “[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.”</p>	
<p>New Jersey</p>	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.”</p> <p>Official Comment by Supreme Court (May 3, 1994)</p> <p>This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they</p>	<p><a href="#">Article</a> detailing attorney conduct in violation of NJ Rule 8.4 (g).</p> <p><a href="#">NJ Law Journal article</a> (2020) calling for adoption of ABA 8.4 (g).</p> <p>According to that 2020 article, the New Jersey State Bar Association Board of Trustees was seeking reconsideration of the Board's overwhelming support of the ABA MR 8.4 (g) in 2017. I have not been able to locate any official petitions, orders, or materials regarding this request for reconsideration.</p>

may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

“Discrimination” is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. *In re Vincenti*, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court

	<p>revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., <i>In re Vincenti</i>, 114 N.J. 275 (554 A.2d 470) (1989).”</p>	
New Mexico	<p>Rule 16-804: “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, or marital 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 16-116 NMRA. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.”</p> <p>Commentary:</p>	<p>NM <a href="#">amended its rules</a> to largely track ABA MR 8.4 (g). NM eliminated the protection to persons based on socioeconomic status. It keeps the mens rea requirement as included in the ABA MR.</p> <p><a href="#">Article regarding adoption</a> of the new rule.</p>

	<p>“[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.</p> <p>[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.</p> <p>[5] 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's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 16-102(B) NMRA.”</p>	
New York	Rule 8.4: “A lawyer or law firm shall not: . . . (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or	It does not appear that this state currently is considering adopting MR 8.4 (g) in full.

	<p>gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding;”</p> <p>Commentary:</p> <p>“[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).”</p>	
North Carolina	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:</p> <p>“[5] Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice. When directed to opposing counsel, such conduct tends to impede opposing counsel's ability to represent his or her client effectively. Comments “by one lawyer tending to disparage the personality or performance of another tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand.” <i>State v. Rivera</i>,</p>	<p>Has not adopted MR 8.4 (g) and does not discriminate, bias, or prejudice in any of its rules or comments.</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>

	350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). See Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].”	
North Dakota	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (f) engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding;”</p> <p>Commentary:  “[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, or sexual orientation violates paragraph (f) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (f). For example, a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.”</p>	<p>In 2017, the Joint Committee on Attorney Standards <a href="#">rejected</a> a proposal to adopt ABA Rule 8.4 (g).</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
Ohio	<p>Rule 8.4: “It is professional misconduct for a lawyer to do any of the following: . . . (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;”</p> <p>Commentary:  “[3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation,</p>	<p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>

	national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.”	
Oklahoma	Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.”	Has not adopted MR 8.4 (g) and does not discriminate or harassment in any of its rules or comments.  It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.
Oregon	Rule 8.4 (a): “It is professional misconduct for a lawyer to: . . . (7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.”	Has not adopted MR 8.4 (g) but addresses harassment in (7).  It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.
Pennsylvania	(Amended June 2020) Rule 8.4: “It is professional misconduct for a lawyer to: . . . (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these Rules.”  Commentary: “[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.	After four years of working on Rule 8.4 (g), in June 2020, the Pennsylvania Supreme Court <a href="#">issued an order</a> adopting a modified version of ABA Rule 8.4 (g).

	[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.”	
Rhode Island	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice, including but not limited to, harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status;”</p> <p>Commentary:  “[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, gender, 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 judicial finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.”</p>	<p>Has not adopted MR 8.4 (g) but addresses discrimination, bias, and prejudice in (d) and comment [3].</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
South Carolina	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (e) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:  [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 (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge’s finding that peremptory challenges were exercised on a</p>	<p>Has not adopted MR 8.4 (g) but addresses bias and prejudice in comment [3].</p> <p>In June, 2017, the South Carolina Supreme Court <a href="#">issued an order</a> rejecting ABA Model Rule 6.4 (g). Noting that discrimination and lack of diversity within the legal profession are issues that should be addressed, the Court agreed to consider any additional / supplemental proposals.</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>



	discriminatory basis does not alone establish a violation of this rule.”	
South Dakota	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) Engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:  “[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.”</p>	<p>In late 2019-early 2020, South Dakota considered a modified version of ABA Rule 8.4 (g). In March, 2020, the Supreme Court of South Dakota <a href="#">issued a letter</a> rejecting the proposal and created a commission to study sexual harassment within the legal profession in South Dakota.</p> <p>The Commission is in place through the end of the calendar year.</p>
Tennessee	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:  “[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic 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).”</p>	<p>In April, 2018, the Supreme Court of Tennessee <a href="#">denied a petition</a> to adopt Model Rule 8.4 (g).</p> <p>Has not adopted MR 8.4 (g) but addresses discrimination, bias, and prejudice in comment [3].</p> <p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
Texas	<p>Full text of the rule is accessible <a href="#">here</a>.</p> <p>Texas Rules of Professional Conduct includes Rule 5.08, “Prohibited Discriminatory Activities” found within section V. “Law Firms and Associations.” Rule 5.08:</p>	<p>In December, 2016, the Texas Attorney General issued <a href="#">an advisory opinion</a> stating that ABA Rule 8.4 (g) would likely be found unconstitutional, if adopted in Texas.</p>

	<p>“(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.</p> <p>(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as “confidential information” under these Rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:</p> <p>(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and</p> <p>(ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.”</p> <p>Commentary:</p> <p>“1. Subject to certain exemptions, paragraph (a) of this Rule prohibits willful expressions of bias or prejudice in connection with adjudicatory proceedings that are directed towards any persons involved with those proceedings in any capacity. Because the prohibited conduct only must occur “in connection with” an adjudicatory proceeding, it applies to misconduct transpiring outside of as well as in the presence of the tribunal's presiding adjudicatory official. Moreover, the broad definition given to the term “adjudicatory proceeding” under these Rules means that paragraph (a)'s prohibition applies to many settings besides conventional litigation in federal or state courts. See Preamble: Terminology (definitions of “Adjudicatory Proceeding” and “Tribunal”).</p>	<p>It does not appear that this state currently is considering adopting MR 8.4 (g) in full.</p>
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	<p>2. The Rule, however, contains several important limitations and exemptions. The first, found in paragraph (a), is that a lawyer's allegedly improper words or conduct must be shown to have been “willful” before the lawyer may be subjected to discipline.</p> <p>3. In addition, paragraph (b) sets out four exemptions from the prohibition of paragraph (a). The first is a lawyer's decision whether to represent a client. The second is any communication made by the lawyer that is “confidential” under Rule 1.05(a) and (b). The third is a lawyer's communication that is necessary to represent a client properly and that complies with applicable rulings and orders of the tribunal as well as with applicable rules of practice or procedure.</p> <p>4. The fourth exemption in paragraph (b) relates to the lawyer's words or conduct in selecting a jury. This exemption ensures that a lawyer will be free to thoroughly probe the venire in an effort to identify potential jurors having a bias or prejudice towards the lawyer's client, or in favor of the client's opponent, based on, among other things, the factors enumerated in paragraph (a). A lawyer, should remember, however, that the use of peremptory challenges to remove persons from juries based solely on some of the factors listed in paragraph (a) raises separate constitutional issues.”</p>	
Utah	<p>Rule 8.4: “It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:  “[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</p>	<p>In May, 2019, the Utah Supreme Court and Judicial Council <a href="#">invited comments</a> on amending Rule 8.4. It is unclear what resulted from the proposal. The Rule remained unchanged, but no record of a rejection was found.</p> <p>Has not adopted MR 8.4 (g); addresses bias and prejudice in comment [3].</p>

	<p>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.</p> <p>[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).”</p>	
Vermont	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, or other grounds that are illegal or prohibited under federal or state 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.”</p> <p>Commentary:</p> <p>“[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 antiharassment statutes and case law may guide application of paragraph (g).</p>	<p>In July, 2017, the Vermont Supreme Court <a href="#">adopted in full</a> ABA Rule 8.4 (g).</p>

	<p>[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.</p> <p>[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)."</p>	
Virginia	Full text of the rule is accessible <a href="#">here</a> . Because the rule and commentary does not touch on discrimination or harassment, I have omitted the full text.	<p>Has not adopted MR 8.4 (g) and does not discrimination or harassment in any of its rules or comments.</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>

Washington	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . <b>(g)</b> commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer’s professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, honorably discharged veteran or military status, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;</p> <p><b>(h)</b> 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, honorably discharged veteran or military status, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments;”</p> <p>Commentary:  “[3] <b>[Washington revision]</b> Legitimate advocacy respecting the factors set forth in paragraph (h) does not violate paragraphs (d) or (h). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.”</p>	<p>Has not adopted MR 8.4 (g); addresses discrimination and prejudice in (g) and (h).</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>
West Virginia	<p>Rule 8.4: “It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:</p>	<p>Has not adopted MR 8.4 (g).</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.</p>

	<p>“[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.”</p>	
Wisconsin	<p>Rule 20:8:4: “It is professional misconduct for a lawyer to: . . .  (i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).”</p> <p>Commentary – Wisconsin Committee  “Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.”</p> <p>Commentary – ABA Comment  “[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.”</p>	<p>Has not adopted MR 8.4 (g). Addresses harassment in (i).</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full</p>

Wyoming	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;”</p> <p>Commentary:  “[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.”</p>	<p>Has not adopted MR 8.4 (g).</p> <p>It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full</p>
<b>Other/ Territories</b>		
American Samoa	ABA Rule 8.4 (g)**	Followed policy to adopt <i>per se</i> the most recent version of the ABA MRPC.
District of Columbia	<p>Rule 8.4: “It is professional misconduct for a lawyer to: . . . (d) Engage in conduct that seriously interferes with the administration of justice;”</p> <p>Comment:  “[3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.”</p> <p>Rule 9.1: Nondiscrimination. “A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex,</p>	<p>Has not adopted ABA MR 8.4 (g), but addresses conduct that interferes with administrative justice in its Comment, and addresses discrimination and harassment separately in DC Rule 9.1.</p> <p>In April, 2019, the D.C. Bar Rules of Professional Responsibility Review Committee held a hearing to determine whether D.C. Rule 9.1 should be amended to include ABA Rule 8.4 (g).</p>



age, marital status, sexual orientation, family responsibility, or physical handicap.”

Full Commentary:

**[1]** This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.

**[2]** The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

**[3]** If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Bar Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Bar Counsel and material allegations involved in such other proceedings. See § 19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

Guam	Rule 8.4: "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice;"	Has not adopted MR 8.4 (g) and does not discriminate or harassment in any of its rules or comments.  It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.
Northern Mariana Islands	ABA Rule 8.4 (g)**	Followed policy to adopt <i>per se</i> the most recent version of the ABA MRPC.
Puerto Rico		Has not adopted MR 8.4 (g) and does not discriminate or harassment in any of its rules or comments.  It does not appear that this state previously has or currently is considering adopting MR 8.4 (g) in full.  <a href="#">Article from 2020 Conference</a> discussing ABA MR 8.4 (g).
Virgin Islands	ABA Rule 8.4 (g)**	Followed policy to adopt <i>per se</i> the most recent version of the ABA MRPC.

**Exhibit F. ABA Standing  
Committee on Ethics and  
Professional  
Responsibility Formal  
Opinion 493 (July 15,  
2020)**

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 493**

**July 15, 2020**

## **Model Rule 8.4(g): Purpose, Scope, and Application**

*This opinion offers guidance on the purpose, scope, and application of Model Rule 8.4(g). The Rule prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of various categories, including race, sex, religion, national origin, and sexual orientation. Whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is found harmful will be grounds for discipline.<sup>1</sup>*

*Rule 8.4(g) covers conduct related to the practice of law that occurs outside the representation of a client or beyond the confines of a courtroom. In addition, it is not restricted to conduct that is severe or pervasive, a standard utilized in the employment context. However, and as this opinion explains, conduct that violates paragraph (g) will often be intentional and typically targeted at a particular individual or group of individuals, such as directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature.*

*The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit a lawyer's speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation. The Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.*

*Besides being advocates and counselors, lawyers also serve a broader public role. Lawyers "should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."<sup>2</sup> Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. Enforcement of Rule 8.4(g) is therefore critical to maintaining the public's confidence in the impartiality of the legal system and its trust in the legal profession as a whole.<sup>3</sup>*

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> MODEL RULES OF PROF'L CONDUCT Scope [14] (2019) [hereinafter MODEL RULES].

<sup>3</sup> As explained in this opinion, events in the legal profession and in the broader community influenced the development of Rule 8.4(g) and demonstrated the necessity for its adoption. The police-involved killing of George Floyd and the unprecedented social awareness generated by it and other similar tragedies have brought the subject of racial justice to the forefront, further underscoring the importance of Rule 8.4(g) and this opinion.

## I. Introduction

In August 2016, the ABA House of Delegates adopted Model Rule 8.4(g).<sup>4</sup> The Rule prohibits a lawyer from “engag[ing] 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.”<sup>5</sup> Adoption of paragraph (g) followed years of study and debate within the ABA. This opinion offers guidance on the Rule’s purpose, scope, and application.

The conduct addressed by Rule 8.4(g) harms the legal system and the administration of justice. As one court emphasized in sanctioning a male lawyer for disparagingly referring to his female adversary as “babe” and making other derogatory, sexual comments during a deposition,

[The lawyer’s] behavior . . . was a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of “sexual [deposition] tactics.” . . . “These actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors.”<sup>6</sup>

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<sup>4</sup> See *Annual Meeting 2016: ABA Amends Model Rules to Add Anti-Discrimination, Anti-Harassment Provision* (Aug. 8, 2016), [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/ethicsandprofessionalresponsibility/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/) (summarizing events at the House of Delegates meeting). The provision was adopted by voice vote, with no one speaking in opposition. See Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 197 (2017).

<sup>5</sup> MODEL RULES R. 8.4(g).

<sup>6</sup> *Mullaney v. Aude*, 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999) (quoting trial judge in the case); see also *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 185 (Sup. Ct. 1992) (“[D]iscriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession. . . . ‘The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual. . . . Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. . . .’ While the conduct here falls under the heading of sexist, the same principle applies to any professional discriminatory conduct involving any of the variations to which human beings are subject, whether it be religion, sexual orientation, physical condition, race, nationality or any other difference.”) (quoting Preamble to the Code of Professional Responsibility)); *Cruz-Aponte v. Caribbean Petroleum Corp.*, 123 F. Supp. 3d 276, 280 (D.P.R. 2015) (“When an attorney engages in discriminatory behavior, it reflects not only on the attorney’s lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.”); *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005) (“Interjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole.”); *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563, 568 (Minn. 1999) (maintaining that “it is especially troubling” when a lawyer engages in “race-based misconduct” and, if not addressed, “undermines confidence in our system of justice”).

On June 4, 2020, the Washington Supreme Court issued an open letter regarding the issues raised by the George Floyd situation, forcefully embracing the cause of racial justice: “We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism. . . . We go by the title of “Justice” and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative.” Supreme Court of Washington, *Open Letter to the Judiciary and the Legal Community* (June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

Comment [3] to the prior version of Rule 8.4 explained that some of the same behavior subjected a lawyer to discipline when the behavior was prejudicial to the administration of justice.<sup>7</sup> Other rules prohibit similar conduct in contexts related to the representation of a client.<sup>8</sup> Rule 8.4(g) is

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<sup>7</sup> MODEL RULES R. 8.4(d) cmt. [3] (1998). In particular, the Comment stated:

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.

*Id.* (emphasis added).

<sup>8</sup> *See, e.g.*, MODEL RULES R. 3.5(d) (prohibits "conduct intended to disrupt a tribunal"); MODEL RULES R. 4.4(a) (prohibits using "means that have no substantial purpose other than to embarrass, delay, or burden a third person" when "representing a client").

The Model Code of Judicial Conduct has long contained a provision prohibiting judges from engaging in this sort of discriminatory and harassing conduct and requiring that judges ensure that lawyers appearing before them adhere to the same restrictions. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2011). The pertinent portion of the Rule provides:

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) 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.

MODEL RULES R. 2.3(B) & (C); *see also* Gillers, *supra* note 4, at 209-11 (discussing adoption of CJC Rule 2.3 and its relationship to Model Rule 8.4(g)). In addition, in 2015, the ABA revised its *Standards for Criminal Justice: Prosecutorial Function and Defense Function* to add anti-bias provisions for both prosecutors and defense counsel. For example, the Defense Function standard provides:

(a) 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. Defense counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel's authority.

(b) Defense counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in *all of counsel's work*. A public defense office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the defense office's jurisdiction, and eliminate those impacts that cannot be properly justified.

more expansive, also forbidding harassment and discrimination in practice-related settings beyond the courtroom and in contexts that may not be connected to a specific client representation.<sup>9</sup> Such breadth was necessitated by evidence that sexual harassment, in particular, occurs outside of court-related and representational situations—for example, in non-litigation matters or at law firm social events or bar association functions.<sup>10</sup>

Furthermore, Rule 8.4(g) prohibits conduct that is not covered by other law, such as federal proscriptions on discrimination and harassment in the workplace.<sup>11</sup> Although conduct that violates Title VII of the Civil Rights Act of 1964 would necessarily violate paragraph (g),<sup>12</sup> the reverse may not be true. For example, a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g).<sup>13</sup> The isolated nature of the conduct, however, could be a mitigating factor in the disciplinary process.<sup>14</sup>

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CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Std. 4-1.6 (4th ed. 2017) (emphasis added). *See also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Std. 3-1.6 (4th ed. 2017) (setting forth the same standard for prosecutors).

<sup>9</sup> Some jurisdictions have limited their antidiscrimination and anti-harassment rules to conduct related to the representation of a client. *See, e.g.*, COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2020) (conduct "in the representation of a client"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2020) (conduct "in appearing in a professional capacity before a tribunal"); MO. RULES OF PROF'L CONDUCT R. 4-8.4(g) (2020) (conduct "in representing a client"); NEB. RULES OF PROF'L CONDUCT § 3-508.4(d) (2020) (conduct when "a lawyer is employed in a professional capacity").

<sup>10</sup> *See generally* Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women from Harassment*, 96 U. DET. MERCY L. REV. 579 (2019). *See also* STANDING COMMITTEE ON ETHICS & PROF'L RESPONSIBILITY, ET AL., REPORT TO THE HOUSE OF DELEGATES ON REVISED RESOLUTION 109, at 10 (Aug. 2016); *infra* note 31 and accompanying text; *Standing Committee on Ethics and Professional Responsibility Hearing on Model Rule 8.4(g)*, at 39, 61-62 (Feb. 2016) (Wendy Lazar testifying that "so much sexual harassment and bullying against women actually takes place on the way home from an event or in a limo traveling on the way back from a long day of litigation"; former ABA president Laura Bellows testifying about anecdotal evidence of sexual harassment, such as, at a "Christmas party"), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/february\\_2016\\_public\\_hearing\\_transcript.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf).

<sup>11</sup> *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (2019). *See also* *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020) (recognizing that discrimination and harassment based on sexual orientation and gender identity are prohibited by Title VII as components of "sex," one of the protected categories listed in the statute). Sexual orientation and gender identity are expressly included among Model Rule 8.4(g)'s categories.

<sup>12</sup> *See* MODEL RULES R. 8.4(g) cmt. [3] (noting that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)").

<sup>13</sup> *See* *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533 (7th Cir. 1993) (observing that "'relatively isolated' instances of non-severe misconduct will not support a hostile environment claim") (quoting *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993); *Martinelli v. Bancroft Chophouse, LLC*, 357 F. Supp. 3d 95, 102 (D. Mass. 2019) (finding that "[a] single, isolated incident of harassment . . . is ordinarily insufficient to establish a claim for hostile work environment unless the incident was particularly egregious and the employee must demonstrate how his or her ability to work was negatively affected").

<sup>14</sup> Whether discipline is imposed for any particular violation of Rule 8.4(g) will depend on a variety of factors, including, for example: (1) severity of the violation; (2) prior record of discipline or lack thereof; (3) level of cooperation with disciplinary counsel; (4) character or reputation; and (5) whether or not remorse is expressed. For a full discussion of factors that influence the imposition of discipline imposed, see ANNOTATED ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2d ed. 2019).

Rule 8.4(g) does not regulate conduct unconnected to the practice of law, as do some other rules of professional conduct.<sup>15</sup> Nevertheless, it does impose a higher standard on lawyers than that expected of the general public.<sup>16</sup> As the Preamble to the Model Rules states, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>17</sup> Harassment and discrimination damage the public’s confidence in the legal system and its trust in the profession.

Section II of this opinion elaborates further on the scope of Rule 8.4(g) and explains in more detail how it safeguards the integrity of the legal system and the profession. Section III contains hypotheticals that illustrate the Rule’s application.

## II. Analysis

Rule 8.4(g) provides:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This 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.<sup>18</sup>

Comment [3] to Rule 8.4(g) addresses the meaning of “discrimination” and “harassment” and emphasizes that such conduct “undermine[s] confidence in the legal profession and the legal

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<sup>15</sup> The most noteworthy example is Rule 8.4(c). Indeed, the misconduct addressed in that rule—dishonesty, fraud, deceit, and misrepresentation—has traditionally been viewed as unacceptable by the legal profession, whether it occurs in the courtroom or on the street. Other Model Rules that subject lawyers to discipline for conduct not necessarily connected with the practice of law include Model Rules 8.2.(a) (prohibiting statements by lawyers about judges or other legal officials known to be false or in reckless disregard as to their truth), and 8.4(b) (misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness). *See also* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 67 (2018) (noting that “the bar readily considers conduct completely unconnected to the practice of law when such conduct is either deceptive or otherwise reflective on fitness, with some jurisdictions requiring and others omitting the element that the conduct in question be criminal”).

<sup>16</sup> *See, e.g.*, MODEL RULES R. 3.6(a) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”); MODEL RULES R. 4.1(a) (“In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person . . .”); MODEL RULES R. 8.4(c) (“It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .”). *See also* Hess, *supra* note 10, at 596 (“Rather than having lawyers escape accountability for their sexually harassing conduct that might not meet Title VII’s high bar, the legal profession can instead take the opportunity to hold itself to a higher standard of professionalism.”).

<sup>17</sup> MODEL RULES Preamble [1].

<sup>18</sup> MODEL RULES R. 8.4(g).



system.”<sup>19</sup> It defines “discrimination” to include “harmful verbal or physical conduct that manifests bias or prejudice towards others.”<sup>20</sup> Harassment includes “derogatory or demeaning verbal or physical conduct.”<sup>21</sup> “Sexual harassment” is more specifically described as “unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”<sup>22</sup> The Comment also indicates that “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”<sup>23</sup>

The existence of the requisite harm is assessed using a standard of objective reasonableness. In addition, a lawyer need only know or reasonably should know that the conduct in question constitutes discrimination or harassment.<sup>24</sup> Even so, the most common violations will likely involve conduct that is intentionally discriminatory or harassing.

Comment [4] identifies the scope of “conduct related to the practice of law,” listing such activities as: “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.”<sup>25</sup>

Comment [5] describes specific circumstances that do not violate paragraph (g). For example, a judge’s determination that a lawyer has utilized peremptory challenges in a discriminatory manner, alone, will not subject the lawyer to discipline.<sup>26</sup> Furthermore, limiting one’s practice to providing representation to underserved populations, consistent with the rules of professional conduct and other law, will not constitute a violation.<sup>27</sup>

Finally, Rule 8.4(g) specifically excludes from its scope “[l]egitimate advice or advocacy consistent with these Rules.” Thus, the Rule covers only conduct for which there is no reasonable justification. Common usage and Rule 8.4(g)’s Comments reinforce this point by elucidating the type of harassing or discriminatory conduct that is disciplinable.

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<sup>19</sup> *Id.* cmt. [3].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* See also MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. [4] (noting that “[s]exual 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”).

<sup>23</sup> MODEL RULES R. 8.4(g) cmt. [3].

<sup>24</sup> “Knows” and “reasonably should know” are defined terms in the Model Rules. See MODEL RULES R. 1.0(f) & (j).

<sup>25</sup> MODEL RULES R. 8.4 cmt. [4].

<sup>26</sup> See *id.* cmt. [5].

<sup>27</sup> See *id.* The balance of the Comment notes some additional actions that will not violate Rule 8.4(g):

A lawyer may charge and collect reasonable fees and expenses for a representation. . . . 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. . . . A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities.

*Id.* (citations omitted).

## A. “Harassment”

Harassment is a term of common meaning and usage under the Model Rules.<sup>28</sup> It refers to conduct that is aggressively invasive, pressuring, or intimidating.<sup>29</sup> Rule 8.4(g) addresses harassment in relation to the practice of law that targets others on the basis of their membership in one or more of the identified categories.<sup>30</sup>

Preventing sexual harassment is a particular objective of Rule 8.4(g).<sup>31</sup> As Comment [3] makes clear, sexual harassment encompasses “unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”<sup>32</sup> This type of behavior falls squarely within the broader, plain meaning of harassment and is consistent with the term’s application throughout the Model Rules.

Model Rule 3.5(c)(3), for example, prohibits lawyers from communicating with jurors or prospective jurors following their discharge if “the communication involves misrepresentation, coercion, duress or *harassment*.”<sup>33</sup> Here, the term “harassment,” as in Rule 8.4(g), refers to conduct that is aggressively invasive, pressuring, or intimidating, including that which is reasonably perceived to be demeaning or derogatory, as demonstrated in *In re Panetta*.<sup>34</sup> In *Panetta*, the respondent was disciplined for sending an email to another lawyer who had served as the jury foreperson in a trial the respondent had lost several years earlier. The message was insulting, badgering, and threatening. Its subject line read, “ALL THESE YEARS LATER I WILL NEVER FORGET ... THE LIAR” and went on to state, among other things: “After numerous multi-million dollar verdicts and success beyond anything you will attain in your lifetime, I will never forget you: the bloated Jury [Foreperson] that I couldn’t get rid of and that misled and hijacked my jury.” He ended the message with “Well you should get attacked you A-hole. Good Luck in Hell.”<sup>35</sup> The

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<sup>28</sup> See, e.g., MODEL RULES R. 3.5(c)(3) & 7.3(c)(2) (both discussed in the text). See also MODEL RULES Preamble [5] (“A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”).

<sup>29</sup> See, e.g., NEW OXFORD AMERICAN DICTIONARY 790 (3d ed. 2010) (defining “harassment” as “aggressive pressure or intimidation”); MERRIAM-WEBSTER DICTIONARY (defining “harass” as meaning “to annoy persistently”; “to create an unpleasant or hostile situation for, especially by uninvited and unwelcome verbal or physical conduct”), <https://www.merriam-webster.com/dictionary/harass> (last visited June 23, 2020).

<sup>30</sup> Consistent with the guiding principle that the Model Rules are rules of reason and “should be interpreted with reference to the purposes of legal representation and of the law itself,” the term “harassment” in Rule 8.4(g) must be construed and applied in a reasonable manner. See MODEL RULES Scope [14].

<sup>31</sup> See Gillers, *supra* note 4, at 200 (noting that decisions and surveys cited overwhelmingly “disclose that the targets [of bias and harassment] are predominantly women”); Hess, *supra* note 10, at 582 (noting conservatively that an estimated “25% of women in the legal workplace have reported unwanted sexual harassment”); Chuck Lundberg, *#MeToo in the Law Firm*, BENCH & BAR MINN., Vol. 75, No. 3, at 16, 17 (Mar. 2018) (noting that in speaking to many male and female “bar leaders, judges, present and former ethics partners and managing partners at large law firms,” the author learned from the men that they had observed or heard about a “broad spectrum of workplace conduct” of a sexual nature, including “some pretty egregious sexual misconduct”; as for the women with whom the author spoke, “[t]o a person, they were able to relate multiple instances of such behaviors—in law firms, law schools, court chambers, and other legal workplaces”).

<sup>32</sup> MODEL RULES R. 8.4(g) cmt. [3].

<sup>33</sup> MODEL RULES R. 3.5(c)(3) (emphasis added).

<sup>34</sup> 127 A.D.3d 99 (N.Y. 2d Dept. 2015).

<sup>35</sup> *Id.* at 101.

court easily found that this conduct was intended to harass the former jury foreperson and adversely reflected on the respondent's fitness as a lawyer.<sup>36</sup>

Model Rule 7.3(c)(2) also prohibits "harassment." It forbids "solicitation that involves coercion, duress or *harassment*."<sup>37</sup> As with other uses of "harassment" in the Model Rules, a rational reading of the term includes badgering or invasive behavior, as well as conduct that is demeaning or derogatory. Similarly, Model Rule 4.4(a) subjects lawyers to discipline for using "means that have no substantial purpose other than to embarrass, delay, or burden a third person."<sup>38</sup> While it does not expressly use the word "harassment," the conduct prohibited is clearly of the same sort that comes within that word's definition.

## B. "Discrimination"

Discrimination "includes harmful verbal or physical conduct that manifests bias or prejudice towards others."<sup>39</sup> Bias or prejudice can be exhibited in any number of ways, some overlapping with conduct that also constitutes harassment. Use of a racist or sexist epithet with the intent to disparage an individual or group of individuals demonstrates bias or prejudice.

For example, in *In re McCarthy*,<sup>40</sup> a lawyer was suspended for a minimum of thirty days for sending an email message that was deeply offensive and undoubtedly evinced racial bias. In connection with a real estate title dispute, the secretary of the seller's agent sent a message to the lawyer demanding that he take certain action. The lawyer responded, by stating, among other things, that "I am here to tell you that I am neither you [sic] or [your boss's] n\*\*\*\*r."<sup>41</sup> The Indiana Supreme Court found that such remarks "serve only to fester wounds caused by past discrimination and encourage future intolerance."<sup>42</sup> Similarly, the same court found that a lawyer engaged in conduct manifesting bias or prejudice in relation to a personal bankruptcy proceeding by distributing flyers that referred to other counsel in the matter as "'bloodsucking shylocks' who were part of a 'heavily Jewish [sic] . . . reorganization cartel.'"<sup>43</sup>

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<sup>36</sup> *Id.* at 102. *See also* Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Advisory Op. 91-52 (1991) (finding that it was permissible for a lawyer's paralegal to conduct post-trial interviews of jurors, provided that no intimidation or pressure was used).

<sup>37</sup> MODEL RULES R. 7.3(c)(2) (emphasis added).

<sup>38</sup> MODEL RULES R. 4.4(a).

<sup>39</sup> MODEL RULES R. 8.4(g), cmt. [3] (emphasis added). In addition, "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law" may serve as a guide in applying paragraph (g). *Id.*

<sup>40</sup> 938 N.E.2d 698 (Ind. 2010).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (quoting *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005)).

<sup>43</sup> *In re Dempsey*, 986 N.E.2d 816 (Ind. 2013). *See also In re Thomsen*, 837 N.E.2d 1011 (Ind. 2005) (publicly reprimanding lawyer for filing a petition in a divorce action arguing that couple's children were put in "harm's way" by wife's association with an African-American man); *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563 (Minn. 1999) (prosecutor disciplined for filing motion seeking to prohibit defendant's counsel from including a lawyer of color as part of the defense team "for the sole purpose of playing upon the emotions of the jury"); *People v. Sharpe*, 781 P.2d 659, 660, 661 (1989) (prosecutor disciplined for exhibiting racial prejudice against Latinos by stating, in reference to two Latino defendants, that he did not "believe either one of those chili-eating bastards").

As many courts have emphasized, such behavior is unacceptable generally but especially when engaged in by members of the bar. In *In re Charges of Unprofessional Conduct*,<sup>44</sup> for instance, the Minnesota Supreme Court expressed this general judicial perspective: “When any individual engages in race-based misconduct it undermines the ideals of society founded on the belief that all people are created equal. When the person who engages in this misconduct is an officer of the court, the misconduct is especially troubling.”<sup>45</sup> Rule 8.4(g) embodies this principle.

### C. Rule 8.4(g) and the First Amendment

The Committee does not address constitutional issues, but analysis of Rule 8.4(g), as with our analysis of other rules, is aided by constitutional context.<sup>46</sup> For Rule 8.4(g), two important constitutional principles guide and constrain its application. First, an ethical duty that can result in discipline must be sufficiently clear to give notice of the conduct that is required or forbidden. Second, the rule must not be overbroad such that it sweeps within its prohibition conduct that the law protects. Identifying the proper balance between freedom of speech or religion and laws against discrimination or harassment is not a new problem, however. The scope of Rule 8.4(g) is no more or less reducible to a precise verbal formula than any number of regulations of lawyer speech or workplace speech that have been upheld and applied by courts.<sup>47</sup>

Courts have consistently upheld professional conduct rules similar to Rule 8.4(g) against First Amendment challenge. For example, in addressing the constitutional authority of a court of appeals to discipline a lawyer for “conduct unbecoming a member of the bar of the court,” the Supreme Court observed that a lawyer’s court-granted license “requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.”<sup>48</sup> More recently, the Kentucky Supreme Court echoed this message in an opinion concerning Rule 8.2(a), which generally prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judicial or other legal official, stating that regulation of lawyer speech “is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of ‘[t]he license granted by the court.’”<sup>49</sup>

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<sup>44</sup> 597 N.W.2d 563 (Minn. 1999).

<sup>45</sup> *Id.* at 567-68.

<sup>46</sup> *See, e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 490 (2020) (discussing ability-to-pay inquiries required by the due process and equal protection clauses, as interpreted in *Bearden v. Georgia*, 461 U.S. 669 (1983) and its progeny); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 486, at 9 (2019) (discussing Sixth Amendment Right to Counsel rooted “[i]n a series of cases beginning with *Argersinger v. Hamlin*,” 407 U.S. 25 (1972)); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009) (discussing obligations based on *Brady v. Maryland*, 373 U.S. 83 (1963)).

<sup>47</sup> For a discussion of workplace speech limitations upheld against a First Amendment challenge, see Aviel, *supra* note 15, at 48-50. For a discussion of lawyers’ speech and Rule 8.4(g), see Robert N. Weiner, “*Nothing to See Here*”: *Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUBLIC POLICY 125 (2018). *See also infra* note 49.

<sup>48</sup> *In re Snyder*, 472 U.S. 634, 644-45 (1985).

<sup>49</sup> *Ky. Bar Ass’n v. Blum*, 404 S.W.3d 841, 855 (Ky. 2013) (*quoting In re Snyder*) (observing that while a lawyer does not surrender First Amendment rights in exchange for a law license, once admitted, “he must temper his criticisms in accordance with professional standards of conduct”) (*quoting In re Sandlin*, 12 F.3d 861, 866 (9th Cir. 1993)). There are also other Model Rules that curtail attorney speech but are uniformly understood as proper regulatory measures, including, for example, the following: Rule 1.6 (generally prohibiting disclosure of “information relating to the representation of a client”); Rule 3.5(d) (prohibiting a lawyer from “engag[ing] in conduct intended to disrupt a tribunal”); Rule 3.6 (restricting a lawyer’s ability to comment publicly about an investigation or litigation matter in which the lawyer is participating or has participated when the lawyer knows or

Rule 8.4(d)'s prohibition of conduct that is prejudicial to the administration of justice has likewise withstood constitutional challenges based on vagueness and overbreadth arguments, with one court observing that: "The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen."<sup>50</sup> Similarly, in rejecting a vagueness challenge to the prohibition against conduct prejudicial to the administration of justice, the Fifth Circuit stated:

The traditional test for vagueness in regulatory prohibitions is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." . . . The particular context in which a regulation is promulgated therefore is all important. . . . *The regulation at issue herein only applies to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the "lore of the profession."*<sup>51</sup>

There is wide and longstanding acceptance of these principles, given lawyers' status as members of the bar. For example, in upholding the constitutionality of DR 1-102(A)(6), which prohibited a lawyer from engaging "in any other conduct that adversely reflects on [the lawyer's] fitness to practice law," the New York Court of Appeals noted: "As far back as 1856, the Supreme Court acknowledged that 'it is difficult if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed'. . . . Broad standards governing professional conduct are permissible and indeed often necessary."<sup>52</sup>

Furthermore, the fact that it is possible to construe a rule's language to reach conduct protected by the First Amendment is not fatal to its application to unprotected conduct. As observed by Justice Scalia in *Virginia v. Hicks*:

[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct". . . . For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally

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reasonably should know that the comments "have a substantial likelihood of materially prejudicing an adjudicative proceeding"); Rule 4.1 (prohibiting a lawyer from "knowingly mak[ing] a false statement of material fact or law to a third person"); and Rule 7.1 (limiting communications about a lawyer or a lawyer's services to those that are truthful and not otherwise misleading).

<sup>50</sup> *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977), *overruled on other grounds*, by *In re Hutchinson*, 534 A.2d 919 (D.C. 1987) (upholding against a vagueness challenge DR 1-102(A)(5), Rule 8.4(d)'s predecessor).

<sup>51</sup> *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (emphasis added); *see also* *Attorney Grievance Comm'n of Maryland v. Korotki*, 569 A.2d 1224, 1235 (1990) (observing that a professional conduct rule for lawyers need not "meet the standards of clarity that might be required for rules governing the conduct of laypersons") (citations omitted).

<sup>52</sup> *In re Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991) (quoting *Ex Parte Secombe*, 60 U.S. [19 How.] 9, 14 (1857) (citing *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 395 (Minn. 1985), appeal dismissed, 474 U.S. 976 (1985)); *see also In re Knutson*, 405 N.W.2d 234, 238 (Minn. 1987).

unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law “overbroad,” we have insisted that a law’s application to protected speech be “substantial,” not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications . . . before applying the “strong medicine” of overbreadth invalidation.<sup>53</sup>

Rule 8.4(g) promotes a well-established state interest by prohibiting conduct that reflects adversely on the profession and diminishes the public’s confidence in the legal system and its trust in lawyers.<sup>54</sup>

Numerous judicial opinions confirm the significance and legitimacy of a state’s regulatory interest in this area. For instance, the Minnesota Supreme Court has noted that “racially-biased actions” engaged in by lawyers “not only undermine confidence in our system of justice, but also erode the very foundation upon which justice is based.”<sup>55</sup> Similarly, in affirming the public reprimand of a lawyer who made racially disparaging accusations in a court filing, the Indiana Supreme Court stressed that “[i]nterjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole.”<sup>56</sup> The New Jersey Supreme Court expressed the same opinion in *Matter of Vincenti*, observing that:

Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, be it based on race or color, . . . or . . . on gender, or ethnic or national background or handicap, is especially offensive. In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.<sup>57</sup>

Rule 8.4(g) protects specific categories of victims from identified harm, and a violation can only take place when the offending conduct engaged in is “related to the practice of law” and the lawyer knows or reasonably should know that it constitutes harassment or discrimination.

Using these various interpretative principles and applying them in an objectively reasonable manner, a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law. For example, in a case referenced earlier, under Indiana’s version of Rule 8.4(g), a lawyer received a three-year suspension for distributing flyers in relation to personal litigation depicting his

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<sup>53</sup> 539 U.S. 113, 119-20 (2003) (emphasis in original) (citations omitted); *see also* *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (“Assuming for the argument that [the rule prohibiting conduct prejudicial to the administration of justice] might be considered vague in some hypothetical, peripheral application, this does not, as this Court [has] observed, . . . warrant throwing the baby out with the bathwater. To invalidate the regulation in toto, . . . we would have to hold that it is impermissibly vague in all of its applications.”) (citations omitted).

<sup>54</sup> *See supra* note 6 and accompanying text.

<sup>55</sup> *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563, 568 (Minn. 1999).

<sup>56</sup> *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005).

<sup>57</sup> 554 A.2d 470, 474 (N.J. 1989).

adversaries as “slumlords,” calling their counsel “bloodsucking shylocks,” and making various derogatory remarks about Jews generally.<sup>58</sup> Another Indiana lawyer representing a husband in a custody dispute violated that state’s version of Rule 8.4(g) by filing a petition in which he alleged that the wife associated herself “in the presence of a black male, and such association [caused] and [placed] the children in harm’s way.”<sup>59</sup> Similarly, a Colorado lawyer was disciplined for disparagingly referring to a female judge as a “c\*\*t” in the course of negotiating a plea deal with prosecutors.<sup>60</sup>

Each of these examples would likewise violate Model Rule 8.4(g), even if the conduct occurred outside of a court-related setting. It need only take place in a context related to the practice of law, as Comment [4] explains.

### III. Application of Rule 8.4(g) to Hypotheticals

To further illustrate the scope and application of Rule 8.4(g), this section discusses several representative situations.

- (1) A religious organization challenges on First Amendment grounds a local ordinance that requires all schools to provide gender-neutral restroom and locker room facilities.<sup>61</sup> Would a lawyer who accepted representation of the organization violate Rule 8.4(g)?

**No. This situation does not involve the type of conduct covered by Rule 8.4(g). The blackletter text underscores this by explaining that the “paragraph does not limit the ability of a lawyer to *accept, decline or withdraw* from a representation in accordance with Rule 1.16.”<sup>62</sup> In addition, the provision’s next sentence further emphasizes that it “does not preclude legitimate advice or advocacy consistent with these Rules.” Though individuals may disagree with the position the lawyer in the hypothetical would be defending, that would not affect the legitimacy of the representation.**

- (2) A lawyer participating as a speaker at a CLE program on affirmative action in higher education expresses the view that rather than using a race-conscious process in admitting African-American students to highly-ranked colleges and universities, those students would be better off attending lower-ranked schools where they would be more likely to excel. Would the lawyer’s remarks violate Rule 8.4(g)?

**No. While a CLE program would fall within Comment [3]’s description of what constitutes “conduct related to the practice of law,” the viewpoint expressed by the lawyer would not violate Rule 8.4(g). Specifically, the lawyer’s remarks, without more, would not constitute “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . race.” A general point of**

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<sup>58</sup> *In re Dempsey*, 986 N.E.2d 816, 817 (Ind. 2013) (court specifically found that “none of these violations are based on any communication that falls within Respondent’s broad constitutional right to freedom of speech and expression”).

<sup>59</sup> *Thomsen*, 837 N.E.2d at 1012.

<sup>60</sup> *People v. Gilbert*, 2011 WL 10PDJ067, \*10-11 (Colo. O.P.D.J. Jan. 14, 2011).

<sup>61</sup> *Cf. Texas Att’y Gen. Op. KP-0123* (Dec. 20, 2016).

<sup>62</sup> MODEL RULES R. 8.4(g) (emphasis added).

view, even a controversial one, cannot reasonably be understood as harassment or discrimination contemplated by Rule 8.4(g). The fact that others may find a lawyer's expression of social or political views to be inaccurate, offensive, or upsetting is not the type of "harm" required for a violation.

- (3) A lawyer is a member of a religious legal organization, which advocates, on religious grounds, for the ability of private employers to terminate or refuse to employ individuals based on their sexual orientation or gender identity.<sup>63</sup> Will the lawyer's membership in this legal organization constitute a violation of Rule 8.4(g)?

**No. As with the prior hypothetical, Rule 8.4(g) does not forbid a lawyer's expression of his or her political or social views, whether through membership in an organization or through oral or written commentary. Furthermore, to the extent that such conduct takes the form of pure advocacy it would not qualify as sufficiently "harmful" or targeted. Moreover, even though the Supreme Court has now recognized that discrimination based on sexual orientation and gender identity violates Title VII,<sup>64</sup> it is not a violation of Rule 8.4(g) to express the view that the decision is wrong.**

- (4) A lawyer serving as an adjunct professor supervising a law student in a law school clinic made repeated comments about the student's appearance and also made unwelcome, nonconsensual physical contact of a sexual nature with the student. Would this conduct violate Rule 8.4(g)?

**Yes. This is an obvious violation and demonstrates the importance of making the scope of the provision broad enough to encompass conduct that may not necessarily fall directly within the context of the representation of a client.<sup>65</sup>**

- (5) A partner and a senior associate in a law firm have been tasked with organizing an orientation program for newly-hired associates to familiarize them with firm policies and procedures. During a planning session, the partner remarked that: "Rule #1 should be never trust a Muslim lawyer. Rule #2 should be never represent a Muslim client. But, of course, we are not allowed to speak the truth around here." Do the partner's remarks violate Rule 8.4(g)?

**Yes. Even if one assumes that the associate was not Muslim, the comments violate Rule 8.4(g).<sup>66</sup> The partner's remarks are discriminatory in so far as they are harmful and manifest bias and prejudice against Muslims. Furthermore, the partner surely knew or reasonably should have known this. In addition, the fact that the comments may not have been directed at a specific individual would not insulate the lawyer from discipline; though, in many instances, the offending conduct will be targeted towards**

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<sup>63</sup> See *Cf.* Texas Att'y Gen. Op. KP-0123 (Dec. 20, 2016).

<sup>64</sup> See *Bostock v. Clayton County*, 590 U.S. \_\_\_ (2020); see also *supra* note 11.

<sup>65</sup> See *In re Griffith*, 838 N.W.2d 792 (Minn. 2013) (lawyer suspended for ninety days and required to petition for reinstatement for engaging in unwelcome verbal and physical sexual advances towards a student the lawyer was supervising in a law school clinic); see also *id.* at 793-96 (Lillenhaug, J., dissenting) (maintaining that more severe discipline was warranted in light of the egregious nature of the misconduct).

<sup>66</sup> *Cf. In re McCarthy*, 938 N.E.2d 698 (Ind. 2010); see also *supra* text accompanying notes 40-42.



someone who falls within a protected category. Because the remarks were made within the law firm setting, they were “related to the practice of law.” Moreover, given the supervisory-subordinate nature of the partner’s relationship to the associate, the remarks may influence how similarly-situated firm lawyers treat clients, opposing counsel, and others at the firm who are Muslim.

#### IV. Conclusion

Model Rule 8.4(g) prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassing or discriminatory. Whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is found harmful will be grounds for discipline.

Rule 8.4(g) covers conduct that occurs outside the representation of a client or beyond the confines of a courtroom. In addition, it is not restricted to conduct that is severe or pervasive, a standard utilized in the employment context. However, and as this opinion explains, conduct that violates paragraph (g) will often be intentional and typically targeted at a particular individual or group of individuals, such as directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature.

The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit in any way a lawyer’s speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer’s expression does not establish a violation. The Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.

Besides being advocates and counselors, lawyers also serve a broader public role. Lawyers “should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”<sup>67</sup> Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. Enforcement of Rule 8.4(g) is therefore critical to maintaining the public’s confidence in the impartiality of the legal system and its trust in the legal profession as a whole.

**Abstaining:** Hon. Goodwin Liu.

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<sup>67</sup> MODEL RULES Preamble [6].

**Exhibit G. *Iowa Supreme  
Court Disciplinary Board  
v Watkins, 944 N.W.2d  
881 (June 19, 2020)***

**IN THE SUPREME COURT OF IOWA**

No. 19-1438

Filed June 19, 2020

**IOWA SUPREME COURT ATTORNEY DISCIPLINARY BOARD,**

Appellee,

vs.

**ABRAHAM K. WATKINS,**

Appellant.

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On appeal from the report of the Iowa Supreme Court Grievance Commission.

The grievance commission recommends the suspension of an attorney's license for thirty days based on the attorney's sexual harassment. **LICENSE SUSPENDED.**

Alfredo Parrish and Gina Messamer of the Parrish Law Firm, Des Moines, for appellant.

Tara van Brederode and Amanda K. Robinson (until withdrawal) and Allison A. Schmidt, Des Moines, for appellee.

**CHRISTENSEN, Chief Justice.**

This case involves an Iowa attorney who was nearly removed from elected office as the Van Buren county attorney because of his sexual harassment. A district court judge ordered him removed. This court reversed the district court because of the high legal burden for removal under Iowa Code section 66.1A. Subsequently, the Iowa Supreme Court Attorney Disciplinary Board (Board) charged the attorney with a violation of Iowa Rule of Professional Conduct 32:8.4(g), which prohibits an attorney from engaging in sexual harassment, and recommended a six-month suspension. The parties reached a factual stipulation, agreeing that the charged violation occurred. The Iowa Supreme Court Grievance Commission (commission) recommended the attorney's license be suspended for thirty days.

The attorney challenges the commission's recommended sanction and requests a public reprimand instead. Upon our de novo review, we conclude that the attorney violated rule 32:8.4(g). We disagree with the commission's recommended sanction of thirty days and suspend the attorney's license to practice law for an indefinite period with no possibility of reinstatement for six months from the filing of this opinion.

**I. Factual and Procedural Background.**

Abraham Watkins graduated from law school in 2004. He was not a licensed attorney and primarily supported himself by playing poker until he and his wife, Renee, decided to move to Iowa in 2012. Watkins was sworn into the Iowa bar in May 2013 and began practicing law for the first time when he opened a solo practice in Keosauqua, Iowa. Watkins operated this practice out of an office located on the main level of his two-story family home with the assistance of Renee, who served as his office

manager. In September 2014, Watkins hired Jane Doe,<sup>1</sup> who was then twenty years old, as a legal assistant. Two months later, Watkins was elected as the Van Buren county attorney, and he assumed office on January 1, 2015.

The Van Buren county attorney is a part-time position. Thus, Watkins split his time between his work as the Van Buren county attorney and his private law office, operating both out of his home. Renee and Doe also began splitting their time between the county attorney's office and Watkins's private law office. As Doe's work expanded, she began working longer hours and performing personal tasks for Watkins such as picking up his medical prescriptions, ordering and retrieving his lunch, and babysitting his children. Doe would also socialize with the Watkins family, occasionally eating dinner with them and taking trips with them.

In April 2015, Watkins hired a female part-time assistant county attorney (ACA). Watkins, Renee, Doe, and the ACA all continued to work out of the main level of Watkins's family home with the approval of the county board of supervisors. During this time, Watkins consumed alcohol heavily outside of the workplace. Tensions continued to escalate in the office between staff members, especially as Watkins and the ACA disagreed on work matters and Renee grew tired of Watkins's drinking habits. Watkins would frequently argue with the ACA and Renee in the office.

In August 2016, Renee left with their children to visit her family in North Carolina because she was frustrated with Watkins's drinking habits. Watkins took this as a sign that he needed help and was later hospitalized for his alcohol abuse. He later contacted Hugh Grady from the Iowa Lawyers Assistance Program, who recommended various steps for Watkins

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<sup>1</sup>We do not refer to Watkins's victims by name out of respect for their privacy and a desire to preserve their anonymity.

to take to address his alcohol abuse. Watkins took these steps and has maintained his sobriety since August 2016.

On August 9, approximately two years after she began working for Watkins, Doe submitted a letter of resignation to Watkins, resigning from all of her responsibilities as his legal assistant. She stated in her letter, “I have learned many things in my time here, including what makes a hostile work environment.” She also wrote, “Due to aberrant behavior and a hostile work environment, I no longer can continue my position and feel confident about coming into work.”

Additionally, Doe prepared a list of complaints regarding Watkins that totaled approximately fifty-five examples over her two years of working with Watkins. Many of these complaints involved her frustration with the menial work tasks Watkins gave her and the way he made her feel inferior to him. These complaints included “criticizing me in front of customers,” “constant yelling between him [and] Renee,” “the importance of him [and] not us,” and “[he] very often expected me to figure [work] out then remind me I didn’t go to law school.”

Several of the complaints involved the sexual-harassment allegations at issue in this case. Watkins appeared before Doe on at least two occasions wearing only his boxer briefs. He told Doe that “he just wished he had a wife that had sex with him all the time,” and he was glad he kept naked pictures of his former girlfriends. Watkins made a sexually driven “joke” about a floor cleaner called “Bona” in the presence of Doe and the women who were cleaning his office.

In reference to a female client, Watkins told Doe, “Man, I wouldn’t want to see her naked.” In discussing a courthouse employee, Watkins told Doe that he needed to see if she “wore a padded bra or if her boobs were really that big.” He referred to a local attorney as “T.Queef,” which is

a term that describes the emission of air from the vagina. Moreover, Watkins told Doe that her “boobs [were] distracting him” and that she should wear that same shirt if she “ever went clubbing.” He also asked Doe on multiple occasions if “her vagina was still broke” after she missed work for a gynecology appointment.

Watkins also showed Doe and the ACA private images of his wife. Specifically, he showed Doe a picture on his cell phone of his wife’s vagina. He also showed her a video of his wife squirting breast milk in the back seat of Doe’s vehicle. Watkins kept nude photographs of his wife on his computer, and he showed the ACA one of these photos in which his wife was pregnant, nude, and covered in blue paint.

The ACA forwarded Doe’s letter of resignation to the Van Buren county auditor, who then notified the Van Buren County Board of Supervisors. Following the board of supervisor’s investigation and two closed sessions to discuss the allegations and how to handle them, the board filed a petition in district court seeking to remove Watkins from office pursuant to Iowa Code sections 66.11 and 331.754(4) (2015). The removal petition cited five separate grounds, including one ground that he created a “hostile work environment” that involved sexual harassment.<sup>2</sup>

The district court issued its ruling on January 3, 2017, following a trial that occurred intermittently over the course of several months. The district court ordered Watkins’s removal from the Office of Van Buren County Attorney based solely upon the sexual-harassment claim, crediting the testimony of Doe and the ACA, in addition to the testimony of other

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<sup>2</sup>In addition to the sexual harassment allegation, the petition alleged that Watkins supplied a minor with alcohol in violation of Iowa Code sections 123.47(1) and 123.47(2)(a), engaged in retaliation, accepted three private-practice cases that created a conflict of interest with his position as county attorney, and had been intoxicated in violation of Iowa Code section 66.1A(6). The district court’s removal ruling was based solely on the sexual-harassment ground in the petition.

witnesses who heard Watkins make inappropriate statements of a sexual nature and whom Watkins offered to show naked pictures of his wife.

The district court concluded Watkins engaged in misconduct or maladministration by regularly committing sexual harassment. It also determined that this misconduct was willful. The district court reasoned,

Mr. Watkins's inappropriate conduct was pervasive and existed over a significant period of time thereby negating any claim of mistake or an isolated lapse of judgment. His actions were clearly intentional. As a lawyer he knew better but continued to subject his two young female employees to sexually related banter, and in some instances images, that have no place in the work setting. This is especially true for a county attorney's office. Given the extent and stunning nature of his conduct one can, and in the Court's opinion must, infer that he was acting with a bad or evil purpose. Therefore, the State has established that his conduct was willful.

Watkins appealed the decision, and our court retained the appeal. In a 4–3 decision with no majority opinion, our court reversed the district court's removal decision due to the high burden required to remove an elected official from office. *See State v. Watkins*, 914 N.W.2d 827, 847 (Iowa 2018) (plurality opinion); *id.* at 848 (Appel, J., concurring specially). Consequently, Watkins was restored to the part-time position of Van Buren county attorney. The voters of Van Buren County did not reelect him to the position in 2018. Watkins maintains his private law office in Keosauqua, although he lives in Des Moines and commutes to Keosauqua as necessary.

The Iowa Supreme Court Attorney Disciplinary Board filed a complaint against Watkins on December 18, 2018. The Board's complaint alleged Watkins violated Iowa Rule of Professional Conduct 32:8.4(g) by engaging in sexual harassment in the practice of law based on the incidents at issue in Watkins's removal action. The parties entered into a



stipulation of facts and agreed to the rule violation. They also stipulated to the admission of an expanded record, including transcripts of testimony offered in the removal proceeding.

The commission issued its findings and recommendation on August 30, 2019, in which it found the violation of rule 32:8.4(g) was factually supported. The commission recommended that we suspend Watkins's license for thirty days. In doing so, the commission found the following mitigating factors: Watkins's lack of prior disciplinary action, his cooperation with the disciplinary process, the steps he took to address his alcoholism, and the counseling efforts he engaged in aimed at addressing the behaviors underlying his ethical violation. The commission also found aggravating factors existed in that Watkins's behavior was not confined to an isolated incident, his harassment took place at the victims' place of work under Watkins's supervision, some of Watkins's harassment took place while he was the Van Buren county attorney, and there was a power imbalance between Watkins and Doe. On appeal, Watkins requests a public reprimand in lieu of a suspension, while the Board recommends a six-month suspension.

## **II. Standard of Review.**

We generally review attorney disciplinary proceedings de novo. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stansberry*, 922 N.W.2d 591, 593 (Iowa 2019). The Board must prove any alleged misconduct by a convincing preponderance of the evidence, which "is less than proof beyond a reasonable doubt, but more than the preponderance standard required in a civil case." *Id.* "[T]he parties are bound by the stipulated facts, 'which we interpret with reference to their subject matter and in light of the surrounding circumstances and the whole record.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Nine*, 920 N.W.2d 825, 828 (Iowa 2018) (quoting

*Iowa Supreme Ct. Att’y Disciplinary Bd. v. Johnson*, 884 N.W.2d 772, 777 (Iowa 2016)). However, “we are not bound by the attorney’s stipulation to an ethical violation or the commission’s recommended sanction.” *Id.*

### **III. Ethical Violation.**

Iowa Rule of Professional Conduct 32:8.4(g) establishes that it is professional misconduct for an attorney to “engage in sexual harassment or other unlawful discrimination in the practice of law.” Iowa R. Prof’l Conduct 32:8.4(g). We define “sexual harassment” broadly, and it “encompasses ‘any physical or verbal act of a sexual nature that has no legitimate place in a legal setting.’ ” *Stansberry*, 922 N.W.2d at 597 (quoting *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 604 (Iowa 2015)). We do not require the sexually harassing conduct to be unwelcome or “more than an occasional stray comment.” *Moothart*, 860 N.W.2d at 604. An attorney may violate this rule “even if there is no attorney–client relationship between the lawyer and the person subject to sexual harassment, as long as the attorney is engaged in the practice of law.” *Id.* at 603. This includes the sexual harassment of “witnesses, court personnel, law partners, law-office employees, or other third parties that come into contact with a lawyer engaged in the practice of law.” *Id.*

Our past attorney disciplinary cases regarding sexual harassment have generally involved attorneys who engage in behaviors that could be considered “come-ons”—conduct like making sexual advances, requesting sexual favors, or engaging in other acts of an overtly sexual nature. See, e.g., *id.* at 602–04. Nevertheless, sexual harassment also encompasses what could be considered “put downs,” in the form of gender harassment that is aimed at degrading or demeaning women, often to maintain gender hierarchy. Louise F. Fitzgerald & Lilia M. Cortina, *Sexual Harassment in Work Organizations: A View From the Twenty-First Century*, in 1 APA

*Handbook of Psychology of Women* 6–7 (Cheryl B. Travis & Jacquelyn W. White, eds., 2018) [hereinafter Fitzgerald & Cortina]; see Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. Chi. Legal F. 227, 231–33 [hereinafter Soucek & Schultz].

The “‘[g]arden variety’ gender harassment . . . includes ‘woman bashing’ jokes, insults about [women’s] incompetence, the irrelevance or sexual unattractiveness of older women, and comments that women have no place in certain kinds of jobs.” Fitzgerald & Cortina at 7. In a “more pernicious form,” it includes “referring to women by degraded names for body parts, pornographic images, [and] crude comments about female sexuality or sexual activity.” *Id.* This discrimination does not require an individual woman to serve as its target or unwanted sexual overtures, nor does it need to be explicitly linked to any job or consideration. *Id.* at 7–8, 26.

Watkins’s behavior in this case virtually ran the whole gamut of the actions mentioned above. For example, Watkins made a sexually driven “joke” about a floor cleaner called “Bona” in the presence of Doe and the women who were cleaning his office. In reference to a female client, Watkins told Doe, “Man, I wouldn’t want to see her naked.” On another occasion, he told Doe that he needed to see if a certain courthouse employee “wore a padded bra or if her boobs were really that big.” He referred to a local female attorney as “T.Queef,” which is a term that describes the emission of air from the vagina.

Moreover, he told Doe that her “boobs [were] distracting him” and that she should wear that same shirt if she “ever went clubbing.” Watkins also asked Doe on multiple occasions if “her vagina was still broke” after she missed work once for a gynecology appointment. Further, Watkins told Doe that “he just wished he had a wife that had sex with him all the

time” and that he was glad he collected and kept naked pictures of his former girlfriends.

Watkins showed Doe a picture on his cell phone of his wife’s vagina. On another occasion, Watkins showed Doe a video of his wife squirting breast milk in the back seat of Doe’s vehicle. Watkins also kept naked photographs of his wife on his computer, and he showed the ACA one of these photos in which his wife was pregnant, nude, and covered in blue paint. Additionally, Watkins appeared before Doe wearing only his boxer briefs on at least two occasions. Based on these facts, we agree with the commission that Watkins violated rule 32:8.4(g).

#### **IV. Sanction.**

Having concluded Watkins violated rule 32:8.4(g), we must now determine the appropriate sanction for his unethical conduct. The commission recommended a thirty-day suspension. On appeal, the Board recommends a six-month suspension, while Watkins requests a public reprimand in lieu of any suspension.

In determining the proper sanction for a violation of our rules of professional conduct, we examine “the nature of the violations, protection of the public, deterrence of similar misconduct by others, the lawyer’s fitness to practice, and [our] *duty to uphold the integrity of the profession in the eyes of the public.*” *Stansberry*, 922 N.W.2d at 598 (emphasis added) (quoting *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Powell*, 726 N.W.2d 397, 408 (Iowa 2007)). “We also consider any aggravating or mitigating circumstances.” *Id.* As Watkins notes, his case differs from past sexual-harassment cases because “this is the first ‘sexual harassment’ disciplinary case before the Court that does *not* involve an attorney propositioning a client, touching a client, or taking some other inappropriate action for the attorney’s own sexual gratification.” Thus,

our prior disciplinary cases involving sexual harassment may be instructive, but their relevance is diminished. *Cf. Iowa Supreme Ct. Att’y Disciplinary Bd. v. Carpenter*, 781 N.W.2d 263, 270 (Iowa 2010) (“There is no standard sanction for a particular type of misconduct, and though prior cases can be instructive, we ultimately determine an appropriate sanction based on the particular circumstances of each case.”).

Our duty to uphold the integrity of the legal profession extends to all forms of sexual harassment as expressly prohibited in rule 32:8.4(g). Sexual harassment in any form can have devastating effects for the women who experience it. In the legal profession, surveys reveal a gender-harassment problem in law firms so serious that “nine in ten harassment victims [at law firms] had experienced sex-based or gender harassment” that did not involve sexual advances. Soucek & Schultz at 235. In a 2018 survey of 3000 businesses and law firms, sixty-eight percent of the female respondents reported experiencing sexual harassment. Hannah Hayes, *Is Time Really Up for Sexual Harassment in the Workplace? Companies and Law Firms Respond*, 26 Perspectives, Dec.–Jan. 2019, at 3, 3.

The effects of this type of sexual harassment have long been recognized. See Catharine A. MacKinnon, *Sexual Harassment of Working Women* 47, 51 (1979) [hereinafter MacKinnon] (Sexual harassment leaves women “feel[ing] humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry” and often “totally shatter[s]” a woman’s confidence in her job performance.). Yet, when “[f]aced with the spectre of unemployment, discrimination in the job market, and a good possibility of repeated incidents elsewhere, women usually try to endure” the harassment. *Id.* at 52; see also Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp’t Opportunity Comm’n, *Select Task Force on the Study of Harassment in the Workplace* (June 2016), <https://www.eeoc.gov/select->

task-force-study-harassment-workplace [https://perma.cc/4XYG-B265] (“The least common response to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint.”). That Watkins’s conduct did not involve the type of self-gratifying sexual harassment involved in our prior cases does not lessen its gravity.

Some states have imposed severe sanctions for similar behavior. For example, the Ohio Supreme Court suspended an attorney’s license to practice law in Ohio for one year for behavior similar to Watkins’s with the final six months of the suspension stayed on the condition that he engage in no further misconduct. *Disciplinary Counsel v. Skolnick*, 104 N.E.3d 775, 778 (Ohio 2018). There, the attorney verbally harassed his paralegal for more than two years by calling her names, insulting her appearance, making fun of her husband and her mother, criticizing her education level in front of other attorneys, falsely telling an African-American client that the paralegal did not like black people, and remarking that she and another female employee should perform a sexual gesture on him so he could rate their performances. *Id.* at 776.

Similarly, the Colorado Supreme Court suspended an attorney’s license for one year and one day for inflicting “vulgar, degrading non-consensual sexually abusive conduct” on his employees. *People v. Lowery*, 894 P.2d 758, 758, 761 (Colo. 1995) (en banc) (per curiam). While the attorney in that case also engaged in other acts of sexual misconduct, such as kissing employees, the Colorado Supreme Court found the attorney’s verbal abuse of the women just as problematic as the nonconsensual physical contact. *Id.* at 760–61.

The Kansas Supreme Court suspended a judge for ninety days who had a history of making highly inappropriate, sexually suggestive

comments to women with whom he worked. *In re Henderson*, 343 P.3d 518, 520–21, 529 (Kan. 2015) (per curiam). These included telling a female prosecutor that when his wife gave birth, the doctor asked if he wanted an extra stitch in his wife for his pleasure; talking about sexual tension between this prosecutor and a witness in a trial; stating that another female prosecutor liked to have sex; inquiring whether this prosecutor was pregnant after returning from vacation; and commenting that his female court reporter’s back hurt because she had been with her boyfriend all weekend. *Id.* at 520–22. While there was other misconduct, including an improper ex parte communication to have a disfavored attorney removed from an appointment list, *id.* at 524, the harassment bears resemblance to that in the present case. These cases support a significant sanction for Watkins’s conduct.

While the parties stipulated to the facts regarding the aggravating and mitigating circumstances, we are not bound by their stipulations of law. *See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Lynch*, 901 N.W.2d 501, 511 n.5 (Iowa 2017). Upon de novo review, our aggravating and mitigating factors do not mirror the commission’s factors. In fact, there are several aggravating factors in this case that support the Board’s requested six-month suspension.

**A. Aggravating Factors.** We note the following aggravating factors: (1) Watkins’s failure to accept responsibility and his continuous downplaying of his behavior, (2) Watkins’s claimed ignorance that his behavior was inappropriate, (3) Watkins’s position as the elected county attorney, (4) the power imbalance between Watkins and Doe, and (5) the harm caused to Doe.

1. *Watkins’s failure to accept responsibility.* While Watkins claims he has accepted responsibility for his sexual harassment and has worked

to address the issue that caused the mentality behind his gender discrimination, his public apology and characterization of his behavior in this case suggest otherwise. *See Stansberry*, 922 N.W.2d at 600 (holding it was an aggravating factor that the attorney accused of misconduct “minimized his crimes, placed blame elsewhere, and failed to acknowledge his wrongdoing”). Notably, in his public apology, he merely referred to his behavior as “careless.” An example of being careless is when you forget to turn off the coffee pot before leaving work. Watkins’s behavior cannot be classified as careless.

In this case, Watkins tries to downplay his harassing conduct by arguing that most of his conduct at issue “consisted of one-off comments, most of which were intended to be humorous,” and “[t]here must be some tolerance for tasteless jokes when there is no evidence that the jokes were intended as come-ons or to be abusive.” Further, he defends his behavior by noting that Doe didn’t object to his comments. Humor, like “tasteless jokes”—as Watkins characterizes most of his behavior—trivializes sexual harassment. MacKinnon at 52. It also places women in the catch-22 situation of either tolerating this harassment or telling their employer about their discomfort at the risk of job retaliation. It should not be the victim’s responsibility to speak up when being sexually harassed at work.

To be clear, there is no “preferred” form of sexual harassment. That Watkins engaged in degrading gender discrimination rather than making sexual advances on women does not lessen the egregiousness of his behavior. Nonetheless, as we have already explained, sexual harassment encompasses both put-downs and come-ons. It also includes behaviors such as “jokes” at a woman’s expense, inappropriate comments about a woman’s attractiveness, offensive names for female body parts,



pornographic images, and repugnant comments about female sexuality. Watkins's misconduct encompassed most of this behavior.

Doe and the ACA are no less the victims of Watkins's harassment just because the comments, photographs, and video largely were directed at or featured other women. Despite Watkins's claim that his inappropriate behavior was only "sporadic," he created a toxic workplace culture that made it harder for these women to do their jobs.

2. *Watkins's proclaimed ignorance that his behavior was inappropriate.* We also find it troubling that Watkins excuses his behavior by noting that his conduct occurred before the #MeToo movement. Watkins explains, "[I]t may seem commonsense that [his] comments were out-of-line. But this issue was not yet at the forefront of the American consciousness, and certainly was not yet at the forefront of Mr. Watkins'[s] consciousness."

Perhaps Watkins only recently figured out that his behavior is repugnant, but sexual harassment has existed for centuries. Reva B. Siegel, *A Short History of Sexual Harassment, in Directions in Sexual Harassment Law* 1, 3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003). The #MeToo movement is not the first time that sexual harassment has been brought to the forefront of the American consciousness in popular culture. High-profile sexual-harassment charges involving famous men gripped the nation's attention in the '90s and subsequent stories of famous men who sexually harass women have continued to make news. See Danielle Kurtzleben, *The Trailblazers and Turning Points Along the Road to #MeToo*, Wash. Post, July 5, 2019, (Outlook), [https://www.washingtonpost.com/outlook/the-trailblazers-and-turning-points-along-the-road-to-metoo/2019/07/05/5a027b42-9457-11e9-b570-6416efdc0803\\_story.html](https://www.washingtonpost.com/outlook/the-trailblazers-and-turning-points-along-the-road-to-metoo/2019/07/05/5a027b42-9457-11e9-b570-6416efdc0803_story.html) [https://perma.cc/RLW2-ELQP]; Peter

Weber, *The Depressingly Long History of Sexual Harassment Turning Points*, The Week, Nov. 27, 2017, (Analysis) <https://theweek.com/articles/738873/depressingly-long-history-sexual-harassment-turning-points> [<https://perma.cc/HF3N-HTKP>].

Since 1964, employees have had the option to bring legal action against employers who subject employees to unwanted sexual advances due to the enactment of Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. § 2000e-2 (2012). In the decades since, the legal community's knowledge and understanding of sexual harassment in the workplace has grown. In 1986, the United States Supreme Court recognized sexual harassment as a violation of Title VII of the Civil Rights Act of 1964. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67–68, 106 S. Ct. 2399, 2406 (1986). Our definition of “sexual harassment” in attorney disciplinary cases is broader than the employment standard under Title VII, and we are not analyzing whether Watkins's behavior was sufficient to establish a Title VII claim. See *Moothart*, 860 N.W.2d at 603–04 (declining to adopt “a narrow definition of sexual harassment borrowed largely from employment law”). Yet, we note these basic legal concepts involving sexual harassment because, as an attorney, it seems implausible that Watkins's behavior stemmed from his claimed ignorance.

3. *Watkins's position as the elected Van Buren county attorney.* The district court in Watkins's removal decision said it best when it stated, “Many people, probably most, would consider much of [Watkins's] conduct to be outrageous or even shocking. The fact that Mr. Watkins is an attorney trained in the law makes his behavior all the more troublesome.” *Watkins*, 914 N.W.2d at 836 (plurality opinion). Frankly, one need not have any legal training to know, for example, that you should not show

your female employee a picture of your wife's vagina as Watkins did to Doe in this case.

Though Watkins's actions were not criminal, it is an aggravating factor that he was an elected county attorney at the time of at least some of his sexual harassment. *See Stansberry*, 922 N.W.2d at 600 (noting an attorney's position as an assistant county attorney at the time of his acts was an aggravating factor); *Comm. on Prof'l Ethics & Conduct v. Tompkins*, 415 N.W.2d 620, 623 (Iowa 1987) (noting an attorney's misconduct was "particularly egregious" in light of his tenure as county attorney). "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 a lawyer." Iowa R. of Prof'l Conduct 32:8.4 cmt. [5]. Watkins was the very person tasked to seek justice for victims of sex crimes and domestic abuse, yet he cultivated and maintained a culture of disrespect for women within his own office. The public and our profession expects and deserves better from its elected county attorneys.

4. *The power imbalance between Watkins and Doe.* The power imbalance between Watkins and Doe is also an aggravating factor, especially given Watkins's supervisory role over Doe. *See Stansberry*, 922 N.W.2d at 597 (holding an attorney violated the rule of professional misconduct against sexual harassment in part by victimizing attorneys who had lower seniority than him in the county attorney's office). At the time, Doe was a young, inexperienced legal assistant. At its core, sexual harassment is "an issue of power," in which those in power use their status in the powerful group at the expense of those outside of that group. MacKinnon at 173. When an employer such as Watkins abuses his position of power and authority over his female employees to denigrate their positions and their very existence as women, he is maintaining a

workplace that serves to keep women from succeeding in their professions. This has a profound impact on the integrity of the legal profession.

5. *The harm Watkins caused to Doe.* Doe resigned from her work with Watkins due to his poor treatment of her, which included but was not limited to Watkins's sexual harassment. Keosauqua and Van Buren County as a whole are small in terms of population. There is not a wide range of employment opportunities in a rural community for a young woman subjected to gender discrimination. This leaves her in a particularly vulnerable position, especially when the gender discrimination involves an elected county official. Doe relinquishing her employment because of Watkins's behavior is yet another aggravating factor in this case. *See Stansberry*, 922 N.W.2d at 600 (“[W]e also consider the harm caused by the attorney’s misconduct as an aggravating factor.”).

#### **B. Mitigating Factors.**

1. *Mitigating factors considered.* The only mitigating factors we consider in this case are Watkins's cooperation in the disciplinary process and the steps that Watkins took to address his past unprofessional behaviors, including his treatment for alcoholism. Watkins cooperated fully with the ethics proceeding and stipulated to his rule violation. He also attends individual and marital counseling to address his personal and marital issues. Finally, while we commend Watkins for his success in treating his alcoholism and consider it a mitigating factor, we do not weigh this factor heavily because Watkins denies being intoxicated during the work hours and the record does not support a finding that his sexual harassment was directly linked to his intoxication. *Cf. Iowa Supreme Ct. Att’y Disciplinary Bd. v. Clarity*, 838 N.W.2d 648, 661 (Iowa 2013) (“To be considered in mitigation, the alcoholism must have contributed to the ethical misconduct . . .”).

2. *Mitigating factors the commission erroneously considered.* The commission erroneously considered certain factors in mitigation, such as Watkins’s lack of prior attorney discipline. Watkins was new to the practice of law at the time of his misconduct, so he did not have much of an opportunity to warrant disciplinary action prior to the misconduct at issue. As we noted in *Iowa Supreme Court Attorney Disciplinary Board v. Sears*, the absence of prior discipline “does not weigh heavily” when the attorney being disciplined has little experience to begin with in the practice of law. 933 N.W.2d 214, 225 (Iowa 2019).

Nor do we consider Watkins’s lack of experience a mitigating factor. It does not require legal experience to treat employees with basic respect in a nondiscriminatory fashion. Watkins’s inexperience did not cause him to engage in sexual harassment.

3. *Watkins’s proffered additional mitigating factor.* We reject Watkins’s argument on appeal that we should consider the seventeen months he was removed from his duties as county attorney during the course of his removal case as a mitigating factor because he “has already been punished for his actions.” Watkins’s county attorney position was only part-time, and he continued to practice law in his private practice throughout the course of his removal case. Any reduction in Watkins’s private practice during that seventeen-month period due to his tarnished reputation was the result of his own behavior. In any event, our “[a]ttorney disciplinary proceedings are not designed to punish the offender.” *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 378 (Iowa 2005) (quoting *Comm. on Prof’l Ethics & Conduct v. Vesole*, 400 N.W.2d 591, 593 (Iowa 1987)). Instead, we determine an attorney’s sanction by examining “the nature of the violations, protection of the public, deterrence of similar misconduct by others, the lawyer’s fitness to practice, and [our]

duty to uphold the integrity of the profession in the eyes of the public.” *Stansberry*, 922 N.W.2d at 598 (quoting *Powell*, 726 N.W.2d at 408).

**C. Summary of Our Analysis.** Watkins created and fostered a culture of sexual harassment that persisted for two years. Doe had the courage to resign and speak up about Watkins’s behavior. Much of Watkins’s misconduct reads like textbook examples of what not to do in the workplace. He abused the public’s trust and confidence as an elected official and the county attorney tasked with seeking justice for victims of other forms of harassment. He undermined the virtues that we hold in high regard within the legal profession.

Despite his admitted embarrassment over the public backlash he received during his removal proceedings, Watkins still continues to minimize and make excuses for his behavior. The commission’s thirty-day suspension sends the message that sexual harassment in the form of gender discrimination is less harmful than other forms of sexual harassment, which have received harsher sanctions. Sexual harassment in all forms is unacceptable and unethical.

In *Stansberry*, our most recent attorney disciplinary case involving sexual harassment, we sanctioned an assistant county attorney with a one-year suspension after he engaged in sexual harassment by secretly photographing female coworkers’ undergarments in the office and photographing and stealing underwear from one coworker’s home. *Id.* at 594, 601. We concluded that attorney violated three different rules of professional conduct, including rule violations for sexual harassment, misleading a law enforcement investigation, and his criminal convictions for the trespass of his coworker’s home and the theft of her underwear. *Id.* at 596–98.

Unlike Stansberry, Watkins did not engage in criminal conduct. However, there are still several aggravating factors in this case that overlap with those we considered in determining Stansberry's sanction. These include the power imbalance of the attorney over Doe in a supervisory capacity, the attorney's position in a county attorney's office, the attorney's minimization of his acts and placing the blame elsewhere, and the harm caused by the attorney's misconduct that included Doe leaving her job. *See id.* at 599–600. Watkins's misconduct did not result in a criminal conviction or more than one disciplinary charge to warrant a one-year suspension, but this is still a rare case of first impression involving the extraordinary circumstances in which a county attorney was nearly removed from elective office due to his shocking and repeated displays of sexual harassment. We must take that into account in our decision to sanction Watkins.

We have a “duty to uphold the integrity of the profession in the eyes of the public.” *Id.* at 598 (quoting *Powell*, 726 N.W.2d at 408). Sexual harassment is a problem in our profession, and our sanction in this case needs to reflect the seriousness of this problem to deter similar misconduct by other attorneys and “uphold the integrity of the profession in the eyes of the public.” *Id.* (quoting *Powell*, 726 N.W.2d at 408). We have repeatedly stated our intention in discipline cases “to achieve consistency with our prior cases when determining the proper sanction.” *See, e.g., Iowa Supreme Ct. Att’y Disciplinary Bd. v. Templeton*, 784 N.W.2d 761, 769 (Iowa 2010). Our holding today sets the precedent for similar cases in the future. The proper sanction in this case is the suspension of Watkins's license to practice law for an indefinite period with no possibility of reinstatement for six months from the filing of this opinion.

**V. Disposition.**

We suspend Watkins's license to practice law in Iowa for an indefinite period with no possibility of reinstatement for six months from the date of filing of this opinion. Watkins must comply with the notification requirements of Iowa Court Rule 34.24. To establish his eligibility for reinstatement, Watkins must file an application for reinstatement meeting all applicable requirements of Iowa Court Rule 34.25. We tax the costs of this action to Watkins in accordance with Iowa Court Rule 36.24(1).

**LICENSE SUSPENDED.**

All justices concur except Waterman, J., who takes no part.