

# MEMORANDUM

June 4, 2021

## **COSAC Proposal to Amend Rule 8.4(g) of the New York Rules of Professional Conduct**

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The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC is proposing amendments to New York Rule of Professional Conduct Rule 8.4(g), which governs discrimination in the practice of law. COSAC’s proposed amendments differ significantly from ABA Model Rule 8.4(g), which the Office of Court Administration (“OCA”) circulated for public comment in March 2021. In submitting this memorandum, COSAC has considered numerous submissions received in response to COSAC’s April 16, 2021 report soliciting public comment on these proposals.

We first set out a clean version of COSAC’s proposed New York Rule 8.4(g) and related Comments (which would replace most of existing New York Rule 8.4(g) and current Comment [5A]). We then discuss (i) COSAC’s consideration of Rule 8.4(g) and recent developments; (ii) COSAC’s reasons for proposing amendments to current New York Rule 8.4(g); (iii) how COSAC’s proposal would improve current New York Rule 8.4(g); (iv) COSAC’s specific proposals for key segments of the rule; (v) a summary of COSAC’s proposed amendments to the text of current New York Rule 8.4(g); (vi) a summary of COSAC’s proposed new and amended Comments to Rule 8.4(g); (vii) a summary of how COSAC’s proposal differs from ABA Model Rule 8.4(g); and (viii) a summary of public comments received in response to COSAC’s April 16, 2021 report; and (viii) proposed changes to COSAC’s April 16 proposal in response to public comments. An Appendix of primary sources reprints the full text of ABA Model Rule 8.4(g) and related Comments, the full text of current New York Rule 8.4(g) and Comment [5A], and a redline version of COSAC’s proposed Rule 8.4(g) and related Comments. Exhibit A to this report summarizes by topic the public comments received in response to COSAC’s April 16, 2021 report, and Exhibit B sets forth all of those public comments in full.

## *Proposed New York Rule 8.4(g)*

A lawyer or law firm shall not:

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) “Harassment,” for purposes of this Rule, means conduct that is:

- a. directed at an individual or specific individuals in one or more of the protected categories;
- b. severe or pervasive; and
- c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules:

- a. accept, decline, or withdraw from a representation;
- b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or
- c. provide advice, assistance, or advocacy to clients.

(5) “Conduct in the practice of law” includes:

- a. representing clients;
- b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
- c. operating or managing a law firm or law practice; and
- d. participating in bar association, business, or professional activities or events in connection with the practice of law.

## COMMENT

[5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers or reaching their potential as lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. However, severe conduct can consist of a single instance. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York. This Rule is not intended to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker’s views.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in Rule 8.4(g) is intended to narrow or limit the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”). Thus, Rule 8.4(h) may sometimes reach conduct that is not covered by Rule 8.4(g).

#### **New York’s Consideration of Rule 8.4(g) and Recent Developments**

In 2017, COSAC began an extensive in-depth study of Rule 8.4(g). In September 2019, COSAC preliminarily discussed Rule 8.4(g) and determined that the best course regarding the rule was to solicit broad input from outside COSAC. On October 8, 2020, COSAC’s Rule 8.4(g) Subcommittee solicited input from NYSBA committees and sections, as well as other relevant bar association groups in New York, on whether New York should amend existing New York Rule 8.4(g) to conform more closely to ABA Model Rule 8.4(g) (which the ABA adopted in August 2016). In light of comments received and COSAC’s own continued study and discussion, COSAC developed proposed amendments to Rule 8.4(g) and circulated those proposed amendments for public comment on April 16, 2021. Several other key developments in connection with the rules governing anti-bias, anti-discrimination, and anti-harassment also occurred during 2020 and 2021, including these:

- On July 15, 2020 the ABA Standing Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 493, which provides guidance on the purpose, scope, and application of ABA Model Rule 8.4(g).

- In October 2020, the NYC Bar issued a Report by the City Bar’s Professional Responsibility Committee proposing amendments to New York Rule 8.4(g) that largely track ABA Model Rule 8.4(g).
- In September 2020, the New York City Bar ethics committee issued N.Y. City Bar Ethics Opinion 2020-4, which analyzed current New York Rule 8.4(g) and its weaknesses.
- In June 2020, the Supreme Court of Pennsylvania approved amendments to Pennsylvania Rule 8.4(g) that were scheduled to take effect on December 8, 2020. However, on December 7, 2020 the United States District Court for the Eastern District of Pennsylvania held that Pennsylvania’s version of Rule 8.4(g) violated the Free Speech Clause of the First Amendment, and the court granted an injunction that temporarily enjoined the Disciplinary Board of the Pennsylvania Supreme Court from enforcing the rule. Specifically, the district court held that the amendments to Rule 8.4(g) and two new explanatory Comments “consist of unconstitutional viewpoint discrimination in violation of the First Amendment.” The Pennsylvania Bar filed a notice of appeal in the Third Circuit, but in March 2021 the Bar voluntarily dismissed the appeal (and presumably started the drafting process again).
- In Fall 2020, the Connecticut Bar Association submitted proposed amendments to Connecticut Rule 8.4(7) to the Connecticut Supreme Court for consideration.
- On March 19, 2021, the New York Unified Court System’s Office of Court Administration circulated a “Request for Public Comment on the Proposal to Adopt ABA Model Rule 8.4(g) in New York’s Rules of Professional Conduct,” with a comment deadline of June 18, 2021.

### **COSAC’s Reasons for Proposing Amendments to Current New York Rule 8.4(g)**

COSAC believes that it is important to amend New York Rule 8.4(g) to increase the public’s confidence in the legal system and to increase opportunities for capable people of all kinds to become lawyers, to remain lawyers, and to reach their full potential as lawyers. COSAC’s proposed amendments would make clear that the legal profession can responsibly regulate itself, which improves the public perception of lawyers and increases perceived and actual fairness in the legal system. In addition, COSAC’s proposed rule promotes diversity, equity, and inclusion in the legal profession.

In connection with diversity, equity, and inclusion, the ABA Commission on Racial and Ethnic Diversity in the Profession recently published its first report on diversity, equity and inclusion in law firm practice. *See 2020 ABA Model Diversity Survey* (2021) (available at <https://bit.ly/3ggU9Fe>). The ABA survey describes itself as “the tool to monitor, validate, and hold each other accountable for reaching the diversity, equity, and inclusion in the profession that we all profess to want and understand to be necessary.” An ABA article summarized the diversity survey as follows: “Minorities are getting hired as associates, but law firm leadership is mostly white and male because of a diversity ‘bottleneck’ and higher rates of minority attrition.” *See* Debra Cassens

Weiss, *Diversity ‘Bottleneck’ and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, ABA Journal (Feb. 17, 2021) (available at <https://bit.ly/3ajCQ2K>).

Equally important, the legal profession should aspire to be more diverse, more equitable, and more inclusive of its own members. The Connecticut Bar Association, while considering whether to recommend amendments to its current version of Rule 8.4(g), cited a national survey of women lawyers. See *Women Lawyers on Guard, Still Broken: Sexual Harassment and Misconduct in the Legal Profession - A National Study* (2020) (available <https://bit.ly/3dkGGKO>), cited in letter from Connecticut Bar Association to Hon. Justice Andrew J. McDonald, Connecticut Supreme Court, in Dec. 4, 2020 (available at <https://bit.ly/3ad5thS>). Out of 578 total respondents to the national survey, 293 respondents reported that they had experienced discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law. In addition, 252 survey respondents reported *witnessing* discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law.

Furthermore, in November 2020, the New York State Judicial Committee on Women in the Courts published an extensive report, entitled *Gender Survey 2020* (available at <http://ww2.nycourts.gov/ip/womeninthecourts/publications.shtml>) that included questions about sexual harassment. Responses from more than 5,300 attorneys showed (among other things) that male respondents believed harassment in law practice occurred less frequently than women believed. For example, the Gender Survey said:

The answers to the question of whether female attorneys experience unwelcome physical contact varied widely by which group were the actors in such harassment. The group of most concern was other attorneys; 10% of female attorney responders reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported it sometimes happened. Therefore, for too many of the female responders, unwelcome physical contact from other attorneys was to some degree part of the court environment. Male attorneys also reported this occurring, though to a lesser extent: 3% reported this happened very often/often, and another 16% said this occurred sometimes.

For more information about *Gender Survey 2020*, see Debra Cassens Weiss, *Survey finds sexual harassment still a problem in New York courts, and lawyers are worst offenders* (ABA Journal Nov. 25, 2020).

### **How COSAC’s Proposal Improves Current New York Rule 8.4(g)**

COSAC believes that New York’s current version of Rule 8.4(g) has several limitations that render it inadequate for its intended purpose. Initially, the current New York rule applies only if an attorney’s conduct constitutes “unlawful discrimination” – it does not prohibit harassing conduct that is not a violation of discrimination law. (The current rule does not mention harassment at all.) Second, the focus of the current rule is on employment discrimination. Third, the rule requires a complainant to exhaust administrative remedies before filing a grievance. Fourth, the New York Rule does not address use of sexual and racial epithets or biased conduct and harassment directed at opposing parties, lawyers, and others in the practice of law.

Taking into consideration (a) the various public comments that COSAC has received in response to its reports during the past two years, including the comments summarized below, as well as comments submitted earlier to COSAC in support of or opposition to adopting ABA Model Rule 8.4(g), (b) the limitations of New York’s current version of Rule 8.4(g), and (c) the overall goal of reducing or eliminating discrimination and harassment in the legal profession, COSAC has endeavored to draft a proposed rule that incorporates and expands on the objectives of current New York Rule 8.4(g), fixes the weaknesses of New York’s current rule, and alleviates some of the concerns of those opposed to the language of ABA Model Rule 8.4(g). COSAC has also proposed specific language in the black letter text and the Comments to provide guidance to practitioners to regarding what conduct is and is not sanctionable under Rule 8.4(g). Accordingly, COSAC’s proposal to amend Rule 8.4(g) includes the following features:

- Eliminates the current requirement to exhaust administrative remedies before filing a grievance alleging discrimination;
- Adds and defines a prohibition on “harassment”;
- Expands the protected classes to conform to New York State anti-discrimination laws; and
- Extends the rule to cover activities in the practice of law beyond the terms and conditions of employment.

#### **COSAC’s Specific Recommendations for Key Elements of Rule 8.4(g)**

This section addresses COSAC’s specific recommendations regarding four discrete elements of Rule 8.4(g).

#### **1. Prohibit improper behavior “in the practice of law” (and provide concrete examples).**

It seemed odd to COSAC to prohibit conduct while a lawyer is working in a law office, but not when a lawyer is attending CLE programs or law firm events or other places where lawyers interact with others. We also recognized (based on research cited by the ABA) that a majority of

the misbehavior occurred in non-litigation matters and in locations other than the law office or courtroom.

Anticipating the challenges that would have been raised if we had recommended the ABA’s “related to the practice of law” language, we attempted to draft language that would narrow the scope of the ABA Model Rule, yet capture the intent to prohibit conduct beyond the law office or courtroom, and also provide examples in order to avoid concerns that the rule is overbroad. We suggest defining “conduct in the practice of law” as follows:

Conduct in the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaging 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.

**2. Expand the protected classes to conform to New York State anti-discrimination laws.**

The intent of COSAC’s proposal is to target discrimination and harassment on the basis of a protected status. We tried to mirror federal and state anti-discrimination laws as much as possible because those laws provide a baseline to evaluate conduct. We considered the protected categories and determined that the protected classes referenced in New York’s current version of Rule 8.4(g) should be expanded to include “ethnicity,” “gender expression,” “gender identity,” “status as a member of the military” and “status as a military veteran.”

However, COSAC does *not* recommend adding “socioeconomic status” to the protected categories, as the ABA Model Rule does. Questions were raised about the definition of socioeconomic status. COSAC believed it best to have the protected categories mirror the protected classes identified in federal and state anti-discrimination laws.

**3. Prohibit harassment (lawful and unlawful) and define “harassment.”**

The current version of New York Rule 8.4(g) does not cover harassment at all. Recognizing that harassment is a construct of anti-discrimination laws and does not have its own independent cause of action under federal and state anti-discrimination laws, we determined it should be defined as (a) conduct directed at an individual or specific individuals in a protected category, (b) that is severe *or* pervasive, and (c) is either unwelcome physical conduct or derogatory or demeaning verbal conduct. We determined that the intent of the rule should be to prohibit conduct directed at those in the protected categories, and we have further limited the proposed rule by adding the requirement that the conduct be severe or pervasive.

**4. Eliminate the requirement to exhaust administrative remedies.**

COSAC proposes to eliminate the New York requirement that “[w]here 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.” COSAC recognizes the cost and difficulty in pursuing and exhausting administrative remedies pertinent to a discrimination complaint, and believes that requirement could prevent or deter complainants from filing meritorious grievances under Rule 8.4(g). In addition, the exhaustion requirement is a creature of the Appellate Divisions – it was never recommended by COSAC in 2008 (or before that). Nevertheless, COSAC also believes that if an administrative agency (such as EEOC or NYDHR) finds that a lawyer has engaged in unlawful discrimination, that should continue to be prima facie evidence of a violation of Rule 8.4(g), as under New York’s current rule, so this is reflected in a Comment. The complainant would thus be able to benefit from a finding by an administrative agency but would not be required to pursue an administrative complaint before filing a grievance.

**Summary of COSAC’s Proposed Amendments to the  
Text of Current New York Rule 8.4(g)**

- Preserve in Rule 8.4(g)(1) the existing prohibition on engaging in conduct that is “unlawful discrimination”;
- Add Rule 8.4(g)(2) to provide that a lawyer shall not engage in conduct that is lawful or unlawful harassment against protected classes, and add pregnancy, religion, ethnicity, status as a veteran and gender identity or expression to the list of protected classes;
- Add Rule 8.4(g)(3) to define “harassment;”
- Add Rule 8.4(g)(4) to specify conduct that would *not* violate the rule; and
- Add Rule 8.4(g)(5) to define the scope of “conduct in the practice of law.”

**Summary of COSAC’s Proposed Comments to New York Rule 8.4**

COSAC also recommends amending and substantially expanding the Comments to Rule 8.4. Currently, only one short Comment – Comment [5A] – pertains to paragraph (g), and it adds nothing to the text of the current rule. COSAC’s proposed Comments to NY Rule 8.4(g) go much further and may be fairly summarized as follows:

- Replace existing Comment [5A], which merely repeats the text of the current rule, by adding language stating that discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system, and discrimination and harassment also discourage or prevent capable people from becoming or remaining lawyers or reaching their potential as lawyers.



- Add a new Comment [5B], which defines “unlawful discrimination” to encompass discrimination under federal, state, and local law.
- Add a new Comment [5C], which clarifies that (i) petty slights, minor indignities and discourteous conduct without more do not constitute harassment, (ii) “severe” conduct can consist of a single instance, and (iii) verbal conduct includes written as well as oral communication.
- Add a new Comment [5D] which provides guidance regarding the scope of the rule and adds that a lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment to the United States Constitution or under Article I, Section 8, of the New York State Constitution. This language is intended to clarify that the Rule is not meant to censor or curtail free speech, no matter how popular or unpopular the speaker’s views.
- Add a new Comment [5E] to clarify that Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from engaging in conduct to promote diversity, equity, and inclusion in the legal profession. The Comment also describe certain examples of permissible conduct.
- Add a new Comment [5F], drawing upon language from ABA Model Rule 8.4(g), stating that a judge’s finding that peremptory challenges were exercised on a discriminatory basis or on another basis that is permitted by law does not, standing alone, establish a violation of Rule 8.4(g).
- Add a new Comment [5G] clarifying that Rule 8.4(g) as amended is not intended to narrow or limit the scope or applicability of Rule 8.4(h), which has been invoked to address instances of discrimination or harassment that occur separate from “conduct in the practice of law.”

### **How COSAC's Proposal Differs from ABA Model Rule 8.4(g)**

COSAC’s proposed amendments differ from the ABA Model Rule in two key ways. First, COSAC’s proposal limits the Rule’s scope to conduct “in the practice of law,” a limitation not found in ABA Model Rule 8.4(g) (which reached conduct “related to” the practice of law). Second, COSAC’s proposal limits and defines “harassment” to avoid overbreadth.

### **Public Comments to COSAC’s April 16, 2021 Report**

During April and May 2021, COSAC received written comments from many entities and individuals, including NYSBA committees and sections, professors of law, legal foundations and societies, and individual practitioners. Specifically, the following people and groups commented on COSAC's proposals:

- William T. Barker
- Professor Alberto Bernabe (Professional Responsibility Blog)
- Brian Faughnan (Faughnan on Ethics blog)
- Professors Josh Blackman, Eugene Volokh and Nadine Strossen
- Philip A. Byler
- Christian Legal Society

- Janice DiGennaro
- Professor Stephen Gillers and Professor Barbara S. Gillers
- Zachary Greenberg
- Richard Hamburger
- William Hodes
- National Legal Foundation
- NYSBA Committee on Diversity and Inclusion
- NYSBA Committee on Legal Aid and the President’s Committee on Access to Justice (jointly)
- NYSBA Trial Lawyers Section
- NYSBA Women in Law Section
- Pacific Legal Foundation
- Professor James Philips

Due to the volume of comments received, we summarize the key points raised by commentators in favor and in opposition to COSAC’s proposal below. The full text of all of the public comments received on COSAC’s proposals are included in Exhibit A and Exhibit B to this report.

1. Should Rule 8.4(g) be limited to “unlawful” discrimination (as opposed to “discrimination” whether lawful or unlawful)?

Proponents of limiting Rule 8.4(g) to “unlawful” discrimination supported how this distinction recognizes that there can be discrimination that is not unlawful and defers to governing legal authorities, as well as how this mitigates against constitutional concerns that the rule would regulate protected speech. In contrast, one commentator opposed limiting actionable discrimination to what is “unlawful” and argued that, as an ethics rule, Rule 8.4(g) should provide greater protection than a legal statute.

Certain commentators noted that, in addition to raising choice of law issues, the limitation to “unlawful” discrimination would require disciplinary committees to reach a legal conclusion on what discrimination is unlawful, or would in practice end up reinstating the exhaustion requirement because the disciplinary committee may choose to defer to other tribunals while the legal question is litigated. Those opposed also noted that the gap in discrimination law coverage outside of the

employment context might result in the rule failing to cover discrimination against clients or potential clients, and might result in inconsistent application where individual states have different ethics rules.

2. Should Rule 8.4(g)'s scope reach conduct "related to the practice of law," or only conduct "in the practice of law"?

Proponents of COSAC's formulation governing conduct "*in* the practice of law" (as opposed to the ABA Model Rule's broader formulation governing conduct "*related to* the practice of law") noted that COSAC's formula limited concerns about overbreadth and properly kept the rule's scope within the bar's core competency of regulating the "practice of law." Proponents also noted the generally accepted idea that rules may constitutionally abridge an attorney's constitutional rights when the attorney is engaged in the practice of law, as opposed to the attorney's personal spheres outside the practice of law, and that COSAC's formulation works in parallel with those parameters.

The primary focus of comments opposed to COSAC's language (as well as comments opposed to the ABA model rule) was the application of the rule to circumstances outside the traditional practice of law, such as social events, CLE presentations, bar association dinners, etc. Commentators raised constitutional concerns that lawyers would be subject to discipline based on actions in circumstances with little connection to their actual practice of law.

3. What kinds of "harassment" should be prohibited under Rule 8.4(g)?

Comments in support of COSAC's definition of harassment as conduct that is "severe or pervasive" and directed at specific individual(s) in protected categories noted that this formulation bolstered the argument for the rule's constitutionality by avoiding the interpretation that it can be used to regulate protected, but offensive, more generalized speech. However, other commentators opposed the "severe and pervasive" limitation given the disparate views among different groups (particularly between men and women) regarding what behavior constitutes harassment. These comments expressed concern that a "severe or pervasive" standard would require complainants to meet a Title VII standard for abusive workplace environments and would not address isolated incidents that, although severe, may not recur (*e.g.*, misconduct during a deposition). These commentators also noted that because Rule 8.4(g) is more specific than Rule 8.4(h), COSAC's proposals would result in a more restricted scope for the application of Rule 8.4(h) as well. In addition, one commentator noted that the "severe and pervasive" standard was recently removed from New York State Human Rights Law and is not a part of the definition of harassment under New York City Human Rights Law. This commentator offered that a potential substitute standard could be the following from the current version of the New York State law: conduct that "rise[s] above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences." NYS Executive Law Section 296(1)(h).

Various commentators opposed COSAC’s proposed definition of harassment—particularly the language that harassment includes “derogatory or demeaning” or “degrading, repulsive, abusive and disdainful” conduct—on the grounds that this language constitutes unconstitutional “viewpoint discrimination” under recent Supreme Court precedent. Other commentators opposed defining “harassment” to reach beyond developed federal, state and local statutory and decisional law, especially in light of the plaintiff-friendly nature of New York state and city anti-discrimination laws.

4. Does COSAC’s proposal raise free speech or other constitutional concerns?

Various commentators argued that implementing COSAC’s proposed Rule 8.4(g) would chill attorney free speech. These commentators noted that, even if a grievance against a lawyer has a low likelihood of success or is ultimately unsuccessful, the rule would still chill speech by failing to protect a lawyer from an investigation and from the expense of defending his or her protected speech. However, other commentators opined that COSAC’s limitation (regulating only speech that is directed at specific individual(s) in one or more protected categories and COSAC’s black letter text and Comment [5D] excluding protected speech from the scope of the rule) obviated many of the free speech concerns.

One commentator raised due process concerns about subjecting a lawyer to professional discipline for conduct that is not actionable civilly.

5. Other comments.

Various commentators expressed support for COSAC’s decision not to add “socioeconomic status” as a protected class. COSAC also received comments both in favor of and opposed to adding pregnancy and gender expression as protected categories. One commentator recommended that “color” as a protected class be expanded to “skin color” for the sake of clarity.

One commentator expressed support for eliminating the existing requirement to exhaust administrative remedies requirement, while another commentator was opposed to eliminating the exhaustion requirement.

Certain commentators raised concerns about the inconsistent application of the rule to attorneys practicing in different parts of New York—*i.e.*, because applicable local laws differ from place to place, what is misconduct under the rule for a lawyer in New York City might not be misconduct for a lawyer practicing upstate. Another commentator stated that the proposed amendments to New York’s current version of Rule 8.4(g) were vague and not needed.

Other commentators opined that using a standard that the lawyer “knowingly” harassed or discriminated—as opposed to using COSAC’s (and the ABA’s) standard of “knows or reasonably should know”—would mitigate some concerns about the constitutionality of the rule.

One commentator sought confirmation that attorneys who, in the course of their practice, may need to use materials that are harassing or discriminatory because such materials are evidence in a case (*e.g.*, in depositions, negotiations, court filings, or otherwise, especially in employment and family law cases) would not be engaging in “harassment” actionable under COSAC’s proposed amendments. The same commentator suggested that this protection may be available under the following language in proposed Rule 8.4(g)(4): “This Rule does not limit the ability of a lawyer or law firm ... (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.”

With respect to the definition of harassment, one commentator questioned why the actionable conduct in Rule 8.4(g)(3)(c)(ii) was framed as derogatory or demeaning “verbal conduct” given that “verbal conduct” is defined in Comment [5C] to include both oral and written communication. Instead, this commentator suggested that the actionable conduct in Rule 8.4(g)(3)(c)(ii) be changed to “oral or written” conduct.

### **COSAC’s Response to Public Comments**

COSAC received a significant number of comments regarding almost all of the amendments proposed in its April 16, 2021 report, including comments supporting COSAC’s proposals, opposing COSAC’s proposals, and supporting the proposals with modifications. COSAC carefully read and considered all of the public comments received. Many of the public comments related to policy issues and considerations that COSAC had already considered during preparation of its April 16, 2021 proposal. After further careful consideration in light of the public comments, COSAC made a number of changes to the language of the proposed Rule and Comments. Those changes are as follows:

1. Modified Rule 8.4(g)(4)(b) to specify that continuing legal education programs, education or other forms of written or oral speech protected by the United States Constitution or the New York State Constitution are not limited by the proposed Rule.
2. Deleted the sentence that “Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct.” from proposed Comment [5C] as unnecessary, confusing, and potentially giving rise to unconstitutional viewpoint discrimination.
3. Clarified in Comment [5C] that a single instance of conduct can be “severe.”
4. Added to Comment [5D] that the Rule is not meant to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker’s views.

5. Clarified in Comment [5G] that Rule 8.4(g) does not narrow or limit the scope of conduct subject to discipline under Rule 8.4(h).

**Contents of the Appendix to this Report**

The Appendix to this report contains the full text of ABA Model Rule 8.4(g), the full text of current New York Rule 8.4(g), and a redline showing how COSAC’s proposal would revise the current New York rule. Exhibit A to this report aggregates public comments received on certain areas of common discussion. Exhibit B to this report sets forth the full text of all public comments received in response to COSAC’s April 16, 2021 report.

## APPENDIX

### ABA Model Rule 8.4(g) and Related Comments

#### Rule 8.4: Misconduct

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.

#### COMMENT

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

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

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate 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).

## Current New York Rule 8.4(g) and Related Comment

Below is New York's current version of Rule 8.4(g), as well as the sole Comment to Rule 8.4 (Comment [5A]) relating to paragraph (g).

### *Rule 8.4. Misconduct*

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 or sexual orientation. 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.

### COMMENT

[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).

## COSAC's Redlined Proposal to Amend Current New York Rule 8.4(g) and Related Comments

(Additions to current New York Rule 8.4(g) are underscored in blue and deletions are ~~stricken through in red.~~)

### *Current New York Rule 8.4. Misconduct*

A lawyer or law firm shall not:

~~(g) unlawfully discriminate 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 or sexual orientation. 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~~

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) “Harassment,” for purposes of this Rule, means conduct that is:

- a. directed at an individual or specific individuals in one or more of the protected categories;
- b. severe or pervasive; and
- c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules,

- a. accept, decline or withdraw from a representation,
- b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or
- c. provide advice, assistance or advocacy to clients.

(5) “Conduct in the practice of law” includes:

- a. representing clients;
- b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
- c. operating or managing a law firm or law practice; and
- d. participating in bar association, business, or professional activities or events in connection with the practice of law.

## COMMENT

[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).~~ Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers or reaching their potential as lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. However, severe conduct can consist of a single instance. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York. This Rule is not intended to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker’s views.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in this Rule 8.4(g) is intended to narrow or limit the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”). Thus, Rule 8.4(h) may sometimes reach conduct that is not covered by Rule 8.4(g).

## Exhibit A

### **Aggregated Public Comments to COSAC Proposal Circulated April 16, 2021 Regarding Rule 8.4(g) of the New York Rules of Professional Conduct**

Given the number and length of comments received to COSAC's April 16, 2021 report soliciting public comment on COSAC's proposed amendments to Rule 8.4(g), this Exhibit A proceeds by aggregating comments received on common topics of discussion, as well as includes a section of comments that address other subjects. The full text of comments received is included as Exhibit B. Exhibits A and B do not include comments received that focus solely on support for or opposition to ABA Model Rule 8.4(g) or the proposal promulgated by the Administrative Board of the New York Unified Court System.

<b>1. Comments discussing whether the scope of Rule 8.4(g) should be limited to “unlawful discrimination” (as opposed to “discrimination”).</b>
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- a. **Professor Alberto Bernabe**: But the most important improvements over the Model Rule are in the way the proposed rule refers to or defines the type of conduct it regulates. For example, the proposed rule starts by adding the word “unlawful” to the word discrimination. Thus, the drafters of the rule recognize that there can be discrimination that is not unlawful and that the legal authorities that define that distinction are going to be relevant to determine how to apply the rule. This simple addition of one word also guards against the possible unconstitutional application of the rule. Because the Model Rule does not make that distinction, it is possible to interpret it to allow regulation of protected speech. By limiting the application of the rule to “unlawful discrimination” the authority of the state to regulate speech is more limited, and presumably will be understood to allow only regulation of speech that is not constitutionally protected.
- b. **Professor Stephen Gillers and Professor Barbara S. Gillers**: We oppose the word “unlawful” in paragraph (g)(1) for several reasons. Preliminarily, we note that discrimination can occur in a variety of settings, including but not only employment and toward clients or potential clients.

First, the presence of “unlawful” would require disciplinary committees to reach a legal conclusion, which they traditionally do not do. Or to avoid that, they could choose to defer while the parties litigated the legal question elsewhere, thereby reinstating the exhaustion requirement.

<sup>3</sup> See City Bar Report (at 6) attached as Exhibit B to the March 19, 2021 Memo issued by the NYS Unified Court System “Re: Request for Public Comment on the Proposal to Adopt ABA Model Rule 8.4(g) in New York’s Rules of Professional Conduct.

Second, and related, the word may require a disciplinary committee to decide which jurisdiction’s laws apply. Imagine a New York law firm that discriminates against persons based on gender identity and expression in its Houston office. Assume Texas does not forbid that discrimination but New York law does (which it does, see Executive Law sec. 296(1)(a)). New York Rule 8.4 applies to a lawyer and “a law firm.” Rule 8.4(g)(5)(c) of your draft defines “[c]onduct in the practice of law” to include “operating or managing a

law firm or law practice.” Would the discrimination in Houston be “unlawful” under your draft? Or do you mean to say that a New York law firm does not violate your rule if it discriminates in hiring based on a characteristic forbidden in New York but allowed where the firm’s employee works? Allowing that discrimination in the Texas office of a New York firm would be inconsistent with the entity responsibility of law firms recognized both in your draft and in the introductory language to Rule 8.4. Federal anti-discrimination law does not apply to employers with fewer than 15 employees and in any event does not identify some of the characteristics in your draft (e.g., gender identity, gender expression, ethnicity).

Third, apart from employment discrimination, your discussion does not take account of when discrimination against clients or potential clients based on the listed characteristics would not be “unlawful.” If it would not be unlawful, then the provision has no effect. For instance, New York Executive Law sec. 296(2)(a) does not include “age” or “ethnicity” in its prohibition against discrimination in places of public accommodation, and let us assume that a law firm is such a place. So unless federal or another state law forbids this type of discrimination, your draft language has no effect. Law firms are not included as a place of public accommodation under federal law. 42 U.S.C. sec. 2000a(b).

If a law firm is *not* a place of public accommodation, and there is no state or federal law that forbids law firms to discriminate against clients or potential clients based on the characteristics in your draft, then the prohibition of “unlawful discrimination” is meaningless when the discrimination is directed at clients or potential clients.

Fourth, the reference to “local law” in comment 5[B] can result in different ethics rules for lawyers in different parts of the state. If, for example, New York City law forbids certain discrimination that federal and state law and local law elsewhere in the state does not, New York lawyers outside the city will be free to discriminate where lawyers in the city cannot. We think a professional conduct rule for the state should apply the same way statewide.

Fifth, your draft would tolerate discrimination outside employment or public accommodation situations, but within the practice of law, when discrimination is not unlawful. Examples might include the decision, when a firm cannot accept a matter, not to refer the potential client to a Black lawyer; the decision to retain only white lawyers as local counsel; the decision not to use a Muslim court reporter for the deposition of a Jewish client; and the decision to retain only men when a client needs a private investigator or an expert witness. In each instance the firm may or may not be responding to the client’s preferences.

- c. **William Hodes:** Third, explicitly adopting existing definitions of what is and is not “lawful” discrimination, rather than using existing law to merely inform new definitions inserted in the ABA Comments, is also obviously huge.

(This will not end contentious debate, but it will “remand” it to the confines of existing debates. In particular, I wonder if disparate impact analysis will or will not be imported into the special world of legal employment. If so, law firms that pay bonuses and compete for former Supreme Court law clerks are going to be in big trouble, because the number of

non-white clerks has been minuscule, no matter the judicial or political philosophy of any of the justices who have served on the Court.)

- d. **NYSBA Women in Law Section:** Notwithstanding this endorsement, the majority of the WILS' Executive Committee members who reviewed and voted on the proposed amendments objects . . . the use of the phrase “unlawful discrimination” rather than “discrimination” in paragraph 8.4(g)(1). . . . The reason for removing the word “unlawful” from the rule against discrimination is that, as an ethics rule, New York Rule 8.4(g) should provide greater protection than a legal statute. Some members of the WILS Executive Committee suggested that the amended Rule 8.4(g) should include a standard, but a lower standard than “unlawful” for finding discriminatory conduct in violation of the ethics rule.

**2. Comments discussing whether the scope of Rule 8.4(g) should be framed as conduct “related to the practice of law” or conduct “in the practice of law.”**

- a. **Janice J. DiGennaro:** I also object to the expansive definition of the “practice of law” sweeping within its scope events without any genuine nexus to the lawyer’s legal practice or work.
- b. **Professor Alberto Bernabe:** First, the proposed rule rejects the Model Rule’s language of “conduct related to the practice of law” and instead applies to “conduct in the practice of law” which is much more limited. This simple change addresses the possible issue of overbreadth in the Model Rule.
- c. **Philip A. Byler:** The phrase “conduct in the practice of law” is explained in the COSAC Memorandum (p.7) as COSAC’s effort to expand the reach of the lawyer disciplinary rules without adopting what is the overly broad language “related to the practice of law” that the American Bar Association uses in its Model Rules of Professional Conduct. COSAC is right not to propose using the “related to the practice of law” language that the American Bar Association uses in its Model Rules of Professional Conduct. But, as raised above, problems arise if proposed amended Rule 8.4(g) applies to lawyers at Bar Association functions and legal associations arguing positions contrary to what is recognized as protected classes in proposed amended Rule 8.4(g).
- d. **Christian Legal Society:** COSAC’s Proposed Rule 8.4(g) has basically the same scope as ABA Model Rule 8.4(g) and, therefore, will similarly chill New York attorneys’ free speech. ABA Model Rule 8.4(g) applies to “conduct related to the practice of law,” while COSAC’s Proposed Rule 8.4(g) applies to “conduct in the practice of law.” Despite the minor difference in language, ABA Model Rule 8.4(g) defines “conduct related to the practice of law” virtually identically to the way in which COSAC’s Proposed Rule defines “conduct in the practice of law.” That is, COSAC’s Proposed Rule defines “conduct in the practice of law” to “include[]”:
  - a. “representing clients;”
  - b. “interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;”
  - c. “operating or managing a law firm or law practice;” and
  - d. “participating in bar association, business, or professional activities or events in connection with the practice of law.”

ABA Model Rule 8.4(g) defines “conduct related to the practice of law,” in its Comment [4], to “include[]”:

- a. “representing clients”—(same as COSAC’s Proposed Rule);
- b. “interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law”—(same as COSAC’s Proposed Rule);
- c. “operating or managing a law firm or law practice”—(same as COSAC’s Proposed Rule); and

- d. “participating in bar association, business or social activities in connection with the practice of law”—(COSAC’s Proposed Rule exchanges “social” for “professional” and inserts “or events” after “activities”).

Given that these two definitions are nearly identical, it is unclear how the scope of COSAC’s Proposed Rule differs from the scope of ABA Model Rule 8.4(g). Both apply to the same range of conduct. A primary criticism leveled at ABA Model Rule 8.4(g) is that its scope is far too broad, a criticism equally applicable to COSAC’s Proposed Rule. (See May 18 Letter at 10-19.)

- e. **Christian Legal Society**: The following comment addresses Comment [5E] of COSAC’s proposed rule, but because it is related the scope of conduct covered it is aggregated here.

Both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule would make it professional misconduct for attorneys to engage in hiring practices that favor persons because they are women or belong to racial, ethnic, or sexual minorities. Both proposed rules have “savings provisions” in Comment [4] and Comment [5E], respectively, to try to preserve practices aimed at increasing diversity among law firms’ employees. But these “savings provisions” blatantly contradict the black-letter text, and text trumps comments.

A highly respected professional ethics expert has concluded that ABA Model Rule 8.4(g) “prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.” (See May 18 Letter at 3 n.8, 32-34.) As he explains, language in the comments is only guidance and not binding. Besides, the drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because the black letter rule itself actually contains two exceptions: “If the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.”

These consequences for New York lawyers’ and their firms’ efforts to promote diversity, equity, and inclusion provide yet another reason to reject COSAC’s Proposed Rule. The substantial value of firms’ programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from either COSAC’s Proposed Rule or ABA Model Rule 8.4(g).

- f. **Professors Josh Blackman, Eugene Volokh and Nadine Strossen**: (*Certain sections of this comment submission comparing and contrasting the text of the current New York Rule, the proposed ABA rule, and the proposed COSAC rule are omitted from this summary but are set forth in the full comments at the end of this document*).

The current version of New York Rule 8.4(g) extends to “the practice of law.” In contrast, the ABA Model Rule and the Administrative Board proposal extend to “conduct related to the practice of law.” And the COSAC proposal extends to “conduct in the practice of law.” The decision to expand the scope of Rule 8.4(g) is the root cause of many constitutional difficulties. Traditionally, the bar’s core competency was regulating the “practice of law.” And when an attorney is engaged in the practice of law, such as in court or in other forums,

his constitutional rights can be abridged. But as the state deviates from this traditional function, it begins to intrude on an attorney's personal spheres. And in those spheres, attorneys have robust individual rights that cannot be abridged. New York Rule 8.4(g) should remain limited to "the practice of law."

The proposal from the Administrative Board explains that "conduct related to the practice of law" can occur in "bar association, business or *social* activities." The COSAC proposal uses slightly different language: "bar association, business, or *professional* activities or events in connection with the practice of law." The word "social" was changed to "professional." But this change is immaterial, because the COSAC proposal also extends to all "events in connection with the practice of law." This broad category is broad enough to embrace "social activities." With these changes, the New York Bar would expand the range of its jurisdiction to social functions. Presentations at a CLE debate would be covered by this rule. Private table conversations at a bar dinner would be covered by the rule. These contexts have little connection to the actual practice of law, but could give rise to discipline.

The government does not have an "unfettered power" to regulate the speech of "lawyers," simply because they provide "personalized services" after receiving a "professional license." *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2375 (2018) (*NIFLA*). To be sure, *NIFLA* recognized that there are two categories of lawyer speech that may sometimes be more restrictable. First, the Court has "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The proposals, however, are not limited to "commercial speech" (which generally means commercial advertising), and do not simply "require professionals to disclose factual, noncontroversial information." Moreover, the Court noted that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372. But the state cannot flip this rule by regulating speech on the grounds that it incidentally involves professional conduct—indeed, the *NIFLA* Court declared unconstitutional this sort of regulation.

The Administrative Board proposal included the constitutional analysis from ABA Formal Opinion 493. But this opinion failed to even discuss *NIFLA*.<sup>4</sup>

- g. **William T. Barker**: I don't think that the change from "related to the practice of law" to "in the practice of law" makes as big a difference as Bill does. In part, that is because I don't see Model Rule 8.4(g) reaching the substance of CLE presentations (or law review articles for that matter), a point on which ABA 493 agrees with me. I see that subject covered by the exclusion for "legitimate advocacy" (which I do not see as limited to advocacy on behalf of a client). Moreover, as I have argued before, prohibitions in the rule must be interpreted narrowly and exclusions broadly where necessary to avoid constitutional questions.
- h. **William Hodes**: First, changing from "conduct related to the practice of law" to "conduct in the practice of law" is huge. The ABA language can (easily) be stretched to cover (almost) everything that a lawyer does, and therefore doesn't do much of anything to



contribute to the meaning of the Rule. (The same problem attends Model Rule 1.6, BTW. As many of us have pointed out, protecting all information "relating to the representation" is so broad that it can lead to strained and even absurd results.)

By contrast, "in the practice of law" is both more focused and connects more readily with existing legal ideas. This change will remove from regulation much that should not be regulated by the Bar at all, but worked out by courageous friends and colleagues in the real world at large--at least that is what I argue in a little piece that will be in the next (electronic) issue of *The Professional Lawyer* shortly: "See Something, Say Something; Model Rule 8.4(g) is Not OK."

I don't think the drafters in New York or Connecticut intended this, BTW, but I think the change will take CLE presentations right out of the picture. (If I give a talk about legal ethics or civil rights injunctions or workers compensation, am I engaged in "conduct in the practice of law?" If so, law professors who are not admitted in the state in which they teach, or who are not lawyers at all, should be pressing the panic button!)

(Yes; there is a Black Letter definition in the New York version that includes some Bar activities, but the fit with the rest of the text is poor, and it might cover some Bar activities, but not others.)

- i. **NYSBA Women in Law Section:** WILS endorses the COSAC proposal to amend New York Rule 8.4(g) to align it more closely with ABA Model Rule of Professional Conduct 8.4(g) ("ABA Rule 8.4(g)") and specifically with the proposed amendments that would (i) include, as unethical conduct by attorneys, discriminatory and harassing conduct in the practice of law (not only discrimination in the context of the employment relationship) . . . .

**3. Comments discussing whether Rule 8.4(g) should target “harassment” or “unlawful harassment.”**

- a. **Janice J. DiGennaro**: The proposal goes too far, is an overreach and will subject lawyers to retaliatory harassment claims for acts that do not rise to level of any civil violation. I do not believe that we should be amending the rule to address harassment claims differently than a developed body of federal, state and city statutory and decisional law has already aggressively addressed such claims. New York city and state has some of the most pro-plaintiff discrimination statutes in the country I fail to see why they are not sufficient. The enforcement of this new rule will make grievance committees jurors in the inevitable “he said she said” which takes place in an harassment suit. The disciplinary system is neither designed nor equipped for that exercise nor are there the same burden shifting procedural safeguards that exist at law to protect the rights of the lawyer.
- b. **Professor Alberto Bernabe**: In addition, the proposal provides a good definition of harassment, which also limits the application of the rule, thus, also making it less vulnerable to constitutional attacks. The proposed rule defines harassment as conduct, whether physical or verbal, that is severe or pervasive and directed at an individual or specific individuals in one or more of several specific protected categories. Again, this description limits the application of the rule tremendously when compared to the Model Rule. And that is a good thing. By limiting the notion of “verbal conduct” to speech directed at specific individuals, the proposal avoids the interpretation that it can be used to regulate protected speech that is offensive but constitutionally protected.
- c. **Philip A. Byler**: In the proposed amended New York Rule 8.4(g), subsection (2) states that a lawyer may not engage in “Harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.” What that means is that a New York lawyer is subject to discipline for what is deemed to be “harassment” even though it is not unlawful. The proposed amended New York Rule 8.4(g), subsection (3) defines “Harassment” as “conduct that is: a. directed at an individual or specific individuals in one or more of the protected categories; b. severe or pervasive; and c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.”

While the scope of unlawful harassment may be determined to a certain degree by reviewing how agencies and courts have defined and treated unlawful harassment in actual cases, the definition of “harassment” has the general language of “unwelcome physical contact” and “derogatory or demeaning verbal conduct” that may be connected to “not unlawful” harassment. The COSAC Memorandum (p. 8) states that the intent of the rule should be to prohibit conduct for protected classes, with the “severe” and “pervasive” language serving to limit the scope of proposed amended Rule 8.4(g). Presumably, “unwelcome physical contact” that can become harassment if “severe” or “pervasive” is, for example, a male boss hugging a female employee (or vice versa); however, that kind of unwelcome physical contact would be unlawful. So, what is “unwelcome physical contact” that can become harassment if “severe” or “pervasive” but still not unlawful?

More importantly, is the intent of the “severe” and “pervasive” language accomplished as to “derogatory or demeaning verbal conduct”? Concretely, what is harassment that involves severe, derogatory verbal conduct and is not unlawful? Concretely, what is harassment that involves pervasive, demeaning verbal conduct and is not unlawful? COSAC’s Memorandum provides no concrete fact examples. COSAC’s Memorandum thus does not shed light on the answers to these questions, even though a New York lawyer is not to engage in such conduct.

Pages 2 and 3 of the COSAC Memorandum does show that there would be a “Comment” section appended to proposed amended Rule 8.4(g) that contains seven statements, and these statements are an apparent attempt to allay concerns about the potential reach of proposed amended Rule 8.4(g). But the seven statements do not provide such assurance and leaves unanswered much.

1. The first statement is that discrimination and harassment in the practice of law is said to undermine confidence in the legal system. The statement is a general truism, but it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in “not unlawful” “harassment,” whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

2. The second statement is that “unlawful discrimination” refers to discrimination under federal, state and local law. The statement is a near tautology, and it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in not unlawful harassment, whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

3. The third statement is that “[p]etty slights, minor indignities and discourteous conduct without more do not constitute harassment.” The statement would seem to deal with arguable examples of “not unlawful” harassment, which raises the question of when do slights and indignities become significant enough to constitute proscribed “not unlawful” harassment? COSAC’s Memorandum provides no concrete fact examples.

4. The fourth statement is that a lawyer’s conduct does not violate proposed amended Rule 8.4(g) if it is protected by the First Amendment and Article I, Section 8 the New York State Constitution. But saying that free speech, free exercise of religion, petitioning and the right to speak freely are not violative of proposed Rule 8.4(g) does not establish whether in individual cases the subject conduct or speech is protected by the First Amendment and Article I, Section 8 the New York State Constitution. Disputes regularly arise and will inevitably arise over whether certain speech or conduct is constitutionally protected. Some hypothetical questions should be considered to make concrete the problem:

At a function for the local bar association, an attorney expresses opposition to transgender bathroom accommodations and calls for the repeal of laws protecting transgenderism.

A Federalist society chapter holds a debate on immigration in which an attorney expresses support for former President Trump's immigration policies and immigration law enforcement.

A professor in a class on the First Amendment denounces Political Islam as a totalitarian ideology and not a religion that should receive the protection of the Free Exercise clause.

An attorney presents an accredited CLE program in which he advocates against campus policies regulating hate speech.

An attorney attending an accredited CLE program on gender and racial bias, when the attending attorneys are asked if they have questions or perspectives to offer on the subject matter, stands up and denounces the program as constituting ideological Marxist propaganda lacking in substantive legal content.

An attorney does work for and is a member of an Evangelical Protestant Church or Catholic Church in which its members believe that homosexuality and transgenderism are sins and should not be legally protected.

5. The fifth statement is that proposed Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from conduct undertaken to promote diversity, equity and/or inclusion in the legal profession. This statement does not address what is "not unlawful" "harassment" and what is "derogatory or demeaning verbal conduct."

6. The sixth statement is that a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of the proposed Rule 8.4(g). This statement should go without saying; that it is said is concerning with respect to the reach of the proposed amended Rule 8.4(g).

7. The seventh statement is that nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) prohibiting a lawyer from engaging in conduct, whether inside or outside the practice of law, that "adversely reflects on the lawyer's fitness as a lawyer." This statement does not define limits on proposed amended Rule 8.4(g), and Rule 8.4(h) has its own problematic coverage if used as a stand-alone provision. A former First Department Disciplinary Chief Counsel has co-authored an article, H.R. Lieberman & H. Prager, "New York Catch-All Rule: Is It Needed?" New York Legal Ethics Reporter (Sept. 18, 2017), noting that New York is only one of five states that have Rule 8.4(h) and criticizing Rule 8.4(h) for the lack of notice of what is proscribed behavior.

The most criticized case involving a stand-alone use of Rule 8.4(h) is *Matter of Elizabeth Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991). There, the New York Court of Appeals upheld a Letter of Reprimand issued to Kings County District Attorney Elizabeth Holtzman for sending a letter to the Administrator of the New York State Commission on Judicial Conduct and releasing that letter to the media containing the opinion that during a trial on sexual misconduct, Kings County Trial Judge Irving Levine had acted improperly in ordering in the robing room, with counsel and court officers present, a witness to get down on her knees and demonstrate the position in which she was raped. The letter directed to be sent by District Attorney Holtzman was based on a report

from the head of District Attorney Holtzman's Sex-Crimes Bureau, and the report was confirmed by a memorandum and sworn affidavit of the male Assistant District Attorney who had tried the case and purportedly witnessed the rape demonstration. District Attorney Holtzman was charged under the old Code of Professional Responsibility with conduct that reflected adversely on her fitness to practice law based on her making allegedly false accusations against Judge Levine. This charge was subject to hearings before a subcommittee of the Grievance Committee, which submitted findings to the whole Grievance Committee, and the Grievance Committee sustained the charge. The Appellate Division-Second Department affirmed, and the New York Court of Appeals also affirmed, calling District Attorney Holtzman's false attacks unwarranted and unprofessional and not what a reasonable attorney would do.

The premise of the disciplinary prosecution, however, was that the accusation against the trial judge was false; a true accusation of judicial misconduct directed toward a rape victim would have been in the public's interest to know and certainly not a proper matter for discipline of the reporting attorney. The determination of falsity and lack of reasonableness in conduct on District Attorney Holtzman's part was made after a privately held hearing; and neither the Appellate Division-Second Department in its short opinion nor the New York Court of Appeals discuss what was the evidence supporting the determination of falsity. The New York Court of Appeals, instead of focusing on berating District Attorney Holtzman, should have in fairness and for the public's edification stated what the evidence was objectively supporting falsity and thus the lack of reasonableness on Ms. Holtzman's part. But the New York Court of Appeals didn't, and neither did the Appellate Division-Second Department. So, we are left to wonder why should District Attorney Holtzman have known that the accusation was false and thus the accusation should not have been responsibly made when it had been reported to her by the Sex-Crimes Bureau and supported by the sworn affidavit of the Assistant District Attorney who tried the case in question before the Brooklyn trial judge?

Reference to Rule 8.4(h) by the Comment to proposed amended Rule 8.4(g) is therefore unsettling. What happened to District Attorney Holtzman for reporting a case of apparent judicial misconduct toward an alleged rape victim should serve as a caution against entrusting discrimination and harassment cases to private disciplinary hearings with no requirement for administrative exhaustion.

- d. **Christian Legal Society**: Because of their equally broad scope, both COSAC's Proposed Rule and ABA Model Rule 8.4(g) violate New York attorneys' free speech because they are viewpoint discriminatory. Both proposed rules define "harassment" using terms that are viewpoint discriminatory. As the Supreme Court made clear in *Matal*, a law or regulation that penalizes speech that is "derogatory or demeaning" is viewpoint discriminatory. 137 S. Ct. at 1753-54, 1765 (plurality op.); *id.* at 1766 (Kennedy, J., concurring). In its Comment [3], ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal . . . conduct."

In its subsection (3)(c)(ii), COSAC's Proposed Rule defines "harassment" to include "derogatory or demeaning verbal conduct." Its Comment [5C] further provides that "[s]evere or pervasive derogatory or demeaning conduct refers to degrading, repulsive,

abusive, and disdainful conduct.” This additional definition simply compounds the viewpoint discriminatory nature of the Proposed Rule for the same reasons that Justice Kagan, writing for the Court in *Iancu*, explained that the terms “immoral” and “scandalous” were facially viewpoint discriminatory. 139 S. Ct. 2294, 2300. (See May 18 Letter at 24-25.) Separately and individually, the terms “degrading,” “repulsive,” or “disdainful” make COSAC’s Proposed Rule viewpoint discriminatory. Government officials do not possess the authority to determine when speech is “degrading,” “repulsive,” or “disdainful.” Such line-drawing would rely too much on the subjective viewpoints of the government officials and, therefore, would violate the First Amendment.

Finally, Comment [5C] raises further concerns when it states that “[p]etty slights, minor indignities and discourteous conduct *without more* do not constitute harassment.” Rather than reassure, Comment [5C] actually suggests that “petty slights, minor indignities, and discourteous conduct” will sometimes be the basis for a finding of professional misconduct in certain circumstances in which “more”—however modest that “more” may be—occurs.

The existing Rule of Professional Conduct 8.4(g) covers unlawful harassment. The April 16, 2021, memorandum states that “[t]he current version of New York Rule 8.4(g) does not cover harassment at all.” COSAC Memorandum at 8. But to the contrary, certain forms of harassment are unlawful under federal and state antidiscrimination laws and, therefore, are “unlawful discrimination” for purposes of existing New York Rule 8.4(g). Existing New York Rule 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in many other states. A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h), respectively, provide for discipline if a lawyer or law firm “engage[s] in conduct that is prejudicial to the administration of justice” or “engage[s] in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct are “applied robustly” by committees and courts “to limit and deter [] conduct, bias or prejudice.”<sup>6</sup>

- e. **Professor Stephen Gillers and Professor Barbara S. Gillers**: COSAC identifies various studies and polls confirming the ongoing problem of discrimination and harassment in law practice. Recently, the New York State Judicial Committee on Women in the Courts reported that women lawyers continue to be a target of physical and verbal harassment and, most dramatically, that male respondents viewed the occurrences as much less frequent. For example:

The answers to the question of whether female attorneys experience unwelcome physical contact varied widely by which group were the actors in such harassment. The group of most concern was other attorneys; 10% of female attorney responders reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported it sometimes happened. Therefore, for too many of the female responders, unwelcome physical contact from other attorneys was to some degree part of the court environment. Male attorneys also reported this occurring, though to a lesser extent: 3% reported this happened very often/often, and another 16% said this occurred sometimes.<sup>1</sup>

<sup>1</sup> New York State Judicial Committee on Women in the Courts Gender Survey 2020 at 8 available here: <http://ww2.nycourts.gov/ip/womeninthecourts/publications.shtml>.

Studies like these, of which there are many, in part inform our response to COSAC's draft.

For several reasons, we oppose the requirement that the harassment be "severe or pervasive," a phrase that appears to have been taken from the entirely different milieu of Title VII cases, where the issue is whether a plaintiff has proved "an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' . . . Title VII is violated").

The addition of this requirement makes "unwelcome physical contact" and "derogatory or demeaning verbal conduct" not forbidden by themselves. The conduct must also be "severe or pervasive," implicitly of the type that would render a workplace environment abusive under Title VII law.

Further, the addition of the "severe or pervasive" language weakens the New York prohibition on harassing conduct as now construed under Rule 8.4(h). The proposed language will become the test for all alleged violations including under Rule 8.4(h). It is no answer to say, in the comment to the draft, that Rule 8.4(h) remains available. The court does not adopt the comments. And although Rule 8.4(h) will remain, the addition of a requirement of severity or pervasiveness in the more specific language of Rule 8.4(g) will, as a matter of statutory construction, limit the general language of Rule 8.4(h). COSAC's draft actually worsens the situation. We urge COSAC fully to address the issues of discrimination and harassment in this rule without punting to another rule.

A separate problem with the draft's treatment of harassment is the contradiction or inconsistency between the comments and the rule. The rule, as stated, does not prohibit "derogatory or demeaning verbal conduct" unless it is also "severe or pervasive." Yet comment [5C] offers a "definition" of "severe or pervasive derogatory or demeaning conduct" with different words -- "degrading, repulsive, abusive, and disdainful." So conduct that is degrading, repulsive, abusive, or disdainful would be severe or pervasive under the definition in the comment, while conduct that is derogatory or demeaning would, by itself, not be severe or pervasive under the text of the rule.

The problem here, among others, is that you have chosen two adjectives in the rule and four other adjectives in comment [5C] and treated the two sets of adjectives differently through the comment's definition. In addition, "pervasive" implies multiple times but the definition does not include any reference to frequency.

Finally, taking the phrase "severe or pervasive" from the employment context and using it to define harassment in law practice fails to appreciate the temporal and spatial differences

<sup>2</sup> Compare the text of the proposed rule with proposed comment [5C]. See also paragraph 3 under the title "COSAC's Specific Recommendations for Key Elements of Rule 8.4(g)" in COSAC's April 16, 2021 Memo.

between these two environments. The workplace is a space where the same people repeatedly encounter each other, which means that the harassment of one or more persons by one or more other persons in that space could recur on a daily or weekly basis – i.e., it is possible for it to be pervasive. But the reported discipline for harassment of which we are aware arises in a single or limited setting, such as in a deposition, offering less or no opportunity for the behavior to be repetitive enough to become pervasive, thereby limiting the utility of your rule.

COSAC’s goal of not making “petty slights” or instances of “discourteous conduct” a basis for discipline can be achieved with the language in proposed comment [5C]’s first sentence, or if COSAC believes a comment is inadequate to achieve its goal, appropriate language can be raised to the text of the rule.

We recommend that COSAC consider the language in comment [3] to ABA Rule 8.4, or that comment as slightly modified by the Professional Conduct Committee of the New York City Bar Association. We suggest that either version adequately addresses your objectives (and ours) and, as important, avoids litigation about the overly restrictive phrase “severe or pervasive.” The City Bar language reads:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.<sup>3</sup>

- f. **William T. Barker:** I do not favor a limitation to prohibition of conduct already prohibited by other law. In particular, I oppose limiting the prohibition to “severe and pervasive” conduct. Given the other limitations, including both those in Model Rule 8.4(g) and those in the NY proposal, I see no reason why that limitation is necessary. The severity of the conduct should simply affect whether charges are brought and the discipline imposed.
- g. **William Hodes:** Second, limiting situations calling for discipline to those involving “severe or pervasive” conduct was not only rejected by the ABA, but was given as a chief reason why federal and state civil rights provisions were insufficient, and had to be augmented by “lawyer only” provisions. The worry that bad actors could too easily “get away with” conduct that wasn’t severe or pervasive enough was explicit in the materials accompanying the House of Delegates package.
- h. **NYSBA Women in Law Section:** Of the WILS Executive Committee members who responded . . . A majority voted in favor of deleting the “severe and pervasive” standard from the definition of harassment in paragraph 8.4(g)(3) and one (1) voted in favor of replacing “severe and pervasive” with a lower standard for finding harassing conduct in violation of the ethics rule . . . . The reason for removing “severe and pervasive” from the



amended rule 8.4(g) is that the “severe and pervasive” standard is not the law in New York. That standard was removed from the definition of harassment in the most recent amendments to the New York State Human Rights Law (“NYS HRL”). In addition, that standard is not part of the definition of harassment under the New York City Human Rights Law.

We note that the NYS HRL does provide a new standard for harassing conduct, which is conduct that “rise[s] above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences.” NYS Executive Law Section 296(1)(h). This standard could be incorporated into the amended Rule 8.4(g)(3).

**4. Comments discussing other constitutional or statutory arguments relating to the scope of proposed Rule 8.4(g).**

- a. **Janice J. DiGennaro:** I am opposed to the proposed amendments to R.P.C.8.4(g). I do not believe that lawyers should be held to a higher standard than other people regarding harassment claims than exists in the statutory and decisional law on these issues. The due process implications are quite extensive in my view relative to making conduct which is not actionable civilly an act of misconduct for which discipline can be imposed. A dissatisfied plaintiff who loses a discrimination suit in court gets another bite at the apple by filing a grievance against that same lawyer because the harassment standard is different. I believe the rule as currently constructed satisfies the goal of making it clear to lawyers that harassment and other forms of discriminatory conduct is not only a violation of law, when properly proven, but is an ethical violation.
- b. **Christian Legal Society:** Because of their equally broad scope, both COSAC's Proposed Rule and ABA Model Rule 8.4(g) will chill New York attorneys' speech. The United States Supreme Court has issued three recent decisions with analyses that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys' speech. Those decisions are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). (See May 18 Letter at 20-26.)

Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, Formal Opinion 493 not only fails to distinguish these recent Supreme Court decisions; *it fails to mention them at all*. And, of course, Formal Opinion 493 was issued before the federal district court's decision in *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), which renders Formal Opinion 493 obsolete. (See May 18 Letter at 21-23.)

In *Greenberg*, the Eastern District of Pennsylvania held that Pennsylvania's Rule 8.4(g), was facially unconstitutional because it violated attorneys' freedom of speech.<sup>1</sup> Pennsylvania had derived its rule from ABA Model Rule 8.4(g), with modifications aimed at narrowing it. In striking down the rule, the federal district court in *Greenberg* explained:

*[The rule] will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how*

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<sup>1</sup> *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.

the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .

*Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.*<sup>2</sup>

Many scholars concur that ABA Model Rule 8.4(g) should not be adopted because it will violate attorneys' freedom of speech. (See May 18 Letter at 6-9.) For example, Professor Michael McGinniss, Dean of the University of North Dakota School of Law, "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."<sup>3</sup> Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019).

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."<sup>4</sup> She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."<sup>5</sup>

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to a civil society in which

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<sup>2</sup> *Id.* at 24-25 (emphasis supplied).

<sup>3</sup> <https://law.und.edu/files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf>.

<sup>4</sup> Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

<sup>5</sup> *Id.*

freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech. (See May 18 Letter at 3-6).

*Christian Legal Society comments continued:*

The basic presumption underlying both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule is that the government may regulate all attorneys’ speech as long as it provides carve-outs for “protected speech;” but the Supreme Court made clear the opposite is true in *NIFLA v. Becerra*. The *NIFLA* Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. The Court stressed that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”<sup>7</sup> It rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”<sup>8</sup> A State’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that

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<sup>6</sup> Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf>. See also, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf>.

<sup>7</sup> 138 S. Ct. at 2371-72 (emphasis added).

<sup>8</sup> *Id.* at 2371.

regulate the noncommercial speech of lawyers.”<sup>9</sup> Subsequently, in striking down Pennsylvania’s Rule 8.4(g), the *Greenberg* court relied on *NIFLA* to “find[] that Rule 8.4(g) does not cover ‘professional speech’ that is entitled to less protection” but instead “[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.”<sup>10</sup>

COSAC’s Proposed Rule flies in the face of the Supreme Court’s decision in *NIFLA*. Its assertion in subsection (4)(ii) that the rule does not limit a lawyer’s ability “to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy” merely underscores that the proposed rule believes it can regulate a lawyer’s expression of views on matters that are not “of public concern.” But that turns the First Amendment on its head. Free speech about private matters is just as protected as free speech about public matters. Protection for lawyers’ speech is not limited to “matters of public concern.” (See May 18 Letter at 20-26.)

Despite its nod to speech concerns, COSAC’s Proposed Rule will chill speech and cause lawyers to self-censor in order to avoid grievance complaints. COSAC’s proposed rule itself recognizes its potential for silencing lawyers when Comment [5D] states that “[a] lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8 of the Constitution of the State of New York.” Comment [5D] affords no

substantive protection for attorneys' speech but merely asserts that COSAC's Proposed Rule does not do what it in fact does.

Nor is it enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."<sup>11</sup> Instead, the Court has rejected "[t]he Government's assurance that it will apply [a statute] far more restrictively than its language provides" because such an assurance "is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading."<sup>12</sup>

The *Greenberg* court likewise rejected such assurances by observing that "[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive." But given "the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer's] words, speeches, notes, written materials, videos, mannerisms, and practice of law," the government is "de facto regulat[ing] speech by threat, thereby chilling speech."<sup>13</sup>

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<sup>9</sup> *Id.* at 2374.

<sup>10</sup> *Greenberg*, 491 F. Supp. 3d at 27-30.

<sup>11</sup> *United States v. Stevens*, 599 U.S. 460, 480 (2010).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Greenberg*, 491 F. Supp. 3d at 24-25.

In the landmark case, *National Association for the Advancement of Colored People v. Button*,<sup>14</sup> the Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.<sup>15</sup>

COSAC's Proposed Rule fails to protect a lawyer from complaints being filed against her based on her speech or from the investigations that will frequently follow such complaints. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought when she applies for admission to another bar or seeks to appear *pro hac vice*. In the meantime, her personal reputation and practice likely will suffer damage through media reports.

The process is the punishment. This brings us to the real problem with COSAC's Proposed Rule. Rather than risk a prolonged investigation with an uncertain outcome and potential lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint. The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

- c. **Professor James Philips**: First, the proposal violates the First Amendment because it is viewpoint discriminatory. See *Matal v. Tam*, 137 S. Ct. 1744, 1753-54(2017); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019). Second, it is overbroad and will chill attorney's speech. And third, its attempts to just regulate professional speech and not private speech do not withstand constitutional scrutiny in light of *NIFLA v. Becerra*, 138S.Ct. 2361, 2371-72 (2018).
- d. **Zachary Greenberg**: The proposed amendment would violate the First Amendment rights of New York attorneys by unduly restricting their expressive freedoms. The proposed rule suffers from the same constitutional defects as the 8.4(g) rule variant adopted by the Disciplinary Board of the Supreme Court of Pennsylvania, which was struck down by a federal district court last year in my response to my lawsuit. I urge you and the COSAC to read about this litigation, especially the court's decision, and refrain from enacting this limitation on attorney free speech rights. Your failure to do so may result in another successful First Amendment lawsuit against you and all those responsible for promulgating this rule, to the detriment of the New York Bar Association and all those it claims to represent.
- e. **Professors Josh Blackman, Eugene Volokh and Nadine Strossen**: The COSAC proposal advances a three-factor test to define "harassment." First, the speech must be "directed at an individual or specific individuals in one or more of the protected categories." We think this element would obviate some of our concerns. Merely speaking about a contentious topic, in the abstract, would not give rise to liability, because it would not be "directed at an individual." The second element obviates other concerns. Off-hand remarks at a bar function would likely not give rise to liability. The speech must be "severe or pervasive."

Alas, the third element suffers from the same problem as the ABA Model Rule, the Administrative Board proposal, as well as the unconstitutional Pennsylvania rule: it imposes viewpoint discrimination against "derogatory or demeaning verbal conduct." No rule with this language can pass constitutional muster. The first two factors cannot overcome this deficiency.

Comment [5C] of the COSAC proposal attempts to mitigate these constitutional concerns. But in the process, it introduces additional grounds of vulnerability. First, it states "Petty slights, minor indignities and discourteous conduct without more do not constitute harassment." What is a "petty slight" to some may be a "severe intrusion" to others. Second, the phrase "minor indignities" is not much more helpful--just another way of defining offensiveness. The third category simply adds further constitutional problems:

“discourteous conduct.” Attempts to police civility in this fashion will simply impose another form of viewpoint discrimination, as well as being potentially unconstitutionally vague. Fourth, the comment defines “severe or pervasive derogatory or demeaning conduct” as “degrading, repulsive, abusive, and disdainful conduct.” These synonyms suffer from the same problems under *Matal v. Tam*: they impose a viewpoint discrimination. And again they would likely be unconstitutionally vague, since all of them (with the possible exception of “abusive”) are not familiar legal terms of art.

The Administrative Board proposal also attempts to narrow the definition of harassment. The Administrative Board proposal states: “Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph.” The Administrative Board proposal, however, falls *far* short of the “severe or pervasive” requirement that the COSAC proposal adopts. The word “typically” is a hedge, and suggests that rule will not always apply. Moreover, the phrase “petty slight” is unclear. What may be “petty” to one person can be “severe” to another. Finally, the mens rea requirement in this sentence (“intended to cause harm”) seems to be at odds with the mens rea element in the rule (“lawyer knows or reasonably should know”).

*Greenberg v. Haggerty* declared unconstitutional Pennsylvania’s Rule 8.4(g), which was premised on the ABA Model Rule. That opinion stated:

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual’s right to speak freely, including those individuals expressing words or ideas we abhor. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The definition of harassment in the Administrative Board Proposal and the COSAC proposal are unconstitutional for the same reasons.

- f. **Professors Josh Blackman, Eugene Volokh, and Nadine Strossen**: The drafters of the ABA Model Rule and the Administrative Board proposal recognized an obvious problem: promoting various diversity and inclusion measures could run afoul of Rule 8.4(g). For example, advocating for the use of affirmative action for certain racial groups could constitute “harmful verbal . . . conduct that manifests bias or prejudice towards other” racial groups. To avoid this problem, both the ABA Model Rule and the Administrative Board proposal create several exemptions: it is not misconduct to “promote diversity and inclusion.” Likewise, the COSAC proposal uses similar language.

Yet these rules thus create an explicit form of viewpoint discrimination. Those who speak in ways that promote diversity and inclusion efforts, such as affirmative action policies, are protected. Those who criticize the same diversity and inclusion efforts are not protected. In theory, it would be possible to strip this sentence from the Administrative Board proposal. But that change would be a poison pill. In the absence of this protection for diversity and inclusion efforts, many lawyers and law firms would face potential liability.

- g. **Professors Josh Blackman, Eugene Volokh, and Nadine Strossen**: The COSAC proposal includes two express protections for the freedom of speech. First, the Comment explains that this rule would not prohibit speech protected by the federal or state Constitutions. This comment, though helpful, doesn't add much. Of course a state ethics rule cannot violate the federal or state Constitutions.

Second, the rule would not “limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy.” This rule would obviate some of our concerns with respect to speaking or presenting at CLE or bar functions. But it would still allow punishment for dinnertime conversation at one of these events. A presenter would be safe to discuss a controversial idea. But if an attendee repeated the same exact remarks to colleagues afterwards, he could be held liable.

We recognize that the rule is designed to prohibit sexual harassment in social functions that are related to the practice of law. But the current rule sweeps too broadly. The draft could be improved by protecting the expression of “views on matters of public concern” in *all* contexts.

- h. **National Legal Foundation**: The NLF opposes adoption of the Committee's proposed amendments, which share many characteristics with the deeply flawed and much criticized ABA Model Rule 8.4(g) (“model rule”). We agree with much of what the Christian Legal Society (CLS) expressed in its comment letter, dated May 25, 2021. Those comments note the substantial body of scholarly and professional criticism focusing on the model rule's constitutional deficiencies. CLS also ably summarizes the negative track record of the model rule to date, its potential for censoring speech and debate that undergird a free society, its embrace of unconstitutional viewpoint discrimination, and its difficulty gaining traction because of its constitutional infirmities. Given these deficiencies, it is not surprising that several state attorneys general have concluded that the model rule *is* unconstitutional; and most states that have considered proposals to adopt the model rule or its variants have declined to adopt it. We fear that the proposed amendments would impose potentially career-ending sanctions for transgressions that are vaguely and subjectively defined and therefore are subject to abuse and manipulation.
- i. **Pacific Legal Foundation**: A wide variety of First Amendment and Constitutional Law scholars have also written criticizing Model Rule 8.4(g) for its potential to stifle or censor attorney speech.<sup>2</sup>

This scholarship raises a series of overlapping concerns which apply to Proposed Rule 8.4(g). First, the rule might penalize speech if it is seen as “derogatory,” or



“demeaning”—highly subjective terms that provide little guidance to New York attorneys.<sup>3</sup> COSAC’s Proposed Rule 8.4(g) includes several additional vague terms such as “degrading,” “repulsive,” and “disdainful.” This might include, for instance, a presentation arguing against race-based affirmative action due to the impact of “mismatch theory,” or a speaker who argues that “low- income individuals who receive public assistance should be subject to drug testing.”<sup>4</sup>

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<sup>1</sup> ABA Model Rule of Professional Conduct 8.4(g) and Louisiana State Bar Association proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att’y Gen. Op. 17-0114 (Sept. 8, 2017), <https://perma.cc/9TWR-8GY9>; S.C. Att’y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), <https://perma.cc/ED72-3UGM>; American Bar Association’s New Model Rule of Professional Conduct 8.4(g), Tenn. Att’y Gen. Op. 18-11 (Mar. 16, 2018), <https://perma.cc/DZY2-YG23>; whether adoption of the American Bar Association’s Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney’s statutory or constitutional rights (RQ-0128-KP), Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016), <https://perma.cc/M248-HKGG>.

<sup>2</sup> Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>; Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(G): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).

<sup>3</sup> Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) The First Amendment and ‘Conduct Related to the Practice of Law,’* 30 Geo. J. Legal Ethics 241, 245 (2017).

Second, the rule will apply to CLE presentations, academic symposia, and even to conversations at a local bar dinner, which will stifle conversations about significant legal topics of controversy.<sup>5</sup> As Professor Eugene Volokh put it, the rule could be applied to dinner conversations “about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on.”<sup>6</sup> COSAC’s proposed rule similarly applies to attorneys when they are “participating in bar association, business, or professional activities or events in connection with the practice of law.”

Third, the rule penalizes attorneys for speech that they “reasonably should know” would cause offense.<sup>7</sup> This mens rea requirement places attorneys at risk of discipline for speech that they were not aware would or could cause any offense, further exacerbating the chilling effect on attorney speech.<sup>8</sup>

These are just a few of the many well-founded criticisms of the ABA rule.

COSAC’s Proposed Rule 8.4(g) does attempt to remedy some of the shortfalls of ABA Model Rule 8.4(g). In particular, the rule states that it does not “limit the ability of a lawyer or law firm to accept, decline, or withdraw from representation. “And that the rule places no limits on a lawyer’s ability “express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy.” The inclusion of this language is a significant improvement. The definition of harassment included in the rule is also an improvement as it tracks much more closely with federal harassment law which requires severe and pervasive conduct.

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<sup>4</sup> *Id.* at 246.

<sup>5</sup> Eugene Volokh, *A speech code for lawyers, banning viewpoints that express ‘bias,’ including in law-related social activities*, Volokh Conspiracy (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?noredirect=on>.

<sup>6</sup> *Id.*

<sup>7</sup> Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol’y 173, 205 (2019).

<sup>8</sup> *Id.*

Unfortunately, because the Proposed Rule still relies on highly subjective concepts such as “offensive” and has an extremely lax mens rea requirement, there is still significant risk that the Proposed Rule will create uncertainty and stifle speech on important matters of public policy.

These caveats also fail to protect a lawyer from investigation for protected speech and would require lawyers to suffer reputational harm and a prolonged process before constitutional rights could be vindicated.

- j. Pacific Legal Foundation:** But even more troublingly, the current version of Model Rule 8.4(g) contains a carve out wide enough to swallow up all of these improvements. Specifically, Model Rule 8.4(g) contains no definition for the crucial term “unlawful discrimination.” Instead, this term is to be defined “under federal, state and local law.”

In New York in particular this is an enormous First Amendment problem. New York City is known for having one of the nation’s most expansive anti-discrimination laws. New York City Human Rights Law defines harassment in a fashion that is far broader and more burdensome on speech than federal anti-discrimination standards. Under federal law, an employer or public accommodation can only be liable where there is discriminatory conduct or severe and pervasive harassment that creates a hostile work environment. In contrast, under the NYCHRL, anything that is more than a “petty slight or trivial inconvenience” can result in liability if it is intended to “demean, humiliate, or offend a person.” *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 79–80, 872 N.Y.S.2d 27, 40–41 (2009). And the burden is on the employer or public accommodation to prove that its actions were just a “petty slight or trivial inconvenience,” which may unduly burden and chill expressive activity. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (concluding that a defense of truth in defamation cases was inadequate to protect First Amendment freedoms, because fear of liability would “dampen[] the vigor and limit[] the variety of public debate”).

Indeed, cases involving provisions of the NYCHRL have found discrimination based on little more than stray remarks or jokes based on protected characteristics. For instance, in *Benzinger v. NYSARC, Inc. New York City Chapter*, 385 F. Supp. 3d 224, 229 (S.D.N.Y. 2019), a security services provider was found liable because one of its security guards laughed at racist comments made by the building porter, because the laughter “could constitute an indirect declaration that Plaintiff’s patronage . . . was unwelcome or

objectionable.” The services provider was found liable even without any independent evidence of intent to demean, and solely because of the subjective impact that the laughter had. *In the Matter of Commission on Human Rights ex. rel. Christina Spitzer and Kassie Thorton v. Mohammed Dahbi*, 2016 WL 7106071, at \*1 (taxi driver asked gay couple to stop kissing in his vehicle).<sup>9</sup> See also *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 80, 872 N.Y.S.2d 27, 41 (2009) (“One can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable.”); *Golston-Green v. City of New York*, 184 A.D.3d 24, 123 N.Y.S.3d 656, 670 (2020) (“A single comment being made in circumstances where that comment would, for example, signal views about the role of women in the workplace may be actionable under the City Human Rights Law” (internal quotation marks omitted)).

The New York City Human Rights Commission has gone even further in guidance documents interpreting New York City civil rights law. For instance, a September 2019 document declared that even a single usage of the words “illegal alien” could be considered unlawful discrimination if it is determined to have been done with the intent to demean, humiliate, or offend.<sup>10</sup> This could include “comments or jokes.” Indeed, any inquiry at all into immigration status might constitute discrimination because such inquiries can make an individual feel “unwelcome, objectionable, or not acceptable.” The NYCHRC has imposed a similarly expansive interpretation against the misgendering of individuals. And the NYCHRC has investigated companies merely for using images in advertising that it deemed offensive.<sup>11</sup>

Incorporating such an expansive interpretation of discrimination into the New York Rules of Professional Conduct would chill attorney speech throughout the State of New York and especially in New York City. Attorneys would be reasonably worried that their words might be seen as demeaning, humiliating or offensive.

- k. **Pacific Legal Foundation**: To illustrate some of the problems with the Proposed Rule, consider the following hypothetical scenarios. How would the proposed rule apply if someone who was offended by an attorney’s speech filed a complaint? And how would a New York attorney reading the vague and overly broad rule ever know?

1. A public interest lawyer in New York brings a lawsuit on behalf of Asian high school students student who argues that Mayor de Blasio discriminated against them by changing the admissions policies at the city’s selective high school based on racial stereotypes and a belief that Asians are over represented.<sup>12</sup> As part of that lawsuit, the New York attorney also argues that the use of affirmative-action creates a “mismatch” and that therefore “racial preference policies often stigmatize minorities, reinforce pernicious stereotypes, and undermine the self-confidence of beneficiaries,”<sup>13</sup> which results in minority students performing worse in the selective schools. In arguing the case, the attorney writes an op-ed and appears in radio and television interviews arguing that the Supreme Court should outlaw all forms of affirmative action because these

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<sup>12</sup> <https://pacificlegal.org/case/christa-mcauliffe-ptv-de-blasio/>

<sup>13</sup> Richard Sander and Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, The Atlantic (Oct. 2, 2012).

policies violate the ideal of equal protection under the law. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

2. Another New York attorney intervenes on behalf of a group of African-American high school students who are likely to benefit from the affirmative action policies. He argues that because of the legacy of slavery and segregation that it is necessary for African-American students to be the beneficiaries of affirmative action policies, and affirmative action is needed to counteract systemic racism which favors white Americans. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

3. At a CLE event, two New York attorneys agree to debate whether the state of New York should introduce rent control legislation. The speaker arguing in favor of rent control argues that absentee landlords are profiteering off the poor and that rent control is needed to mitigate their greed. The speaker arguing against rent control extols the virtues of private property ownership and entrepreneurship and argues that renters need to work harder in order to meet the rising cost of rent rather than demand subsidies from landlords. How does the prohibition against discrimination on the basis of socioeconomic status in the Proposed Rule apply to either attorney's statements?

4. A New York attorney files an amicus brief arguing that the President has plenary authority to exclude individuals from admission to this country on the basis of their ethnicity or religion. How does the prohibition against discrimination on the basis of religion and national origin in the Proposed Rule apply to this speech?

5. Relatedly, another New York attorney writes an op-ed critiquing the attorney by name and calling her a racist and an islamophobe. How does the prohibition against discrimination on the basis of race and religion in the Proposed Rule apply to this speech?

6. A New York attorney represents the KKK when their petition to hold a rally in a town in New York is denied. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

7. Relatedly, a New York attorney represents Antifa when their counter protest at the KKK rally is shut down due to security concerns. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?

8. A New York attorney attends a pro-life rally and shares a picture of her attending the rally on her social media feed which includes several other New York attorneys that she knows are strongly pro-choice. How does the prohibition against discrimination on the basis of sex in the Proposed Rule apply to this speech?

9. A New York attorney who is a member of the Boomer generation shares an article on social media which calls Millennials lazy and entitled. The following day in his law firm's lunch room the attorney discusses the article with another attorney within earshot of

several young associates. How does the prohibition against discrimination on the basis of age in the Proposed Rule apply to this speech?

10. A New York attorney wears a MAGA hat to a social event hosted by the New York State Bar Association and refuses to take the hat off even after another attorney informs him that she is offended because she sees the hat as a symbol of racism and sexism. How does the prohibition against discrimination on the basis of race and sex in the Proposed Rule apply to this speech?

Whatever the answers to each of these real-world-based hypotheticals, they show that the broad and unclear scope of the Proposed Rule threatens to stifle attorney speech on a wide variety of important issues of public concern. The Proposed Rule should accordingly be rejected.

1. **William Hodes**: Another big change is the clarification that verbal attacks must be aimed at specific individuals in order to be disciplinable. That will remove most of the chilling effect of the most "out there" claims of being "unsafe" and the like. And I think there is a good chance that the ABA will see the wisdom of making that change, at least (because it came up at the online discussion and was greeted favorably by Barbara Gillers and others.)

## 5. Other Comments

- a. **Professor Alberto Bernabe:** (*COSAC framing of protected categories*): In terms of the protected categories, the proposed rule in New York adds a few but eliminates the most problematic of the one in the Model Rule (socio-economic status). Thus, the proposed rule adds pregnancy, gender expression, status as a member of the military, and status as a military veteran, none of which I have a problem with; but it also adds the word “color” which I am not sure is needed since the rule already mentions race and ethnicity. For the sake of clarity, I would at least suggest to say “skin color” rather than just “color.”
- b. **Philip Byler** (*No exhaustion of administrative remedies*): The first change is stated to be “Elimination of the current requirement to exhaust administrative remedies before filing a grievance alleging discrimination.” What this practically means is that the disciplinary forum may become a preferred forum in which to adjudicate claims of harassment and discrimination, a development which would not advance the fair administration of justice. Disciplinary proceedings are special actions in which respondents have limited rights as to discovery and respondents do not have the right to take depositions. Disciplinary hearings are conducted in private, and there is no jury trial. Claims of sexual harassment and discrimination, for example, frequently involve “he said/she said” conflicts, and those conflicts will be resolved in the disciplinary forum where, after limited opportunities for a respondent attorney to develop a fact record in defense, a single referee, who may or may not follow the rules of evidence, will decide the matter.

The experience of universities and colleges with sexual misconduct tribunals should give serious pause to moving sexual misconduct and harassment cases to the disciplinary forum. The Obama Administration issued on April 4, 2011, a “Dear Colleague Letter,” calling upon universities and colleges to use their disciplinary procedures to deal with complaints of sexual misconduct, and universities and colleges did so. In justification of calling upon universities and colleges to so use their disciplinary procedures, the April 4, 2011 Dear Colleague Letter premised the need for universities to discipline sexual misconduct, using a preponderance of the evidence standard, with the statistic that 1 in 5 *women* on campus were victims of sexual assault, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. While the real number of college women assault victims is .03 in 5. *Rape and Sexual Assault Victimization among College Age Females, 1995-2013* (Special Report), U.S. Department of Justice, December 2014, <http://www.bjs.gov/content/pub/pdf/ravcaf9513.pdf>, the 1 in 5 statistic propelled the establishment of campus sexual misconduct tribunals to protect women.

Soon enough, lawsuits were brought by male respondents complaining about the denial of due process and sex discrimination in the issuance of erroneous and career-destructive disciplinary decisions against them. See, e.g., *Doe v. Columbia*, 831 F.3d 46 (2d Cir. 2016) (Leval, J.). In 2017, then U.S. Education Secretary Betsy DeVos denounced the campus tribunals as involving wholly un-American denials of due process: Remarks, Sept. 7, 2017, [www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement](http://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement). The September 22, 2017 Dear Colleague Letter (<https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf>) criticized the April 2011 Dear Colleague Letter for directing that schools use sexual misconduct procedures with reduced protections for the accused. Lawsuits

continued, with a significant decision in *Doe v. Purdue*, 928 F.3d 652 (7<sup>th</sup> Cir. 2019) (Barrett, J.), which was one of the main decisions inspiring the new Title IX regulations that were announced on May 6, 2020 and that went in effective on August 14, 2020 to mandate due process. “Secretary DeVos Announces New Title IX Regulation,” <https://www.youtube.com/watch?v=hTb3yfMNGuA>; U.S. Department of Education Press Release, “Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students,” May 6, 2020; U.S. Department of Education Press Release, “U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect” (August 14, 2020); 34 Code of Federal Regulations 106.45.

As noted above, the rationales in the COSAC Memorandum on the Proposed Amendments to Rule 8.4(g) are stated to be to promote public confidence in the legal system and to promote diversity, and the COSAC Memorandum cites to a Connecticut Bar survey finding a high incidence of sexual harassment -- based on what women but not men voluntarily answered. A review of the cited source, however, shows an unscientific methodology that included an overly broad definition of harassment (asking for unwanted dates, offensive jokes and perceived ogling were included) and that seems similar in kind to the false 1 in 5 statistic in the April 4, 2011 Dear Colleague Letter justifying universities and colleges using their disciplinary procedures to deal with sexual assault and harassment. With the issues and problems that will arise in making the confidential disciplinary process a preferred forum for adjudicating sexual discrimination and harassment, the proposed amended Rule 8.4(g) will not promote public confidence in the legal system and will not promote diversity.

COSAC’s Memorandum (p.8) argues that the exhaustion of administrative remedies requirement could prevent or deter complainants from filing grievances under the current Rule 8.4(g). What COSAC wrongly does not take into account at all are the limitations and undesirable features of the disciplinary forum as the place for adjudicating discrimination and harassment complaints as discussed above.

- c. **Philip A. Byler: (*Expansion of protected classes*)**: The third change is stated to be “Expands the protected classes to conform to New York anti-discrimination laws.” What that means is a long list of protected classes is imported into the proposed amended Rule 8.4(g)’s prohibition of discrimination and/or harassment without any requirement of administrative exhaustion for complaints. As raised above, there are limitations and undesirable features of the disciplinary forum as the place for adjudicating sexual discrimination and sexual harassment complaints, and the expansion of protected classes means there will be more such complaints, some of which undoubtedly present novel issues.

There is a developed body of law for outlawing discrimination and harassment on the basis of race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age and even sexual orientation; however, the prohibition of proposed amended Rule 8.4(g) covers “not unlawful” harassment, whatever that might be, which would not be defined in the case law. Further, there should be no doubt that a lawyer should be able, without running afoul of proposed amended Rule 8.4(g), to represent a Christian baker or a Christian florist who on

religious grounds refuses to perform special services for a gay wedding (as opposed to being required to serve them in the regular course of business in the shop), and a lawyer should be able to engage in public advocacy for a Christian baker or a Christian florist in those cases. But with proposed amended Rule 8.4(g), is there a doubt?

On other hand, not permitting discrimination or harassment of members of the military, military veterans and married people or single people for being married or single, seems a very salutary provision. Also, COSAC is right in its Memorandum (p.7) in justifying not adding “socioeconomic status,” as in the American Bar Association’s Model Rules of Professional Conduct, because of the practical problems such inclusion would bring to providing legal services.

Where difficulties may arise, however, come from the inclusion of gender identity and gender expression as protected classes. Transgenderism is contrary to many people’s religion and/or morality. Would a lawyer not hiring, as an employee, a male identifying and dressing as a female (or vice versa) be a disciplinary matter under proposed amended Rule 8.4(g)? COSAC’s Memorandum does not provide an answer, as COSAC’s Memorandum provides no concrete fact examples.

- d. **Christian Legal Society:** (*Inconsistent application*): Under COSAC’s Proposed Rule, New York lawyers would be subject to different restrictions based on the locality in which they practice. COSAC’s Proposed Rule will not apply uniformly to all New York attorneys. The inclusion of local statutes or ordinances means that COSAC’s Proposed Rule 8.4(g) will apply to New York lawyers differently depending on where they live in New York. That is, speech spoken by a New York lawyer might or might not constitute professional misconduct, depending on whether the lawyer practices in New York City with its expansive nondiscrimination laws, or Geneseo with a less broad nondiscrimination ordinance.

A good rule promotes consistency in its application. But COSAC’s Proposed Rule’s application, by its very terms, will vary depending on the locality in which a lawyer practices. Such a rule is neither consistent nor fair to New York lawyers.

- e. **Richard Hamburger:** (*“Verbal conduct” vs. “oral or written”*) “Verbal conduct includes written as well as oral communication.” Comment 5(c). ??? The commonly understood meaning of “verbal” is “spoken words,” although I admit being surprised to see some dictionary definitions that would encompass written communications. Why not say “oral or written” instead of “verbal” in 3(c)?
- f. **NYSBA Trial Lawyers’ Section:** (*Proposed amendments are vague and not needed*) On behalf of the Chair of the Trial Lawyers Section, William Friedlander (copied) please note that at a special meeting of the Trial Lawyers Executive Committee on May 4th, 2021, the Committee has voted to not take a position on the Proposed Amendments to Rule 8.4 of the New York Rules of Professional Conduct due to it being vague and unneeded.
- g. **Professor Stephen Gillers and Professor Barbara S. Gillers:** (*Rule 1.16*). We urge you to insert “in accordance with Rule 1.16” at the end of paragraph (g)(4)(i). This is the



language of the ABA rule. In our view, Rule 1.16 would not permit a lawyer to decline to represent a client or to withdraw on discovering that the client or potential client was gay, or Muslim, or Jewish, or in the military. Without the insertion, the rule as drafted could be read to expand Rule 1.16 and allow withdrawal even if Rule 1.16 would not because in context the current language is stated as an *exception* to the prohibition in Rule 8.4(g), creating a further basis for permissive withdrawal. In other words, as drafted, a firm could withdraw from a matter when allowed under Rule 1.16 *or*, citing your language, because of the client’s race, sex, religion, etc. even if not allowed by Rule 1.16. This textual ambiguity should be eliminated.

- h. Professors Josh Blackman, Eugene Volokh, and Nadine Strossen: (*Support for the elimination of socioeconomic status as a protected class*). The COSAC proposal eliminates socioeconomic status. We think the elimination of socioeconomic status is prudent: There is no basis for the rules to categorically ban discrimination based on “socioeconomic status”—a term not defined by the rule, but which is commonly used to refer to matters such as income, wealth, education, or form of employment. A law firm, for instance, may prefer more-educated employees—both as lawyers and as staffers—over less- educated ones. Or a law firm may contract with expert witnesses and expert consultants who have had especially prestigious educations or employment. Or a firm may prefer employees who went to high-”status” institutions, such as Ivy League schools. Yet each of these commonplace actions would constitute discrimination on the basis of socioeconomic status under the new rule.**
- i. Professors Josh Blackman, Eugene Volokh, and Nadine Strossen: (*Mens rea*). All three proposals adopt the same mens rea requirement: “knows or reasonably should know.” We previously commented on a draft proposal from COSAC in February 2021. That draft stated that a “lawyer shall not *knowingly* engage in conduct “ COSAC seems to have reduced the mens rea requirement from “knowingly” to “knows or reasonably should know.” A requirement of “knowingly” would mitigate some of the constitutional problems with this rule. Scierter would avoid unknowing harassment, however that phrase is defined.**
- j. NYSBA Women in Law Section: (*Expansion of protected categories and elimination of exhaustion requirement*) WILS endorses the COSAC proposal to amend New York Rule 8.4(g) to align it more closely with ABA Model Rule of Professional Conduct 8.4(g) (“ABA Rule 8.4(g)”) and specifically with the proposed amendments that would . . . (ii) expand the list of protected categories; and (iii) eliminate the requirement to bring a complaint to an administrative tribunal prior to a disciplinary proceeding.**
- l. NYSBA Women in Law Section: (*Protection for use of harassing or discriminatory materials as evidence*) WILS’ Executive Committee members also raised concerns about whether the proposed amended New York Rule 8.4(g) provides sufficient protections for attorneys who, in the course of their practice (for example, employment law or family law), may need to use materials that are harassing or discriminatory because such materials are evidence in a case. The concern is whether, by using the materials in depositions, negotiations, filings or otherwise would be considered harassment under amended Rule 8.4(g). One answer suggested by members of WILS’ Executive Committee is that protection is provided by the language in ABA Rule 8.4(g) and the amended New York**

Rule 8.4(g)(4) as follows: “This Rule does not limit the ability of a lawyer or law firm . . . (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.” The WILS members who raised this concern suggest that, if subparagraph (4) does provide the protection sought, then the comments to the proposed amended rule should so state, but if subparagraph (4) does not provide the protection sought, that the rule be further amended to provide such protection.

**Exhibit B**

**Full Text of Public Comments Received to COSAC’s April 16, 2021 Report Proposing  
Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct**

<b>Tab</b>	<b>Commentator</b>
1.	Comment from Janice DiGennaro
2.	Comments from Professor Alberto Bernabe (Professional Responsibility Blog)
3.	Comments from Richard Hamburger
4.	Comments from Professor Stephen Gillers and Professor Barbara S. Gillers
5.	Comments from Philip A. Byler, Esq.
6.A.	Comments from Christian Legal Society to COSAC Report
6.B.	Comments from Christian Legal Society to ABA Report
7.	Comments from Professors Josh Blackman, Eugene Volokh and Nadine Strossen
8.	Comments from National Legal Foundation
9.	Comments from NYSBA Committee on Diversity and Inclusion (in support of ABA Model Rule 8.4(g))
10.	Comments from NYSBA Committee on Legal Aid and the President’s Committee on Access to Justice
11.	Comments from NYSBA Trial Lawyers Section
12.	Comments from Pacific Legal Foundation
13.	Comments from Professor James Philips
14.	Comments from Zachary Greenberg
15.	Comments from Willaim T. Barker
16.	Comments from William Hodes
17.	Comments from NYSBA Women in Law Section



Roy Simon &lt;roy.d.simon@gmail.com&gt;

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**FW: COSAC proposed Rule 8.4(g)**

1 message

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**Janice J. DiGennaro** <Janice.DiGennaro@rivkin.com>  
To: "Roy D. Simon (roy.d.simon@gmail.com)" <roy.d.simon@gmail.com>

Tue, May 18, 2021 at 8:19 PM

Roy,

I am opposed to the proposed amendments to R.P.C.8.4(g). I do not believe that lawyers should be held to a higher standard than other people regarding harassment claims than exists in the statutory and decisional law on these issues. The due process implications are quite extensive in my view relative to making conduct which is not actionable civilly an act of misconduct for which discipline can be imposed. A dissatisfied plaintiff who loses a discrimination suit in court gets another bite at the apple by filing a grievance against that same lawyer because the harassment standard is different. I believe the rule as currently constructed satisfies the goal of making it clear to lawyers that harassment and other forms of discriminatory conduct is not only a violation of law, when properly proven, but is an ethical violation.

The proposal goes too far, is an overreach and will subject lawyers to retaliatory harassment claims for acts that do not rise to level of any civil violation. I do not believe that we should be amending the rule to address harassment claims differently than a developed body of federal, state and city statutory and decisional law has already aggressively addressed such claims. New York city and state has some of the most pro-plaintiff discrimination statutes in the country I fail to see why they are not sufficient. The enforcement of this new rule will make grievance committees jurors in the inevitable "he said she said" which takes place in an harassment suit. The disciplinary system is neither designed nor equipped for that exercise nor are there the same burden shifting procedural safeguards that exist at law to protect the rights of the lawyer.

I also object to the expansive definition of the "practice of law" sweeping within its scope events without any genuine nexus to the lawyer's legal practice or work.

While I am sure I am a minority among the New York Bar, I could not allow this amendment to pass without voicing my strenuous objection. This amendment goes too far.

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**From:** Roy D. Simon [mailto:[Roy.D.Simon@hofstra.edu](mailto:Roy.D.Simon@hofstra.edu)]

**Sent:** Wednesday, April 21, 2021 6:53 PM

**To:** O'Clair, Melissa

**Cc:** [rhamburger@hmylaw.com](mailto:rhamburger@hmylaw.com); Sarah Diane McShea; Kathy Baxter; Margaret J. Finerty; [wllarson@gmail.com](mailto:wllarson@gmail.com); Richards, Thomas; Lawrence Hausman; Sam Levine; [pconn@albanylaw.edu](mailto:pconn@albanylaw.edu); Janice J. DiGennaro; [beverley.s.braun@us.hsbc.com](mailto:beverley.s.braun@us.hsbc.com); Michael J. Lingle; Brenda Dorsett; [jtowns44@gmail.com](mailto:jtowns44@gmail.com); [jameswalker@perkinscoie.com](mailto:jameswalker@perkinscoie.com); Ralph L. Halpern; Gerard E Harper; [mwhiteman@woh.com](mailto:mwhiteman@woh.com); Marjorie E. Gross; [cherylsmithfisher@gmail.com](mailto:cherylsmithfisher@gmail.com); [bgreen@law.fordham.edu](mailto:bgreen@law.fordham.edu); [krantzbar@gmail.com](mailto:krantzbar@gmail.com); Joe Neuhaus; Hand, Michella; Marian C. Rice; [klgartner@lgdlaw.com](mailto:klgartner@lgdlaw.com); [steven.dean@brooklaw.edu](mailto:steven.dean@brooklaw.edu)

**Subject:** [EXTERNAL] COSAC proposed Rule 8.4(g)

Dear Ethics Committee Members — As I mentioned at the end of our meeting today, last Friday COSAC circulated its proposed version of Rule 8.4(g) for public comment (see attached memo). Many of you commented (anonymously) a few months ago when COSAC circulated ABA Model Rule 8.4(g) for public comment, and those comments were helpful to COSAC, but COSAC's own proposal is quite different from the ABA Model Rule, and COSAC hopes you will take the time to comment (in your individual capacity) on COSAC's proposal, which is attached. Please send all comments directly to me at [roy.simon@hofstra.edu](mailto:roy.simon@hofstra.edu). The deadline for comments is Friday, May 28.

Comments pointing out specific changes to the proposal that you would like to see, or specific features of the proposal you particularly like, will be especially valuable, but even very short comments saying (for example) that you support the proposal, oppose the proposal, or favor keeping New York's current version of Rule 8.4(g) will be helpful in assessing the level of public support. Thank you in advance for your thoughts.

Professor Roy D. Simon

Chair of NYSBA Committee on Standards of Attorney Conduct ("COSAC")

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**COSAC Report on Rule 8.4(g) April 16, 2021 (AS CIRCULATED FOR PUBLIC COMMENT).docx**  
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# Professional Responsibility Blog

Professor Alberto Bernabe - The University of Illinois at Chicago John Marshall Law School

Sunday, April 18, 2021

## New York State Bar Committee proposes new anti-discrimination rule akin to Model Rule 8.4(g), but it is very different and the best yet

As I am sure you know, I have been writing about Model Rule 8.4(g) since way back when it was first proposed. [See here](#). Over time, I have expressed my concerns about its vulnerability to attack under First Amendment principles, and my concern was proven valid when recently a similar rule was declared unconstitutional in Pennsylvania. See [here](#), [here](#) and [here](#), for more on that story in particular.

But that is not what I want to talk about today. Today I am more optimistic.

On Friday afternoon the New York State Bar Association Committee on Standards of Attorney Conduct ("COSAC") posted for public comment a proposed version of Rule 8.4(g). Comments are welcome until May 28 deadline and they want comments from inside and outside of New York. I am trying to find a link, and will post it here when I do.

You can read the [proposal here](#) and its accompanying [report here](#).

In my opinion, this version of the rule is much better than the Model Rule originally adopted by the ABA. It is carefully drafted to limit the reach of the Model Rule, and to avoid the potential problems regarding its constitutional validity.

First, the proposed rule rejects the Model Rule's language of "conduct related to the practice of law" and instead applies to "conduct in the practice of law" which is much more limited. This simple change addresses the possible issue of overbreadth in the Model Rule.

But the most important improvements over the Model Rule are in the way the proposed rule refers to or defines the type of conduct it regulates.

For example, the proposed rule starts by adding the word "unlawful" to the word discrimination. Thus, the drafters of the rule recognize that there can be discrimination that is not unlawful and that the legal authorities that define that distinction are going to be relevant to determine how to apply the rule.

This simple addition of one word also guards against the possible unconstitutional application of the rule. Because the Model Rule does not make that distinction, it is possible to interpret it to allow regulation of protected speech. By limiting the application of the rule to "unlawful discrimination" the authority of the state to regulate speech is more limited, and presumably will be understood to allow only regulation of speech that is not constitutionally protected.

In addition, the proposal provides a good definition of harassment, which also limits the application of the rule, thus, also making it less vulnerable to constitutional attacks.

The proposed rule defines harassment as conduct, whether physical or verbal, that is severe or pervasive and directed at an individual or specific individuals in one or more of several specific protected categories. Again, this description limits the application of the rule tremendously when compared to the Model Rule. And that is a good thing. By limiting the notion of "verbal conduct" to speech directed at specific individuals, the

### Professor Alberto Bernabe

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proposal avoids the interpretation that it can be used to regulate protected speech that is offensive but constitutionally protected.

In terms of the protected categories, the proposed rule in New York adds a few but eliminates the most problematic of the one in the Model Rule (socio-economic status). Thus, the proposed rule adds pregnancy, gender expression, status as a member of the military, and status as a military veteran, none of which I have a problem with; but it also adds the word "color" which I am not sure is needed since the rule already mentions race and ethnicity. For the sake of clarity, I would at least suggest to say "skin color" rather than just "color."

All told, the proposed new rule in New York is the best version of an anti-discrimination Model Rule 8.4(g) type rule I have seen yet.

If you want to send comments to the committee, you can contact Professor [Roy Simon](#) directly.


Posted by [Professor Alberto Bernabe](#) at [8:58 PM](#)

Labels: [ABA Model Rules](#), [Conduct outside the practice of law](#), [Freedom of Speech](#), [Model Rule 8.4\(g\)](#), [New York](#), [Regulation of the profession](#)

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From: **Richard Hamburger** rhamburger@hmylaw.com  
Subject: Proposed New York Rule 8.4(g)  
Date: April 22, 2021 at 10:22 AM  
To: Roy D. Simon Roy.D.Simon@hofstra.edu



EXTERNAL MESSAGE

Hi Roy,

“Verbal conduct includes written as well as oral communication.” Comment 5(c). ??? The commonly understood meaning of “verbal” is “spoken words,” although I admit being surprised to see some dictionary definitions that would encompass written communications. **Why not say “oral or written” instead of “verbal” in 3(c)?**

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May 27, 2021

Roy Simon  
Chair, NYSBA Committee on Standards of Attorney Conduct (COSAC)  
Via email to: [roy.simon@hofstra.edu](mailto:roy.simon@hofstra.edu)

Dear Roy:

This letter responds to COSAC's Memorandum dated April 16, 2021, which invites comments on COSAC's proposals for amendments to New York Rule of Professional Conduct 8.4(g). Thank you for this opportunity.

We assume the final version of COSAC's report to the House of Delegates will be publicly available before the House meets. We look forward to seeing it. If COSAC intends to treat its report to the House as private, we would appreciate knowing that.

### **Harassment**

COSAC identifies various studies and polls confirming the ongoing problem of discrimination and harassment in law practice. Recently, the New York State Judicial Committee on Women in the Courts reported that women lawyers continue to be a target of physical and verbal harassment and, most dramatically, that male respondents viewed the occurrences as much less frequent. For example:

The answers to the question of whether female attorneys experience unwelcome physical contact varied widely by which group were the actors in such harassment. The group of most concern was other attorneys; 10% of female attorney responders reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported it sometimes happened. Therefore, for too many of the female responders, unwelcome physical contact from other attorneys was to some degree part of the court environment. Male attorneys also reported this occurring, though to a lesser extent: 3% reported this happened very often/often, and another 16% said this occurred sometimes.<sup>1</sup>

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<sup>1</sup> New York State Judicial Committee on Women in the Courts Gender Survey 2020 at 8 available here: <http://ww2.nycourts.gov/ip/womeninthecourts/publications.shtml> .

Studies like these, of which there are many, in part inform our response to COSAC's draft.

For several reasons, we oppose the requirement that the harassment be "severe or pervasive," a phrase that appears to have been taken from the entirely different milieu of Title VII cases, where the issue is whether a plaintiff has proved "an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' ... Title VII is violated").

The addition of this requirement makes "unwelcome physical contact" and "derogatory or demeaning verbal conduct" not forbidden by themselves. The conduct must also be "severe or pervasive," implicitly of the type that would render a workplace environment abusive under Title VII law.

Further, the addition of the "severe or pervasive" language weakens the New York prohibition on harassing conduct as now construed under Rule 8.4(h). The proposed language will become the test for all alleged violations including under Rule 8.4(h). It is no answer to say, in the comment to the draft, that Rule 8.4(h) remains available. The court does not adopt the comments. And although Rule 8.4(h) will remain, the addition of a requirement of severity or pervasiveness in the more specific language of Rule 8.4(g) will, as a matter of statutory construction, limit the general language of Rule 8.4(h). COSAC's draft actually worsens the situation. We urge COSAC fully to address the issues of discrimination and harassment in this rule without punting to another rule.

A separate problem with the draft's treatment of harassment is the contradiction or inconsistency between the comments and the rule. The rule, as stated, does not prohibit "derogatory or demeaning verbal conduct" unless it is also "severe or pervasive." Yet comment [5C] offers a "definition" of "severe or pervasive derogatory or demeaning conduct" with different words -- "degrading, repulsive, abusive, and disdainful." So conduct that is degrading, repulsive, abusive, or disdainful would be severe or pervasive under the definition in the comment, while conduct that is derogatory or demeaning would, by itself, not be severe or pervasive under the text of the rule.<sup>2</sup>

The problem here, among others, is that you have chosen two adjectives in the rule and four other adjectives in comment [5C] and treated the two sets of adjectives differently through the comment's definition. In addition, "pervasive" implies multiple times but the definition does not include any reference to frequency.

Finally, taking the phrase "severe or pervasive" from the employment context and using it to define harassment in law practice fails to appreciate the temporal and spatial differences

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<sup>2</sup> Compare the text of the proposed rule with proposed comment [5C]. See also paragraph 3 under the title "COSAC's Specific Recommendations for Key Elements of Rule 8.4(g)" in COSAC's April 16, 2021 Memo.

between these two environments. The workplace is a space where the same people repeatedly encounter each other, which means that the harassment of one or more persons by one or more other persons in that space could recur on a daily or weekly basis – i.e., it is possible for it to be pervasive. But the reported discipline for harassment of which we are aware arises in a single or limited setting, such as in a deposition, offering less or no opportunity for the behavior to be repetitive enough to become pervasive, thereby limiting the utility of your rule.

COSAC’s goal of not making “petty slights” or instances of “discourteous conduct” a basis for discipline can be achieved with the language in proposed comment [5C]’s first sentence, or if COSAC believes a comment is inadequate to achieve its goal, appropriate language can be raised to the text of the rule.

We recommend that COSAC consider the language in comment [3] to ABA Rule 8.4, or that comment as slightly modified by the Professional Conduct Committee of the New York City Bar Association. We suggest that either version adequately addresses your objectives (and ours) and, as important, avoids litigation about the overly restrictive phrase “severe or pervasive.” The City Bar language reads:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.<sup>3</sup>

## **Discrimination**

We oppose the word “unlawful” in paragraph (g)(1) for several reasons. Preliminarily, we note that discrimination can occur in a variety of settings, including but not only employment and toward clients or potential clients.

First, the presence of “unlawful” would require disciplinary committees to reach a legal conclusion, which they traditionally do not do. Or to avoid that, they could choose to defer while the parties litigated the legal question elsewhere, thereby reinstating the exhaustion requirement.

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<sup>3</sup> See City Bar Report (at 6) attached as Exhibit B to the March 19, 2021 Memo issued by the NYS Unified Court System “Re: Request for Public Comment on the Proposal to Adopt ABA Model Rule 8.4(g) in New York’s Rules of Professional Conduct.

Second, and related, the word may require a disciplinary committee to decide which jurisdiction's laws apply. Imagine a New York law firm that discriminates against persons based on gender identity and expression in its Houston office. Assume Texas does not forbid that discrimination but New York law does (which it does, see Executive Law sec. 296(1)(a)). New York Rule 8.4 applies to a lawyer and "a law firm." Rule 8.4(g)(5)(c) of your draft defines "[c]onduct in the practice of law" to include "operating or managing a law firm or law practice." Would the discrimination in Houston be "unlawful" under your draft? Or do you mean to say that a New York law firm does not violate your rule if it discriminates in hiring based on a characteristic forbidden in New York but allowed where the firm's employee works? Allowing that discrimination in the Texas office of a New York firm would be inconsistent with the entity responsibility of law firms recognized both in your draft and in the introductory language to Rule 8.4. Federal anti-discrimination law does not apply to employers with fewer than 15 employees and in any event does not identify some of the characteristics in your draft (e.g., gender identity, gender expression, ethnicity).

Third, apart from employment discrimination, your discussion does not take account of when discrimination against clients or potential clients based on the listed characteristics would not be "unlawful." If it would not be unlawful, then the provision has no effect. For instance, New York Executive Law sec. 296(2)(a) does not include "age" or "ethnicity" in its prohibition against discrimination in places of public accommodation, and let us assume that a law firm is such a place. So unless federal or another state law forbids this type of discrimination, your draft language has no effect. Law firms are not included as a place of public accommodation under federal law. 42 U.S.C. sec. 2000a(b).

If a law firm is *not* a place of public accommodation, and there is no state or federal law that forbids law firms to discriminate against clients or potential clients based on the characteristics in your draft, then the prohibition of "unlawful discrimination" is meaningless when the discrimination is directed at clients or potential clients.

Fourth, the reference to "local law" in comment 5[B] can result in different ethics rules for lawyers in different parts of the state. If, for example, New York City law forbids certain discrimination that federal and state law and local law elsewhere in the state does not, New York lawyers outside the city will be free to discriminate where lawyers in the city cannot. We think a professional conduct rule for the state should apply the same way statewide.

Fifth, your draft would tolerate discrimination outside employment or public accommodation situations, but within the practice of law, when discrimination is not unlawful. Examples might include the decision, when a firm cannot accept a matter, not to refer the potential client to a Black lawyer; the decision to retain only white lawyers as local counsel; the decision not to use a Muslim court reporter for the deposition of a Jewish client; and the decision to retain only men when a client needs a private investigator or an expert witness. In each instance the firm may or may not be responding to the client's preferences.

Letter, Stephen Gillers and Barbara S. Gillers to Roy Simon  
Re COSAC recommendations on Rule 8.4(g)  
May 27, 2021

**Rule 1.16.** We urge you to insert “in accordance with Rule 1.16” at the end of paragraph (g)(4)(i). This is the language of the ABA rule. In our view, Rule 1.16 would not permit a lawyer to decline to represent a client or to withdraw on discovering that the client or potential client was gay, or Muslim, or Jewish, or in the military. Without the insertion, the rule as drafted could be read to expand Rule 1.16 and allow withdrawal even if Rule 1.16 would not because in context the current language is stated as an *exception* to the prohibition in Rule 8.4(g), creating a further basis for permissive withdrawal. In other words, as drafted, a firm could withdraw from a matter when allowed under Rule 1.16 *or*, citing your language, because of the client’s race, sex, religion, etc. even if not allowed by Rule 1.16. This textual ambiguity should be eliminated.

Thank you for your attention to this letter.

Yours sincerely,

/s/

Stephen Gillers

/s/

Barbara S. Gillers

**COMMENTS OF PHILIP A. BYLER, ESQ. ON COSAC  
PROPOSED NEW YORK RULE OF PROFESSIONAL CONDUCT 8.4(g)**

A career and personal background statement on Philip A. Byler, Esq. follows the below comments made in response to the Memorandum dated April 16, 2021, to members of Bar and the Public from the NYSBA Committee on Standards of Attorney Conduct (“COSAC”) requesting comments on proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct. The comments and opinions expressed here are Mr. Byler’s own and are not provided on behalf of his law firm or of any Bar Association or Bar Association Committee of which he is a member.

A review of COSAC’s Memorandum dated April 16, 2012, concerning proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct reveals a striking fact: no cases are discussed at all, much less cases that would reflect gaps in the existing New York Rules of Professional Conduct calling for curative amendments. Instead of real situations arising in cases in which the coverage of the New York Rules of Professional Conduct was apparently deficient, there is a general discussion at pages 5 and 6 of the COSAC Memorandum about the importance of increasing the public’s confidence in the legal system and the need to promote diversity in the practice. While such virtue signaling may cause lawyers to feel good about their intentions, without a discussion of case law and real fact situations, there are serious justifiable concerns as to what concretely would be

accomplished by COSAC's proposed amendments and how those proposed amendments would work -- or not work well.

On page 6 of the COSAC Memorandum, there is an identification of the four changes contained in the proposed amended Rule 8.4(g) of the New York Rules of Professional Conduct that are said by COSAC to improve the current New York Rule 8.4(g). An examination of those four changes is in order.

**1. No Exhaustion of Administrative Remedies Requirement.**

The first change is stated to be "Elimination of the current requirement to exhaust administrative remedies before filing a grievance alleging discrimination."

What this practically means is that the disciplinary forum may become a preferred forum in which to adjudicate claims of harassment and discrimination, a development which would not advance the fair administration of justice. Disciplinary proceedings are special actions in which respondents have limited rights as to discovery and respondents do not have the right to take depositions. Disciplinary hearings are conducted in private, and there is no jury trial. Claims of sexual harassment and discrimination, for example, frequently involve "he said/she said" conflicts, and those conflicts will be resolved in the disciplinary forum where, after limited opportunities for a respondent attorney to develop a fact record in defense, a single referee, who may or may not follow the rules of evidence, will decide the matter.

The experience of universities and colleges with sexual misconduct tribunals should give serious pause to moving sexual misconduct and harassment cases to the disciplinary forum. The Obama Administration issued on April 4, 2011, a “Dear Colleague Letter,” calling upon universities and colleges to use their disciplinary procedures to deal with complaints of sexual misconduct, and universities and colleges did so. In justification of calling upon universities and colleges to so use their disciplinary procedures, the April 4, 2011 Dear Colleague Letter premised the need for universities to discipline sexual misconduct, using a preponderance of the evidence standard, with the statistic that 1 in 5 *women* on campus were victims of sexual assault, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. While the real number of college women assault victims is .03 in 5. *Rape and Sexual Assault Victimization among College Age Females, 1995-2013* (Special Report), U.S. Department of Justice, December 2014, <http://www.bjs.gov/content/pub/pdf/ravcaf9513.pdf>, the 1 in 5 statistic propelled the establishment of campus sexual misconduct tribunals to protect women.

Soon enough, lawsuits were brought by male respondents complaining about the denial of due process and sex discrimination in the issuance of erroneous and career-destructive disciplinary decisions against them. See, e.g., *Doe v. Columbia*, 831 F.3d 46 (2d Cir. 2016) (Leval, J.). In 2017, then U.S. Education Secretary Betsy DeVos denounced the campus tribunals as involving wholly un-American denials of



due process: Remarks, Sept. 7, 2017, [www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement](http://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement). The September 22, 2017 Dear Colleague Letter (<https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf>) criticized the April 2011 Dear Colleague Letter for directing that schools use sexual misconduct procedures with reduced protections for the accused. Lawsuits continued, with a significant decision in *Doe v. Purdue*, 928 F.3d 652 (7<sup>th</sup> Cir. 2019) (Barrett, J.), which was one of the main decisions inspiring the new Title IX regulations that were announced on May 6, 2020 and that went in effective on August 14, 2020 to mandate due process. “Secretary DeVos Announces New Title IX Regulation,” <https://www.youtube.com/watch?v=hTb3yfMNGuA>; U.S. Department of Education Press Release, “Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students,” May 6, 2020; U.S. Department of Education Press Release, “U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect” (August 14, 2010); 34 Code of Federal Regulations 106.45.

As noted above, the rationales in the COSAC Memorandum on the Proposed Amendments to Rule 8.4(g) are stated to be to promote public confidence in the legal system and to promote diversity, and the COSAC Memorandum cites to a Connecticut Bar survey finding a high incidence of sexual harassment -- based on what women but not men voluntarily answered. A review of the cited source,

however, shows an unscientific methodology that included an overly broad definition of harassment (asking for unwanted dates, offensive jokes and perceived ogling were included) and that seems similar in kind to the false 1 in 5 statistic in the April 4, 2011 Dear Colleague Letter justifying universities and colleges using their disciplinary procedures to deal with sexual assault and harassment. With the issues and problems that will arise in making the confidential disciplinary process a preferred forum for adjudicating sexual discrimination and harassment, the proposed amended Rule 8.4(g) will not promote public confidence in the legal system and will not promote diversity.

COSAC's Memorandum (p.8) argues that the exhaustion of administrative remedies requirement could prevent or deter complainants from filing grievances under the current Rule 8.4(g). What COSAC wrongly does not take into account at all are the limitations and undesirable features of the disciplinary forum as the place for adjudicating discrimination and harassment complaints as discussed above.

**2. The Prohibition of "Harassment," Unlawful and Not Unlawful.**

The second change is stated to be "Adds and defines a prohibition on harassment."

In the proposed amended New York Rule 8.4(g), subsection (2) states that a lawyer may not engage in "Harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion,

national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.” What that means is that a New York lawyer is subject to discipline for what is deemed to be “harassment” even though it is not unlawful. The proposed amended New York Rule 8.4(g), subsection (3) defines “Harassment” as “conduct that is: a. directed at an individual or specific individuals in one or more of the protected categories; b. severe or pervasive; and c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.”

While the scope of unlawful harassment may be determined to a certain degree by reviewing how agencies and courts have defined and treated unlawful harassment in actual cases, the definition of “harassment” has the general language of “unwelcome physical contact” and “derogatory or demeaning verbal conduct” that may be connected to “not unlawful” harassment. The COSAC Memorandum (p. 8) states that the intent of the rule should be to prohibit conduct for protected classes, with the “severe” and “pervasive” language serving to limit the scope of proposed amended Rule 8.4(g). Presumably, “unwelcome physical contact” that can become harassment if “severe” or “pervasive” is, for example, a male boss hugging a female employee (or vice versa); however, that kind of unwelcome physical contact would be unlawful. So, what is “unwelcome physical contact” that can become harassment if “severe” or “pervasive” but still not unlawful? More importantly, is the intent of

the “severe” and “pervasive” language accomplished as to “derogatory or demeaning verbal conduct”? Concretely, what is harassment that involves severe, derogatory verbal conduct and is not unlawful? Concretely, what is harassment that involves pervasive, demeaning verbal conduct and is not unlawful? COSAC’s Memorandum provides no concrete fact examples. COSAC’s Memorandum thus does not shed light on the answers to these questions, even though a New York lawyer is not to engage in such conduct.

Pages 2 and 3 of the COSAC Memorandum does show that there would be a “Comment” section appended to proposed amended Rule 8.4(g) that contains seven statements, and these statements are an apparent attempt to allay concerns about the potential reach of proposed amended Rule 8.4(g). But the seven statements do not provide such assurance and leaves unanswered much.

1. The first statement is that discrimination and harassment in the practice of law is said to undermine confidence in the legal system. The statement is a general truism, but it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in “not unlawful” “harassment,” whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

2. The second statement is that “unlawful discrimination” refers to discrimination under federal, state and local law. The statement is a near tautology,

and it does not necessarily translate into promulgating a disciplinary rule prohibiting lawyers from engaging in not unlawful harassment, whatever that might be, and does not define what is “not unlawful” “harassment” involving “derogatory or demeaning verbal conduct.”

3. The third statement is that “[p]etty slights, minor indignities and discourteous conduct without more do not constitute harassment.” The statement would seem to deal with arguable examples of “not unlawful” harassment, which raises the question of when do slights and indignities become significant enough to constitute proscribed “not unlawful” harassment? COSAC’s Memorandum provides no concrete fact examples.

4. The fourth statement is that a lawyer’s conduct does not violate proposed amended Rule 8.4(g) if it is protected by the First Amendment and Article I, Section 8 the New York State Constitution. But saying that free speech, free exercise of religion, petitioning and the right to speak freely are not violative of proposed Rule 8.4(g) does not establish whether in individual cases the subject conduct or speech is protected by the First Amendment and Article I, Section 8 the New York State Constitution. Disputes regularly arise and will inevitably arise over whether certain speech or conduct is constitutionally protected. Some hypothetical questions should be considered to make concrete the problem:

- At a function for the local bar association, an attorney expresses opposition to transgender bathroom accommodations and calls for the repeal of laws protecting transgenderism.
- A Federalist society chapter holds a debate on immigration in which an attorney expresses support for former President Trump’s immigration policies and immigration law enforcement.
- A professor in a class on the First Amendment denounces Political Islam as a totalitarian ideology and not a religion that should receive the protection of the Free Exercise clause.
- An attorney presents an accredited CLE program in which he advocates against campus policies regulating hate speech.
- An attorney attending an accredited CLE program on gender and racial bias, when the attending attorneys are asked if they have questions or perspectives to offer on the subject matter, stands up and denounces the program as constituting ideological Marxist propaganda lacking in substantive legal content.
- An attorney does work for and is a member of an Evangelical Protestant Church or Catholic Church in which its members believe that homosexuality and transgenderism are sins and should not be legally protected.

5. The fifth statement is that proposed Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from conduct undertaken to promote diversity, equity and/or inclusion in the legal profession. This statement does not address what is “not unlawful” “harassment” and what is “derogatory or demeaning verbal conduct.”

6. The sixth statement is that a trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a

violation of the proposed Rule 8.4(g). This statement should go without saying; that it is said is concerning with respect to the reach of the proposed amended Rule 8.4(g).

7. The seventh statement is that nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) prohibiting a lawyer from engaging in conduct, whether inside or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer.” This statement does not define limits on proposed amended Rule 8.4(g), and Rule 8.4(h) has its own problematic coverage if used as a stand-alone provision. A former First Department Disciplinary Chief Counsel has co-authored an article, H.R. Lieberman & H. Prager, “New York Catch-All Rule: Is It Needed?” *New York Legal Ethics Reporter* (Sept. 18, 2017), noting that New York is only one of five states that have Rule 8.4(h) and criticizing Rule 8.4(h) for the lack of notice of what is proscribed behavior.

The most criticized case involving a stand-alone use of Rule 8.4(h) is *Matter of Elizabeth Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991). There, the New York Court of Appeals upheld a Letter of Reprimand issued to Kings County District Attorney Elizabeth Holtzman for sending a letter to the Administrator of the New York State Commission on Judicial Conduct and releasing that letter to the media containing the opinion that during a trial on sexual misconduct, Kings County Trial Judge Irving Levine had acted improperly in ordering in the robing room, with counsel and court officers present, a witness to get

down on her knees and demonstrate the position in which she was raped. The letter directed to be sent by District Attorney Holtzman was based on a report from the head of District Attorney Holtzman's Sex-Crimes Bureau, and the report was confirmed by a memorandum and sworn affidavit of the male Assistant District Attorney who had tried the case and purportedly witnessed the rape demonstration. District Attorney Holtzman was charged under the old Code of Professional Responsibility with conduct that reflected adversely on her fitness to practice law based on her making allegedly false accusations against Judge Levine. This charge was subject to hearings before a subcommittee of the Grievance Committee, which submitted findings to the whole Grievance Committee, and the Grievance Committee sustained the charge. The Appellate Division-Second Department affirmed, and the New York Court of Appeals also affirmed, calling District Attorney Holtzman's false attacks unwarranted and unprofessional and not what a reasonable attorney would do.

The premise of the disciplinary prosecution, however, was that the accusation against the trial judge was false; a true accusation of judicial misconduct directed toward a rape victim would have been in the public's interest to know and certainly not a proper matter for discipline of the reporting attorney. The determination of falsity and lack of reasonableness in conduct on District Attorney Holtzman's part was made after a privately held hearing; and neither the Appellate Division-Second



Department in its short opinion nor the New York Court of Appeals discuss what was the evidence supporting the determination of falsity. The New York Court of Appeals, instead of focusing on berating District Attorney Holtzman, should have in fairness and for the public's edification stated what the evidence was objectively supporting falsity and thus the lack of reasonableness on Ms. Holtzman's part. But the New York Court of Appeals didn't, and neither did the Appellate Division-Second Department. So, we are left to wonder why should District Attorney Holtzman have known that the accusation was false and thus the accusation should not have been responsibly made when it had been reported to her by the Sex-Crimes Bureau and supported by the sworn affidavit of the Assistant District Attorney who tried the case in question before the Brooklyn trial judge?

Reference to Rule 8.4(h) by the Comment to proposed amended Rule 8.4(g) is therefore unsettling. What happened to District Attorney Holtzman for reporting a case of apparent judicial misconduct toward an alleged rape victim should serve as a caution against entrusting discrimination and harassment cases to private disciplinary hearings with no requirement for administrative exhaustion.

### **3. Expansion of Protected Classes.**

The third change is stated to be "Expands the protected classes to conform to New York anti-discrimination laws."

What that means is a long list of protected classes is imported into the proposed amended Rule 8.4(g)'s prohibition of discrimination and/or harassment without any requirement of administrative exhaustion for complaints. As raised above, there are limitations and undesirable features of the disciplinary forum as the place for adjudicating sexual discrimination and sexual harassment complaints, and the expansion of protected classes means there will be more such complaints, some of which undoubtedly present novel issues.

There is a developed body of law for outlawing discrimination and harassment on the basis of race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age and even sexual orientation; however, the prohibition of proposed amended Rule 8.4(g) covers "not unlawful" harassment, whatever that might be, which would not be defined in the case law. Further, there should be no doubt that a lawyer should be able, without running afoul of proposed amended Rule 8.4(g), to represent a Christian baker or a Christian florist who on religious grounds refuses to perform special services for a gay wedding (as opposed to being required to serve them in the regular course of business in the shop), and a lawyer should be able to engage in public advocacy for a Christian baker or a Christian florist in those cases. But with proposed amended Rule 8.4(g), is there a doubt?

On other hand, not permitting discrimination or harassment of members of the military, military veterans and married people or single people for being married or

single, seems a very salutary provision. Also, COSAC is right in its Memorandum (p.7) in justifying not adding “socioeconomic status,” as in the American Bar Association’s Model Rules of Professional Conduct, because of the practical problems such inclusion would bring to providing legal services.

Where difficulties may arise, however, come from the inclusion of gender identity and gender expression as protected classes. Transgenderism is contrary to many people’s religion and/or morality. Would a lawyer not hiring, as an employee, a male identifying and dressing as a female (or vice versa) be a disciplinary matter under proposed amended Rule 8.4(g)? COSAC’s Memorandum does not provide an answer, as COSAC’s Memorandum provides no concrete fact examples.

#### **4. In The Practice of Law.**

The fourth change is stated to be “Extends the rule to cover activities in the practice of law beyond the terms and confines of employment.”

The phrase “conduct in the practice of law” is explained in the COSAC Memorandum (p.7) as COSAC’s effort to expand the reach of the lawyer disciplinary rules without adopting what is the overly broad language “related to the practice of law” that the American Bar Association uses in its Model Rules of Professional Conduct. COSAC is right not to propose using the “related to the practice of law” language that the American Bar Association uses in its Model Rules of Professional Conduct. But, as raised above, problems arise if proposed amended

Rule 8.4(g) applies to lawyers at Bar Association functions and legal associations arguing positions contrary to what is recognized as protected classes in proposed amended Rule 8.4(g).

### **Background of Philip A. Byler, Esq.**

Philip A. Byler in 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021 was selected for inclusion in the Thomson Reuters New York Metro Super Lawyers.

Mr. Byler received his J.D. degree in 1976 from the Harvard Law School. From 1976 to 1978, Mr. Byler was law clerk to the Honorable Judge John W. Peck of the U.S. Court of Appeals for the Sixth Circuit. In 1978, Mr. Byler began the private practice of law as an associate in the Litigation Department of Cravath, Swaine & Moore in New York City working on antitrust, securities, First Amendment and civil rights litigations. Mr. Byler was at the Cravath firm until 1984 when he moved to Weil Gotshal & Manges in New York City, where he worked on international trade, accounting fraud, First Amendment, RICO, ERISA, breach of contract and commercial litigations. In 1990, Mr. Byler established his own practice.

Mr. Byler is currently and has since 2002 been Senior Litigation Counsel at Nesenoff & Miltenberg LLP where he has practiced in federal court and complex state court practice, specializing in appeals and trials. He has tried cases in New York state court and in federal court. He has orally argued cases in the U.S. Court of Appeals for the First Circuit, the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Third Circuit, the U.S. Court of Appeals for the Seventh Circuit, the U.S. Court of Appeals for the Eighth Circuit, the U.S. Court of Appeals for the Ninth Circuit, the U.S. Court of Appeals for the Tenth Circuit, the Arizona Supreme Court, the New York Court of Appeals and the New York Appellate Divisions for the First and Second Departments. Mr. Byler's current practice is in Title IX law, constitutional litigation, defamation, copyright and trademark law and breach of contract.

Mr. Byler argued and won in the New York Court of Appeals the constitutional case of *Immuno A.G. v. Dr. Jan Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert denied*, 500 U.S. 954 (1991); *see* Anthony Lewis, "Abusing The Law," May 10, 1991, *New York Times* ("Philip A. Byler, the winning lawyer"). Mr. Byler successfully briefed and orally argued in the U.S. Court of Appeals for the Second Circuit the appeal of what has been said to have nationwide significance in *Doe v. Columbia*, 831 F.3d 46 (2d Cir. 2016) (Leval, J.), obtaining the reinstatement of a Title IX discrimination suit for a male student. Mr. Byler successfully briefed and orally argued in the U.S. Court of Appeals for the Seventh Circuit the appeal in an even more significant Title IX case in *Doe v. Purdue*, 928 F.3d 652 (7<sup>th</sup> Cir. 2019) (Barrett, J.), given the author of the Court opinion, again obtaining the reinstatement of another Title IX

discrimination suit for a male student. Mr. Byler tried and won in 2012 in *O'Brien v. Golden*, Index No. 11889/08 (Sup.Ct. Suffolk Co.), a two-week property jury trial in New York Supreme Court-Suffolk County. He tried and won in *Delshah Group LLC v. Atit Javeri, et al.*, 09-Civ-6909 (KBF), 2013 WL 2322488, Fed. Sec. L.Rep.. P 97,504 (S.D.N.Y. May 28, 2013), a two-month federal securities bench trial in the U.S. District Court for the Southern District of New York (Katherine Forrest, J.). Mr. Byler argued and won in the New York Appellate Division-First Department in *AJ Holdings Group LLC v. IP Holdings LLC, et al.*, 129 A.D.3d 504, 11 N.Y.S.3d 55 (1<sup>st</sup> Dep't 2015), the reversal of the award of discovery sanctions for alleged spoliation of electronic evidence. Mr. Byler argued and won in the New York Appellate Division-First Department in *Miller v. Ross*, 43 A.D.3d 730, 841 N.Y.S.2d 586 (1<sup>st</sup> Dep't 2007), the unwinding of a conversion of a New York limited partnership into a Delaware limited liability company as a legal nullity.

Mr. Byler is a member of the Bars of, among others, the States of New York and Ohio, the U.S. District Courts for the District of Columbia and the Southern and Eastern Districts of New York, the U.S. Courts of Appeals for the First, Second, Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits and the U.S. Supreme Court.

Mr. Byler is active in Bar Associations. He is a member of the American Bar Association, the New York State Bar Association, the New York City Bar Association and the Republican National Lawyers Association. He is and has been since 2007 a member of the Professional Discipline Committee of the New York State Bar Association, its current Secretary (since 2015), its current Chair of its Subcommittee on Fitness To Practice and its past Chair of its Subcommittee on Discovery in Disciplinary Proceedings; the whole State Bar Professional Discipline Committee adopted the Subcommittee's report providing a 51-jurisdiction review of the discovery procedures in each State's disciplinary system and made recommendations for reform. When Mr. Byler served on the Trial Evidence Committee of the New York State Bar Association, he was the Chair of the Subcommittee on comparing the Federal Rules of Evidence and New York state court evidence rules. Mr. Byler has been a member of the Professional Discipline Committee of the New York City Bar Association since 2008, and he was a member of the International Security Committee of the New York City Bar Association in the years 2007 to 2011, serving as its Secretary from September 2009 to May 2011. Mr. Byler did election law lecturing for the Republican National Lawyers Association – in 2016, for the training of deployment attorneys for New Hampshire and Pennsylvania on behalf of the Republican National Lawyers Association and in 2017 and 2018, for the deployment of lawyers in New York State elections. In 2019, Mr. Byler did ethics law lecturing for the Republican National Lawyers Association.

Mr. Byler is active in political and community affairs, including: Republican Party Committeeman for Town of Huntington, Long Island, New York and Suffolk County, New York (2009-present); Delegate, 10<sup>th</sup> Judicial District Republican Nominating Convention (2009-present); New York State Republican Party; Delegate, 2008 Republican National Convention; Federalist Society; Trustee and former Recording Secretary, Long Island Ronald Reagan Republican Club (2007-present); Marine Corps League - Affiliate Member, Huntington, Long Island; Director and Legal Advisor to Huntington Tri-Village Little League/Senior League Baseball Association (1997-present); Manager, numerous Huntington Tri-Village Little League and Senior League youth baseball teams, including the 1997 American Charter Williamsport Little

League Tournament team and the 2003 District 34 Williamsport Big League Tournament team; Commissioner, Long Island Stan Musial Adult Baseball League (2010-present); Player-Coch, Stan Musial Huntington Tri-Village Reds (2002-2017); Elder, Central Presbyterian Church of Huntington, Long Island (2005-present); Community Service Award, DePauw University (2008).

The foregoing credentials, however, mean nothing to Mr. Byler compared to the fact that he is “Dad” to two hero sons. John, a Purdue graduate (Class of 2005) is now a U.S. Army Lieutenant Colonel who served four combat tours of duty, two in Iraq, the first as an infantry platoon leader during the surge there when he earned a Bronze Star, and two in Afghanistan. James, also a Purdue grad (Class of 2008), is now a Wounded Warrior U.S. Marines Captain (retired) who served as an infantry platoon commander in Afghanistan in the 3/5 Marines in Sangin District, Helmand Province, Afghanistan when he earned a Purple Heart and who has since earned an M.B.A. from New York University-Stern School of Business (2015) and is working as a trader at Barclay’s Bank. Mr. Byler has been married to his wife Janet for 40 years.



May 25, 2021

Professor Roy Simon  
Chair, Committee on Standards of Attorney Conduct  
New York State Bar Association

By email (roy.simon@hofstra.edu)

Dear Professor Simon:

Thank you for taking comments on COSAC's proposed amendments to current New York Rule 8.4(g). As you will recall, Christian Legal Society (CLS) submitted comments in February 2021 regarding COSAC's earlier proposal. Unfortunately, the current COSAC Proposal remains constitutionally problematic and should not be imposed on New York attorneys for the reasons below and in the attached letter dated May 18, 2021.

COSAC's Proposed New York Rule 8.4(g) ("COSAC's Proposed Rule") does not differ significantly from ABA Model Rule 8.4(g). For that reason, this comment letter on COSAC's Proposed Rule is augmented by CLS's comprehensive comment letter of May 18, 2021, to the Administrative Board of the Courts of the New York State Unified Court System's Office of Court Administration. That letter addresses the Administrative Board's proposal to substitute ABA Model Rule 8.4(g) for existing New York Rule of Professional Conduct 8.4(g). The numerous reasons for rejecting ABA Model Rule 8.4(g) that CLS discusses in its letter to the Administrative Board equally apply to COSAC's Proposed Rule which also would impose the substance of ABA Model Rule 8.4(g) on New York attorneys. Both rules will chill attorneys' free speech, despite wishful claims to the contrary.

This letter provides additional reasons why COSAC's Proposed Rule specifically should not be adopted, including:

**1. COSAC's Proposed Rule 8.4(g) has basically the same scope as ABA Model Rule 8.4(g) and, therefore, will similarly chill New York attorneys' free speech.** ABA Model Rule 8.4(g) applies to "conduct related to the practice of law," while COSAC's Proposed Rule 8.4(g) applies to "conduct in the practice of law." Despite the minor difference in language, ABA Model Rule 8.4(g) defines "conduct related to the practice of law" virtually identically to the way in which COSAC's Proposed Rule defines "conduct in the practice of law." That is, COSAC's Proposed Rule defines "conduct in the practice of law" to "include[]":

- "representing clients;"
- "interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging 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."

ABA Model Rule 8.4(g) defines “conduct related to the practice of law,” in its Comment [4], to “include[]”:

- “representing clients”—(same as COSAC’s Proposed Rule);
- “interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law”—(same as COSAC’s Proposed Rule);
- “operating or managing a law firm or law practice”—(same as COSAC’s Proposed Rule); and
- “participating in bar association, business or social activities in connection with the practice of law”—(COSAC’s Proposed Rule exchanges “social” for “professional” and inserts “or events” after “activities”).

Given that these two definitions are nearly identical, it is unclear how the scope of COSAC’s Proposed Rule differs from the scope of ABA Model Rule 8.4(g). Both apply to the same range of conduct. A primary criticism leveled at ABA Model Rule 8.4(g) is that its scope is far too broad, a criticism equally applicable to COSAC’s Proposed Rule. (See May 18 Letter at 10-19.)

**2. Because of their equally broad scope, both COSAC’s Proposed Rule and ABA Model Rule 8.4(g) will chill New York attorneys’ speech.** The United States Supreme Court has issued three recent decisions with analyses that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys’ speech. Those decisions are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). (See May 18 Letter at 20-26.)

Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, Formal Opinion 493 not only fails to distinguish these recent Supreme Court decisions; *it fails to mention them at all*. And, of course, Formal Opinion 493 was issued before the federal district court’s decision in *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), which renders Formal Opinion 493 obsolete. (See May 18 Letter at 21-23.)

In *Greenberg*, the Eastern District of Pennsylvania held that Pennsylvania’s Rule 8.4(g), was facially unconstitutional because it violated attorneys’ freedom of speech.<sup>1</sup> Pennsylvania had derived its rule from ABA Model Rule 8.4(g), with modifications aimed at narrowing it. In striking down the rule, the federal district court in *Greenberg* explained:

*[The rule] will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how*

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<sup>1</sup> *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.



the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .

*Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.<sup>2</sup>*

Many scholars concur that ABA Model Rule 8.4(g) should not be adopted because it will violate attorneys' freedom of speech. (See May 18 Letter at 6-9.) For example, Professor Michael McGinniss, Dean of the University of North Dakota School of Law, "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."<sup>3</sup> Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019).

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."<sup>4</sup> She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."<sup>5</sup>

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to a civil society in which

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<sup>2</sup> *Id.* at 24-25 (emphasis supplied).

<sup>3</sup> <https://law.und.edu/files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf>.

<sup>4</sup> Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

<sup>5</sup> *Id.*

freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech. (See May 18 Letter at 3-6).

**3. Because of their equally broad scope, both COSAC’s Proposed Rule and ABA Model Rule 8.4(g) violate New York attorneys’ free speech because they are viewpoint discriminatory.** Both proposed rules define “harassment” using terms that are viewpoint discriminatory. As the Supreme Court made clear in *Matal*, a law or regulation that penalizes speech that is “derogatory or demeaning” is viewpoint discriminatory. 137 S. Ct. at 1753-54, 1765 (plurality op.); *id.* at 1766 (Kennedy, J., concurring). In its Comment [3], ABA Model Rule 8.4(g) defines “harassment” to include “derogatory or demeaning verbal . . . conduct.”

In its subsection (3)(c)(ii), COSAC’s Proposed Rule defines “harassment” to include “derogatory or demeaning verbal conduct.” Its Comment [5C] further provides that “[s]evere or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct.” This additional definition simply compounds the viewpoint discriminatory nature of the Proposed Rule for the same reasons that Justice Kagan, writing for the Court in *Iancu*, explained that the terms “immoral” and “scandalous” were facially viewpoint discriminatory. 139 S. Ct. 2294, 2300. (See May 18 Letter at 24- 25.) Separately and individually, the terms “degrading,” “repulsive,” or “disdainful” make COSAC’s Proposed Rule viewpoint discriminatory. Government officials do not possess the authority to determine when speech is “degrading,” “repulsive,” or “disdainful.” Such line-drawing would rely too much on the subjective viewpoints of the government officials and, therefore, would violate the First Amendment.

Finally, Comment [5C] raises further concerns when it states that “[p]etty slights, minor indignities and discourteous conduct *without more* do not constitute harassment.” Rather than reassure, Comment [5C] actually suggests that “petty slights, minor indignities, and discourteous conduct” will sometimes be the basis for a finding of professional misconduct in certain circumstances in which “more”—however modest that “more” may be—occurs.

**4. The existing Rule of Professional Conduct 8.4(g) covers unlawful harassment.** The April 16, 2021, memorandum states that “[t]he current version of New York Rule 8.4(g) does not cover harassment at all.” COSAC Memorandum at 8. But to the contrary, certain forms of harassment are unlawful under federal and state antidiscrimination laws and, therefore, are “unlawful discrimination” for purposes of existing New York Rule 8.4(g). Existing New York Rule 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in many other states. A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h), respectively, provide for discipline if a lawyer or law firm “engage[s] in conduct that is prejudicial to the administration of justice” or “engage[s] in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct

are “applied robustly” by committees and courts “to limit and deter [] conduct, bias or prejudice.”<sup>6</sup>

**5. Both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule would make it professional misconduct for attorneys to engage in hiring practices that favor persons because they are women or belong to racial, ethnic, or sexual minorities.** Both proposed rules have “savings provisions” in Comment [4] and Comment [5E], respectively, to try to preserve practices aimed at increasing diversity among law firms’ employees. But these “savings provisions” blatantly contradict the black-letter text, and text trumps comments.

A highly respected professional ethics expert has concluded that ABA Model Rule 8.4(g) “prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.” (See May 18 Letter at 3 n.8, 32-34.) As he explains, language in the comments is only guidance and not binding. Besides, the drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because the black letter rule itself actually contains two exceptions: “If the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.”

These consequences for New York lawyers’ and their firms’ efforts to promote diversity, equity, and inclusion provide yet another reason to reject COSAC’s Proposed Rule. The substantial value of firms’ programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from either COSAC’s Proposed Rule or ABA Model Rule 8.4(g).

**6. The basic presumption underlying both ABA Model Rule 8.4(g) and COSAC’s Proposed Rule is that the government may regulate all attorneys’ speech as long as it provides carve-outs for “protected speech;” but the Supreme Court made clear the opposite is true in *NIFLA v. Becerra*.** The *NIFLA* Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. The Court stressed that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”<sup>7</sup> It rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”<sup>8</sup> A State’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that

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<sup>6</sup> Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf>. See also, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf>.

<sup>7</sup> 138 S. Ct. at 2371-72 (emphasis added).

<sup>8</sup> *Id.* at 2371.

regulate the noncommercial speech of lawyers.”<sup>9</sup> Subsequently, in striking down Pennsylvania’s Rule 8.4(g), the *Greenberg* court relied on *NIFLA* to “find[] that Rule 8.4(g) does not cover ‘professional speech’ that is entitled to less protection” but instead “[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.”<sup>10</sup>

COSAC’s Proposed Rule flies in the face of the Supreme Court’s decision in *NIFLA*. Its assertion in subsection (4)(ii) that the rule does not limit a lawyer’s ability “to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy” merely underscores that the proposed rule believes it can regulate a lawyer’s expression of views on matters that are not “of public concern.” But that turns the First Amendment on its head. Free speech about private matters is just as protected as free speech about public matters. Protection for lawyers’ speech is not limited to “matters of public concern.” (See May 18 Letter at 20-26.)

**7. Despite its nod to speech concerns, COSAC’s Proposed Rule will chill speech and cause lawyers to self-censor in order to avoid grievance complaints.** COSAC’s proposed rule itself recognizes its potential for silencing lawyers when Comment [5D] states that “[a] lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8 of the Constitution of the State of New York.” Comment [5D] affords no substantive protection for attorneys’ speech but merely asserts that COSAC’s Proposed Rule does not do what it in fact does.

Nor is it enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, “The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>11</sup> Instead, the Court has rejected “[t]he Government’s assurance that it will apply [a statute] far more restrictively than its language provides” because such an assurance “is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading.”<sup>12</sup>

The *Greenberg* court likewise rejected such assurances by observing that “[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive.” But given “the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer’s] words, speeches, notes, written materials, videos, mannerisms, and practice of law,” the government is “de facto regulat[ing] speech by threat, thereby chilling speech.”<sup>13</sup>

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<sup>9</sup> *Id.* at 2374.

<sup>10</sup> *Greenberg*, 491 F. Supp. 3d at 27-30.

<sup>11</sup> *United States v. Stevens*, 599 U.S. 460, 480 (2010).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Greenberg*, 491 F. Supp. 3d at 24-25.

In the landmark case, *National Association for the Advancement of Colored People v. Button*,<sup>14</sup> the Supreme Court ruled that “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights,” explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.<sup>15</sup>

COSAC’s Proposed Rule fails to protect a lawyer from complaints being filed against her based on her speech or from the investigations that will frequently follow such complaints. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer’s speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought when she applies for admission to another bar or seeks to appear pro hac vice. In the meantime, her personal reputation and practice likely will suffer damage through media reports.

The process is the punishment. This brings us to the real problem with COSAC’s Proposed Rule. Rather than risk a prolonged investigation with an uncertain outcome and potential lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer’s loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one’s own speech than to risk a grievance complaint. The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

**8. Under COSAC’s Proposed Rule, New York lawyers would be subject to different restrictions based on the locality in which they practice.** COSAC’s Proposed Rule will not apply uniformly to all New York attorneys. The inclusion of local statutes or ordinances means that COSAC’s Proposed Rule 8.4(g) will apply to New York lawyers differently depending on where they live in New York. That is, speech spoken by a New York lawyer might or might not constitute professional misconduct, depending on whether the lawyer practices in New York City with its expansive nondiscrimination laws, or Geneseo with a less broad nondiscrimination ordinance.

A good rule promotes consistency in its application. But COSAC’s Proposed Rule’s application, by its very terms, will vary depending on the locality in which a lawyer practices. Such a rule is neither consistent nor fair to New York lawyers.

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<sup>14</sup> *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>15</sup> *Id.* at 438-39.

We thank the Committee for its consideration of our views.

Respectfully submitted,

/s/ David Nammo

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Attachment: Christian Legal Society Letter of May 18, 2021, to Ms. Eileen D. Millett, Esq.



# CHRISTIAN LEGAL SOCIETY

*Seeking Justice with the Love of God*

May 18, 2021

Ms. Eileen D. Millett, Esq.  
Counsel, Office of Court Administration  
25 Beaver Street, 11<sup>th</sup> Floor  
New York, New York 10004

By email ([rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov))

Re: In Opposition to the New York City Bar's Professional Responsibility Committee's  
Proposed Amendment to New York Rule of Professional Conduct 8.4(g)

Dear Ms. Millett:

This letter is respectfully submitted in response to the request of the Office of Court Administration for public comment on a proposal to impose the deeply flawed, highly criticized ABA Model Rule 8.4(g) on all members of the New York State Bar. Specifically, the New York City Bar's Professional Responsibility Committee has proposed that current New York Rule of Professional Conduct 8.4(g) be replaced by the much broader ABA Model Rule 8.4(g) with only minor modifications. The New York City Bar's proposal should be rejected for the reasons detailed below.

## Summary

Deeply flawed and highly criticized, ABA Model Rule 8.4(g) should not be imposed on New York attorneys. Leading scholars have determined ABA Model Rule 8.4(g) to be a speech code for lawyers.<sup>1</sup> A thoughtful recent analysis of ABA Model Rule 8.4(g) by Professor Michael McGinniss, Dean of the University of North Dakota School of Law, entitled *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019), "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."<sup>2</sup>

As the United States District Court for the Eastern District of Pennsylvania held in December 2020, Pennsylvania's Rule 8.4(g), derived from ABA Model Rule 8.4(g), was facially

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<sup>1</sup> Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>. See *infra* Part I, pp. 6-9 (scholars' criticisms of ABA Model Rule 8.4(g)); Part III, pp.20-26 (recent United States Supreme Court free speech decisions regarding regulation of professional speech and viewpoint discrimination).

<sup>2</sup> Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173, 173 (2019), [https://law.und.edu/\\_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf](https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf).

unconstitutional because it violated attorneys' freedom of speech.<sup>3</sup> In striking down the rule, the federal district court in *Greenberg v. Haggerty* explained:

*[The rule] will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .*

*Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.<sup>4</sup>*

In the nearly five years since ABA Model Rule 8.4(g) was first urged upon state supreme courts, thirteen state supreme courts or state bar committees have rejected or abandoned it.<sup>5</sup> Two states have adopted it (Vermont and New Mexico), and two states (Maine and Pennsylvania) have adopted modified versions with Pennsylvania's rule struck down as unconstitutional.<sup>6</sup>

By contrast, current New York Rule of Professional Conduct 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in several other states. The current rule allows a lawyer to be disciplined for unlawful employment discrimination if a tribunal determines that her conduct was unlawful and the appeals process has been completed. But if the New York City Bar Proposal is adopted, any lawyer and law firm which has been found by a tribunal not to have engaged in unlawful discriminatory conduct could nonetheless be subject to discipline. Indeed, ABA Model Rule 8.4(g) subjects a lawyer or law firm to discipline for any conduct related to the practice of law, including social activities.

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<sup>3</sup> *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.

<sup>4</sup> *Id.* at 24-25.

<sup>5</sup> See *infra* Part V, pp. 28-32 (describing states' responses to ABA Model Rule 8.4(g)).

<sup>6</sup> *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).



A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h) respectively provide for discipline if a lawyer or law firm “engage[s] in conduct that is prejudicial to the administration of justice” or “engage[s] in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct are “applied robustly” by committees and courts “to limit and deter [] conduct, bias or prejudice.”<sup>7</sup>

Most importantly, the United States Supreme Court has issued three recent decisions that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys’ speech. Those decisions, which were relied upon by the *Greenberg* court, are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). See *infra* pp. 20-26. Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, *Formal Opinion 493* not only fails to distinguish these recent Supreme Court decisions; it fails to mention them at all. But ignoring Supreme Court precedent does not make it go away.

ABA Model Rule 8.4(g) will inevitably chill New York attorneys’ speech regarding political, ideological, religious, and social issues to the detriment of New York attorneys, their clients, and society in general. But a free society depends on attorneys being able to speak their minds freely without fear of losing their license to practice law.

Both liberal and conservative lawyers should be concerned about ABA Model Rule 8.4(g)’s disturbing implications for their ability to practice law. For example, attorneys who serve on their firms’ hiring committees and make employment decisions in which, in order to achieve diversity goals, even modest preference in hiring or promotion is given based on race, sex, religion, or sexual orientation would be in violation of ABA Model Rule 8.4(g).<sup>8</sup> Or an

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<sup>7</sup> Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf>. See also, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), <https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf>.

<sup>8</sup> Thomas Spahn, a highly respected professional ethics expert, has concluded that ABA Model Rule 8.4(g) “prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.” He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:

Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a “plus” when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law

attorney who tweets a common but hurtful sexual term aimed at a presidential spokeswoman could be subject to discipline under the proposed rule.<sup>9</sup> Or a law professor whose comments to the media employ racial and gender stereotypes to describe the critics of ABA Model Rule 8.4(g) could be subject to discipline under the proposed rule.<sup>10</sup> Because the terms “harassment” and “discrimination” are difficult to define and hold greatly dissimilar meanings for different people, ABA Model Rule 8.4(g) threatens lawyers’ speech across the political, ideological, social, and religious spectrum.

Sadly, we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree. Some lawyers purportedly have filed bar complaints in order to harass officeholders whose political views they dislike.<sup>11</sup> Yale law students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.<sup>12</sup>

In July 2020, the Judicial Conference Committee on Codes of Conduct withdrew a draft advisory opinion that had said it was improper for judges to be members of the Federalist Society or the American Constitution Society, but permissible to belong to the American Bar Association. A comment letter signed by 210 federal judges took exception to the opinion’s

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firms’ head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues 5-7* (July 12, 2018) (emphasis supplied). *See infra*, Part VI, pp. 32-34 (why diversity programs cannot be protected).

<sup>9</sup> Debra Cassens Weiss, *Big Law Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (lawyer, honored in 2009 by the ABA Journal “for his innovative use of social media in his practice,” apologized to firm colleagues, saying no “woman should be subjected to such animus”), [https://www.abajournal.com/news/article/biglaw\\_partner\\_deletes\\_twitter\\_account\\_after\\_profane\\_insult\\_toward\\_sarah\\_hu](https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu).

<sup>10</sup> Eugene Volokh, *Professor Stephen Gillers (NYU) Unwittingly Demonstrates Why ABA Model Rule 8.4(g) Chills Protected Speech*, The Volokh Conspiracy, June 17, 2019, <https://reason.com/2019/06/17/professor-stephen-gillers-nyu-unwittingly-demonstrates-why-aba-model-rule-8-4g-chills-protected-speech/>. The article explains that in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule stereotyped critics of the Rule by race and gender. The article suggests that the same comment made in the context of a bar association debate might be grounds for discipline under ABA Model Rule 8.4(g).

<sup>11</sup> *See* Brian Sheppard, *The Ethics Resistance*, 32 Geo. J. Legal Ethics 235, 238 (2018):

Ordinary ethics complaints have the capacity to ruin individual law careers and serve as cautionary examples to other lawyers. Ethics Resistance complaints have the additional capacity to prompt official action, alter staffing decisions at the highest levels of government, influence high-ranking lawyers’ willingness to comply with investigations, and terminate or preempt relationships between lawyers and the politically powerful.

Most importantly, they can change public perception regarding the moral integrity of an administration. And they can do this even if they do not result in a sanction.

<sup>12</sup> *See, e.g.*, Aaron Haviland, “I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong,” The Federalist (Mar. 4, 2019), <https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/> (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

underlying “double standard” and “untenable” “disparate treatment” as reflected in “the Committee[’s] oppos[ing] judicial membership in the Federalist Society while permitting membership in the ABA.”<sup>13</sup> In withdrawing its proposal, the Judicial Conference Committee noted that “judges confront a world filled with challenges arising out of emerging technologies, deep ideological disputes, a growing sense of mistrust of individuals and institutions, and an ever-changing landscape of competing political, legal and societal interests.”<sup>14</sup> Far less sheltered than judges from these competing interests, lawyers daily confront such an environment.

Many proponents of ABA Model Rule 8.4(g) sincerely believe that the Rule will only be used to punish lawyers who are bad actors. Unfortunately, we have recently witnessed too many times when people have lost their livelihoods for holding traditional religious views. For example, the Fire Chief of Atlanta, an African-American man who had been appointed National Fire Marshal by President Obama, was fired because he wrote a book that briefly referred to his religious beliefs regarding marriage and sexual conduct.<sup>15</sup> The CEO of Mozilla lost his position because he made a contribution that reflected his religious beliefs to one side of a political debate regarding marriage laws.<sup>16</sup>

Merely expressing support for freedom of speech has itself become controversial. In July 2020, several well-known liberal signatories to a public letter in support of freedom of speech were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.<sup>17</sup>

Given the current climate, lawyers who hold classical liberal, conservative, libertarian, or religious viewpoints are understandably unwilling to support a black letter rule that could easily be misused to deprive them of their license to practice law. As a nationally recognized First Amendment expert has explained, ABA Model Rule 8.4(g) is a speech code that threatens lawyers’ speech.<sup>18</sup>

Perhaps this is why after nearly five years of deliberations by state supreme courts and state bar associations in many states across the country, only two states have adopted ABA

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<sup>13</sup> Letter from 210 Federal Judges to Robert P. Deyling, Ass’t Gen. Counsel, Administrative Off. of the U.S. Courts (Mar. 18, 2020), <https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf>.

<sup>14</sup> Memorandum from James C. Duff, Director, Administrative Office of the United States Courts to All United States Judges, “Update Regarding Exposure Draft – Advisory Opinion No. 117 Information” (July 30, 2020), <https://aboutblaw.com/SkA>,

<sup>15</sup> *Testimony Before the House Committee on Oversight and Government Reform on Religious Freedom & The First Amendment Defense Act*, 114<sup>th</sup> Cong. (July 12, 2016) (statement of Kelvin J. Cochran).

<sup>16</sup> “Did Mozilla CEO Brendan Eich Deserve to Be Removed from His Position?” *Forbes* (Apr. 11, 2014), <https://www.forbes.com/sites/quora/2014/04/11/did-mozilla-ceo-brendan-eich-deserve-to-be-removed-from-his-position-due-to-his-support-for-proposition-8/#483d85c02158>.

<sup>17</sup> “J.K. Rowling Joins 150 Public Figures Warning Over Free Speech,” *BBC* (July 8, 2020), <https://www.bbc.com/news/world-us-canada-53330105>.

<sup>18</sup> Volokh, *supra* note 1.

Model Rule 8.4(g). In contrast, at least thirteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is unconstitutional or unworkable. Those states have opted for the prudent course of letting other states experiment with ABA Model Rule 8.4(g) in order to evaluate its actual effect on the lawyers in those states before imposing it on lawyers in their states. See *infra* pp. 28-32.

This memorandum explains the numerous reasons why ABA Model Rule 8.4(g) should not be recommended for adoption, including:

1. Scholars' analysis of ABA Model Rule 8.4(g) as a speech code for lawyers (pp. 6-9);
2. ABA Model Rule 8.4(g)'s overreach into attorneys' lives, particularly its chilling effect on lawyers' speech and religious exercise, which is exacerbated by its use of a negligence standard (pp. 10-19);
3. ABA Model Rule 8.4(g)'s unconstitutionality under the analyses in three recent United States Supreme Court decisions, which ABA Formal Opinion 493 ignored, but the federal court decision in *Greenberg v. Haggerty* relied upon (pp. 20-26);
4. The fact that only Vermont and New Mexico have adopted ABA Model Rule 8.4(g), contrary to the inaccurate claim that 24 states have a similar rule (pp. 26-27);
5. The fact that official bodies in Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have abandoned proposals to adopt it (pp. 28-32);
6. ABA Model Rule 8.4(g)'s unintended consequence of making it professional misconduct for law firms to engage in many diversity-oriented employment practices (pp. 32-34);
7. Its ramifications for lawyers' ability to accept, decline, or withdraw from a representation (pp. 34-35); and
8. The strain ABA Model Rule 8.4(g) would place on the scarce resources of the attorney grievance committees to process the increase in complaints against attorneys and firms (pp. 35-37).

**I. Scholars have explained that ABA Model Rule 8.4(g) is a speech code for lawyers.**

For four years before the *Greenberg* decision, a number of scholars had accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has

summarized his view, in a two-minute video, that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech.<sup>19</sup> Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.<sup>20</sup>

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that “[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers’ First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants.”<sup>21</sup> She insists that “lawyer speech, association, and petitioning” are “rights [that] must be protected” because they “play a major role in checking the use of governmental and non-governmental power in the United States.”<sup>22</sup>

The late Professor Ronald Rotunda, a deeply respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers’ First Amendment rights.<sup>23</sup> Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, “[t]he ABA’s efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment.”<sup>24</sup> They observed that “[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds.”<sup>25</sup> In a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

In the case of Rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of “verbal” conduct when one lawyer tells another, in connection with a case, “I abhor the idle

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<sup>19</sup> Volokh, *supra* note 1.

<sup>20</sup> *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.

<sup>21</sup> Margaret Tarkington, *Throwing Out the Baby: The ABA’s Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

<sup>22</sup> *Id.*

<sup>23</sup> Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

<sup>24</sup> Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter “Rotunda & Dzienkowski”], “§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech” & “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” in “§ 8.4-2 Categories of Disciplinable Conduct.”

<sup>25</sup> *Id.* at “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

rich. We should raise capital gains taxes.” The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.<sup>26</sup>

Professor Josh Blackman has explained that “Rule 8.4(g) is unprecedented, as it extends a disciplinary committee’s jurisdiction to conduct merely ‘related to the practice of law,’ with only the most tenuous connection to representation of clients, a lawyer’s fitness, or the administration of justice.”<sup>27</sup>

Professor McGinniss, Dean of the University of North Dakota School of Law, who teaches professional responsibility, warns against “the widespread ideological myopia about what it truly means to have a diverse and inclusive profession” that seems to be an impetus for ABA Model Rule 8.4(g).<sup>28</sup> He explains that a genuinely “diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests ‘bias or prejudice,’ is ‘demeaning’ or ‘derogatory’ because disagreement is deemed offensive, or is considered intrinsically ‘harmful’ or as reflecting adversely on the ‘fitness’ of the speaker.”<sup>29</sup>

In a thorough examination of the rule’s legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”<sup>30</sup> They recommend that “jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all.”<sup>31</sup> They conclude that “the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected.”<sup>32</sup>

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<sup>26</sup> Ron Rotunda, “*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers’ speech*,” *The Wall Street Journal*, Aug. 16, 2016, <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>.

<sup>27</sup> Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 *Geo. J. Legal Ethics* 241, 243 (2017). See also, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 *Notre Dame J.L. Ethics & Pub. Pol’y* 135 (2018).

<sup>28</sup> McGinniss, *supra* note 2, at 249.

<sup>29</sup> *Id.*

<sup>30</sup> Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 *J. Legal. Prof.* 201, 257 (2017).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 204.

In adopting ABA Model Rule 8.4(g), the ABA largely ignored over 480 comment letters,<sup>33</sup> most opposed to the new rule. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.<sup>34</sup>

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.<sup>35</sup> But little was done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."<sup>36</sup> Specifically, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."<sup>37</sup> Halaby and Long summarized the legislative history of the rule:

Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.<sup>38</sup>

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) would dramatically shift the disciplinary landscape for New York attorneys.

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<sup>33</sup>American Bar Association website, Comments to Model Rule 8.4, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8\\_4/mr\\_8\\_4\\_comments.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html).

<sup>34</sup> Halaby & Long, *supra* note 30, at 220 & n.97 (listing the Committee's concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA%20MODEL%20RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA%20MODEL%20RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf).

<sup>35</sup> Halaby & Long, *supra* note 30, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).

<sup>36</sup> *Id.* at 203.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 233.

## **II. ABA Model Rule 8.4(g) Would Greatly Expand the Reach of the Rules of Professional Conduct into New York Attorneys' Lives and Chill Their Speech.**

### **A. ABA Model Rule 8.4(g) would regulate lawyers' interactions with anyone while engaged in conduct related to the practice of law, including when participating in business or social activities in connection with the practice of law.**

ABA Model Rule 8.4(g) would make professional misconduct *any* conduct related to the practice of law that a lawyer “knows *or reasonably should know* is harassment or discrimination” on eleven separate bases (“race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status”) whenever a lawyer is: “(1) representing clients; 2) interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; 3) operating or managing a law firm or law practice; or 4) participating in bar association, business *or social activities in connection with the practice of law.*”

Simply put, ABA Model Rule 8.4(g) would regulate a lawyer’s “conduct . . . while . . . *interacting with . . . others* while engaged in the practice of law . . . or participating in . . . bar association, business *or social activities in connection with the practice of law.*” Proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as “[a]cademics, nonprofit lawyers, and some government lawyers,” as well as “[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system.”<sup>39</sup>

The compelling question becomes: *What conduct doesn't ABA Model Rule 8.4(g) reach?* Virtually everything a lawyer does can be characterized as conduct while interacting with others while engaged in the practice of law.<sup>40</sup> Much of a lawyer’s social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

The Rule’s scope is of particular concern when “conduct” is euphemistically defined to include “harmful verbal conduct,” which is speech. As ABA Model Rule 8.4(g) and its accompanying Comment [3] state, “[d]iscrimination and harassment” include “harmful verbal or physical conduct.” Thus, ABA Model Rule 8.4(g) would regulate pure speech.

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<sup>39</sup> ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), <https://www.clnet.org/document.doc?id=1125>.

<sup>40</sup> See Halaby & Long, *supra* note 30, at 226 (“The proposed comment of Version 3 expanded the ambit of ‘conduct related to the practice of law’ to include virtually anything a working lawyer might do.”)



ABA Model Rule 8.4(g) is a minefield for New York lawyers who frequently speak to community groups, classes, and other audiences about current legal issues of the day. Lawyers frequently participate in panel discussions, present CLEs, write op-eds, or tweet regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation. Lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new professional opportunities.

ABA Model Rule 8.4(g) raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?<sup>41</sup>
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints?<sup>42</sup>
- Is a law professor or adjunct faculty member subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?<sup>43</sup>

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<sup>41</sup> The *Greenberg* case was a facial challenge to Pennsylvania's version of ABA Model Rule 8.4(g) by a lawyer who regularly presents CLEs on controversial freedom of speech topics. The court found his concerns legitimate and his speech unconstitutionally chilled. 491 F. Supp. 3d at 16, 20-21. *Cf.*, Kathryn Rubino, *Did D.C. Bar Course Tell Attorneys That It's Totally Cool to Discriminate If that's What the Client Wants?*, Above the Law (Dec. 12, 2018) (reporting on attendees' complaints regarding an instructor's discussion of a hypothetical about sex discrimination and the applicability of the ethical rules during the mandatory D.C. Bar Professional Ethics course for newly admitted D.C. attorneys), <https://abovethelaw.com/2018/12/did-d-c-bar-course-tell-attorneys-its-totally-cool-to-discriminate-if-thats-what-the-client-wants/>.

<sup>42</sup> *Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP)*, Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>. ("Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event."); *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) at 4, <https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384>, at 6 ("[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.").

<sup>43</sup> See *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Com'n. (May 15, 2018) discussed *infra* note 51.

- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist term?<sup>44</sup>
- Is a lawyer subject to discipline for employment decisions made by religious or other charitable nonprofits if she sits on its board and ratifies its decisions or employment policies?<sup>45</sup>
- May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various groups as protected classes in a nondiscrimination law being debated in the state legislature?
- Is a lawyer at risk if she provides legislative testimony in favor of adding new protected classes to state or local civil rights laws, but only if religious exemptions (which some consider “a license to discriminate”) are also added?<sup>46</sup>
- Is a lawyer subject to discipline for comment letters she writes as a lawyer expressing her personal views on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer who is running for public office subject to discipline for socio-economic discrimination if she proposes that college loans be forgiven only for graduates earning below a certain income level?
- Is a lawyer subject to discipline for failing to use “preferred” pronouns or names that she believes are not objectively accurate?<sup>47</sup>
- Is a lawyer subject to discipline for serving on the board of an organization that discriminates based on sex, such as a social fraternity or sorority?
- Is a lawyer at risk for volunteer legal work for political candidates who take controversial positions?
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?

Professor Eugene Volokh has explored whether discipline under ABA Model Rule 8.4(g) could be triggered by conversation on a wide range of topics at a local bar dinner, explaining:

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<sup>44</sup> Debra Cassens Weiss, *BigLaw Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (noting that the lawyer had been honored in 2009 by the ABA Journal “for his innovative use of social media in his practice”), [http://www.abajournal.com/news/article/biglaw\\_partner\\_deletes\\_twitter\\_account\\_after\\_profane\\_insult\\_toward\\_sarah\\_hu](http://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu).

<sup>45</sup> See D.C. Bar Legal Ethics, Opinion 222 (1991) (punting the issue of whether a lawyer could be disciplined for arguably discriminatory employment decisions made by his church or a religious nonprofit while he was on its board), <https://www.dcbare.org/bar-resources/legal-ethics/opinions/opinion222.cfm>.

<sup>46</sup> The Montana Legislature passed a resolution expressing its concerns about the impact of ABA Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees.” See *infra* notes 144.

<sup>47</sup> See, e.g., *Meriwether v. Hartop*, 992 F.3d 492 (6<sup>th</sup> Cir. 2021) (tenured professor’s free speech implicated when he was disciplined by university for violating its nondiscrimination policies because he refused to address a transgender student using the student’s preferred gender identity title and pronouns).

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."<sup>48</sup>

Professor Josh Blackman similarly has a thought-provoking list of CLE topics that would expose their presenters to grievance complaints by persons who disagree with the ideas or beliefs that a lawyer expresses.<sup>49</sup>

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.<sup>50</sup> Such a troubling situation arose in Alaska when the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm, alleging that the firm violated a municipal nondiscrimination law. The firm represented a religiously affiliated, private nonprofit shelter for homeless women, many of whom had been abused by men. The firm represented the shelter in a proceeding arising from a discrimination complaint filed with the AERC, alleging that the shelter had refused admission to a biological male who identified as female. The shelter denied the complaint, explaining that it had denied shelter to the individual because, among other things, of its policy against admitting persons who were inebriated, but acknowledging that it also had a policy against admitting biological men. The law firm responded to an unsolicited request for a media interview. When the interview was published providing the shelter's version of the facts, the AERC brought a discrimination claim

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<sup>48</sup> Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a\\_inl&utm\\_term=.f4beacf8a086](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086).

<sup>49</sup> Blackman, *supra* note 27 at 246.

<sup>50</sup> See, e.g., Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," The Federalist (Mar. 4, 2019), <http://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/> (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

against the law firm alleging it had published a discriminatory policy. The AERC complaint was eventually dismissed, but only after several months of legal proceedings.<sup>51</sup>

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech.

At bottom, ABA Model Rule 8.4(g) has a “fundamental defect” because it “wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech which is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech.”<sup>52</sup> ABA Model Rule 8.4(g) creates doubt as to whether particular speech is permissible and, therefore, will inevitably chill lawyers’ public speech.<sup>53</sup> In all likelihood, it will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.<sup>54</sup> If so, public discourse and civil society will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) will impose on lawyers.

**C. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other nonprofit charities.**

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.<sup>55</sup>

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<sup>51</sup> *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comm’n (May 15, 2018).

<sup>52</sup> Tenn. Att’y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter “Tenn. Att’y Gen. Letter”), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>. The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we cite to the page numbers of the letter rather than the opinion. (“[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.”) (Emphasis in original.)

<sup>53</sup> *Id.* at 8 (“Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.”)

<sup>54</sup> McGinniss, *supra* note 2, at 217-249 (explaining the “justified distrust of speech restrictions” such as Model Rule 8.4(g), in light of its proponents’ stated desire “for a cultural shift . . . to be captured in the rules of professional conduct”).

<sup>55</sup> Tex. Att’y Gen. Op., *supra* note 42, at 4 (“Model Rule 8.4(g) could also be applied to restrict an attorney’s religious liberty and prohibit an attorney from zealously representing faith-based groups.”).

As a volunteer on a charitable institution's board, a lawyer arguably is engaged "in conduct related to the practice of law" when serving on the risk management committee or providing legal input during a board discussion about the institution's policies. For example, a lawyer may be asked to help craft her congregation's policy regarding whether its clergy will perform marriages or whether the institution's facilities may be used for wedding receptions that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for pro bono legal work that she performs for her church or her alma mater.<sup>56</sup> By making New York lawyers hesitant to serve on these nonprofit boards, ABA Model Rule 8.4(g) would do real harm to religious and charitable institutions and hinder their good works in their communities.

**D. Attorneys' membership in religious, social, or political organizations could be subject to discipline.**

ABA Model Rule 8.4(g) could chill lawyers' willingness to associate with political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. Would ABA Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage?<sup>57</sup> Would lawyers be subject to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

The late Professor Rotunda and Professor Dzienkowski expressed concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith.<sup>58</sup> State attorneys general have voiced similar concerns.<sup>59</sup> Several attorneys general have warned that "serving as a member of the board of a religious organization,

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<sup>56</sup> See D.C. Bar Legal Ethics, Opinion 222, *supra* note 45. See also, Tenn. Att'y Gen. Letter, *supra* note 49, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

<sup>57</sup> For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, [http://www.courts.ca.gov/documents/sc15-Jan\\_23.pdf](http://www.courts.ca.gov/documents/sc15-Jan_23.pdf).

<sup>58</sup> Rotunda & Dzienkowski, *supra* note 24, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

<sup>59</sup> Tex. Att'y Gen. Op., *supra* note 42, at 5 ("Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline."); La. Att'y Gen. Op., *supra* note 42, at 6 ("Proposed 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.").

participating in groups such as Christian Legal Society or even speaking about how one’s religious beliefs influence one’s work as an attorney” could “be deemed conduct ‘related to the practice of law.’”<sup>60</sup> Attorneys should not have to choose between their faith and their livelihood.

**E. ABA Model Rule 8.4(g)’s potential for chilling New York attorneys’ speech is compounded by its use of a negligence standard rather than a knowledge requirement.**

The lack of a knowledge requirement is a serious flaw: “[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.”<sup>61</sup> Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

[ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the ‘objectively reasonable lawyer’ will be constructed for purposes of making this determination.<sup>62</sup>

ABA Model Rule 8.4(g) is perilous because the list of words and conduct deemed “discrimination” or “harassment” is ever shifting, often in unanticipated ways. Phrases that were generally acceptable ten years ago may now be critiqued as discriminating against or harassing a person in one of the eleven enumerated categories.

**F. ABA Model Rule 8.4(g) does not preclude a finding of professional misconduct based on a lawyer’s “implicit bias.”**

This negligence standard makes it entirely foreseeable that ABA Model Rule 8.4(g) could reach communication or conduct that demonstrates “implicit bias, that is, conduct or speech that the lawyer is not consciously aware may be discriminatory.” As Dean McGinniss notes, “this relaxed mens rea standard” might even be used to “more explicitly draw lawyers’ speech reflecting unconscious, or ‘implicit,’ bias within the reach of the rule.”<sup>63</sup> Acting Law Professor Irene Oritseyinmi Joe recently argued that while ABA Model Rule 8.4(g) “addresses explicit attorney bias, . . . it also provides a vehicle for those tasked with governing attorney behavior to

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<sup>60</sup> Tenn. Att’y Gen. Letter, *supra* note 52, at 10.

<sup>61</sup> *Id.* at 5. See Halaby & Long, *supra* note 30, at 243-245.

<sup>62</sup> Prof. Dane S. Ciolino, *LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct*, Louisiana Legal Ethics (Aug. 6, 2017) (emphasis in original), <https://lalegaethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/>.

<sup>63</sup> McGinniss, *supra* note 2, at 205 & n.135.

address implicit bias.”<sup>64</sup> She explains that “the rule’s use of ‘knows or reasonably should know’ arguably includes an understanding and reflection of unconscious bias and its effects.”<sup>65</sup>

Proponents of ABA Model Rule 8.4(g) often are likewise proponents of the ABA’s “Implicit Bias Initiative.”<sup>66</sup> On its webpages devoted to its “Implicit Bias Initiative,” the ABA defines “implicit bias” and “explicit biases” as follows:<sup>67</sup>

**Explicit biases:** Biases that are directly expressed or publicly stated or demonstrated, often measured by self-reporting, *e.g.*, “I believe homosexuality is wrong.” A preference (positive or negative) for a group based on stereotype.

**Implicit bias:** A preference (positive or negative) for a group based on a stereotype or attitude we hold that *operates outside of human awareness* and can be understood as a lens through which a person views the world that automatically filters how a person takes in and acts in regard to information. Implicit biases are usually measured indirectly, often using reaction times.

One can agree that implicit bias exists and still believe that bias “outside of human awareness” should not be grounds for a lawyer’s loss of licensure or her suspension, censure, or admonition.<sup>68</sup> But nothing would prevent a charge of discrimination based on “implicit bias” from being brought against an attorney under ABA Model Rule 8.4(g).<sup>69</sup> Such charges are foreseeable given that ABA Model Rule 8.4(g)’s “proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all.”<sup>70</sup>

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<sup>64</sup> Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 975 (2020) (ABA Model Rule 8.4(g) “addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”).

<sup>65</sup> *Id.* at 978 n.70.

<sup>66</sup> See Halaby & Long, *supra* note 30, at 216-217, 243-245. Halaby and Long eventually conclude that implicit-bias conduct probably would not fall within the “reasonably should know” standard. *Id.* at 244-245. We are not so certain.

<sup>67</sup> ABA Section on Litigation, *Implicit Bias Initiative, Toolbox, Glossary of Terms* (Jan. 23, 2012), <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/glossary/#23>

<sup>68</sup> Halaby & Long, *supra* note 30, at 245 (“Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.”). See also, McGinnis, *supra* note 2, at 204-205; Dent, *supra* note 27, at 144.

<sup>69</sup> See, *e.g.*, Irene Oritseweyinmi Joe, *supra* note 64 (ABA Model Rule 8.4(g) “addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”); *id.* at 978n.70 (“[T]he rule’s use of ‘knows or reasonably should know’ arguably includes an understanding and reflection of unconscious bias and its effects.”).

<sup>70</sup> Halaby & Long, *supra* note 30, at 244 (“When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative ‘reasonably should know’ qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA’s broader membership.”) (footnote omitted).

**G. Despite its nod to speech concerns, ABA Model Rule 8.4(g) will chill speech and cause lawyers to self-censor in order to avoid grievance complaints.**

ABA Model Rule 8.4(g) itself recognizes its potential for silencing lawyers when it asserts that it “does not preclude legitimate advice or advocacy consistent with these rules.” This provision affords no substantive protection for attorneys’ speech: It merely asserts that the rule does not do what it in fact does. And what qualifies as “legitimate” advice or advocacy? Or what “legitimate” advice or advocacy is not “consistent with these rules”? And who makes that determination?

This is a constitutional thicket. Because enforcement of proposed ABA Model Rule 8.4(g) gives government officials unbridled discretion to determine which speech is permissible and which is impermissible, the rule clearly invites viewpoint discrimination based on government officials’ subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens’ free speech is unconstitutional viewpoint discrimination.<sup>71</sup>

Proponents of ABA Model Rule 8.4(g) often try to reassure its critics that the rule actually will only rarely be used and to trust that its use will be judicious. But it is not enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, “The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>72</sup> Instead, the Court has rejected “[t]he Government’s assurance that it will apply [a statute] far more restrictively than its language provides” because such an assurance “is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading.”<sup>73</sup>

The *Greenberg* court likewise rejected such assurances by observing that “[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive.” But given “the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer’s] words, speeches, notes, written materials, videos, mannerisms, and practice of law,” the government is “de facto regulat[ing] speech by threat, thereby chilling speech.”<sup>74</sup>

Moreover, in the landmark case, *National Association for the Advancement of Colored People v. Button*,<sup>75</sup> which involved a First Amendment challenge to a state statute regulating

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<sup>71</sup> See, e.g., *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4<sup>th</sup> Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7<sup>th</sup> Cir. 2001).

<sup>72</sup> *United States v. Stevens*, 599 U.S. 460, 480 (2010).

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> *Greenberg*, 491 F. Supp. 3d at 24-25.

<sup>75</sup> *NAACP v. Button*, 371 U.S. 415 (1963).



attorneys' speech, the Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.<sup>76</sup>

ABA Model Rule 8.4(g) fails to protect a lawyer from complaints being filed against her based on her speech. It fails to protect a lawyer from an investigation into whether her speech is "harmful" and "manifests bias or prejudice" on the basis of one or more of the eleven protected categories. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought and she is under investigation whenever she applies for admission to another bar or seeks to appear pro hac vice in a case. In the meantime, her personal reputation may suffer damage through media reports.

The process is the punishment. This brings us to the real problem with ABA Model Rule 8.4(g). Rather than risk a prolonged investigation with an uncertain outcome, and then lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint under ABA Model Rule 8.4(g), as the federal judge warned in *Greenberg*.<sup>77</sup> The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

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<sup>76</sup> *Id.* at 438-39.

<sup>77</sup> 491 F. Supp. 3d at 24-25.

### **III. ABA Formal Opinion 493 Ignores Three Recent Supreme Court Decisions that Demonstrate the Likely Unconstitutionality of Rules Like ABA Model Rule 8.4(g) and Predates the Federal Court Decision in *Greenberg v. Haggerty*.**

Since the ABA adopted Model Rule 8.4(g) in 2016, the United States Supreme Court has issued three free speech decisions that make clear that it unconstitutionally chills attorneys' speech: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The *Becerra* decision clarified that the First Amendment protects "professional speech" just as fully as other speech. That is, there is no free speech carve-out that countenances content-based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that the terms used in ABA Model Rule 8.4(g) create unconstitutional viewpoint discrimination. In *Greenberg v. Haggerty*, the federal district court relied on these three Supreme Court cases to hold Pennsylvania's version of ABA Model Rule 8.4(g) unconstitutional on its face because it invites viewpoint discrimination.<sup>78</sup>

#### **A. *NIFLA v. Becerra* protects lawyers' speech from content-based restrictions.**

Under the Court's analysis in *Becerra*, ABA Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. That is, a government regulation that targets speech must survive strict scrutiny – a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"<sup>79</sup> "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"<sup>80</sup> As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"<sup>81</sup>

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech, which is the operative assumption underlying ABA Model Rule 8.4(g). In striking down Pennsylvania's Rule 8.4(g), the district court relied on *Becerra* to "find[] that Rule 8.4(g) does not cover 'professional speech' that is entitled to less protection" but

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<sup>78</sup> *Id.*

<sup>79</sup> *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

instead “[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.”<sup>82</sup>

To illustrate its point, the Supreme Court noted three recent federal courts of appeals that had ruled that “‘professional speech’ [w]as a separate category of speech that is subject to different rules” and, therefore, less protected by the First Amendment.<sup>83</sup> The Court then abrogated those decisions, stressing that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”<sup>84</sup> The Court rejected the idea that “‘professional speech’ was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”<sup>85</sup>

Instead, the Court was clear that a State’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.”<sup>86</sup>

**B. ABA Formal Opinion 493 and Professor Aviel’s article fail to address the Supreme Court’s decision in *NIFLA v. Becerra*.**

**1. ABA Formal Opinion 493 fails even to mention *Becerra*.**

The ABA Section of Litigation recognized *Becerra*’s impact. Several section members understood that the decision raised grave concerns about the overall constitutionality of ABA Model Rule 8.4(g):

Model Rule 8.4(g) “is intended to combat discrimination and harassment and to ensure equal treatment under the law,” notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section’s Civil Rights Litigation Committee. While it serves important goals, “*the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers’ speech rights—and after the Court’s decision in *Becerra*, it increasingly looks like the answer is yes,*” Robertson concludes.<sup>87</sup>

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<sup>82</sup> *Greenberg*, 491 F. Supp. 3d at 27-30.

<sup>83</sup> *NIFLA*, 138 S. Ct. at 2371.

<sup>84</sup> *Id.* at 2371-72 (emphasis added).

<sup>85</sup> *Id.* at 2371.

<sup>86</sup> *Id.* at 2374.

<sup>87</sup> C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g)*

But two years after *Becerra*, in July 2020, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493, “Model Rule 8.4(g): Purpose, Scope, and Application.” *Formal Opinion 493 does not even mention the Supreme Court’s Becerra decision*, even though it was handed down two years earlier and has been frequently relied upon to identify ABA Model Rule 8.4(g)’s constitutional deficiencies. This lack of mention, let alone analysis, is inexplicable. Formal Opinion 493 has a four-page section that discusses “Rule 8.4(g) and the First Amendment, “ yet never mentions the United States Supreme Court’s on-point decisions in *Becerra*, *Matal*, and *Iancu*.<sup>88</sup> Like the proverbial ostrich burying its head in the sand, the ABA adamantly refuses to see the deep flaws of Model Rule 8.4(g). But New York attorneys deserve honest scrutiny of a rule that would “hang over [New York] attorneys like the sword of Damocles.”<sup>89</sup>

Instead, Formal Opinion 493 serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is intended to restrict lawyers’ speech. The Opinion reassures that it will only be used for “harmful” conduct, which the Rule makes clear includes “verbal conduct” or “speech.”<sup>90</sup> Formal Opinion 493 explains that the Rule’s scope “is *not* restricted to conduct that is severe or pervasive.”<sup>91</sup> Violations will “*often* be intentional and *typically* targeted at a particular individual or group of individuals.” This merely confirms that a lawyer can be disciplined for speech that is not necessarily intended to harm and that does not necessarily “target” a particular person or group.<sup>92</sup>

Formal Opinion 493 claims that “[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern.” But that is hardly reassuring because “matters of public concern” is a term of art in free speech jurisprudence that appears in the context of the broad limits that the government is allowed to place on its employees’ free speech. The category actually provides *less*, rather than more, protection for free speech.<sup>93</sup> And it may even reflect the alarming notion that lawyers’ speech is akin to government speech, a topic

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*Constitutional?*, ABA Section of Litigation Top Story (Apr. 3, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/> (emphasis added).

<sup>88</sup> American Bar Association Standing Comm. on Ethics and Prof. Resp., Formal Op., 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (July 15, 2020), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-493.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf).

<sup>89</sup> *Greenberg*, 491 F. Supp. 3d at 24.

<sup>90</sup> *Id.* at 1.

<sup>91</sup> *Id.* (emphasis added).

<sup>92</sup> *Id.*

<sup>93</sup> *Garcetti v. Cabellos*, 547 U.S. 410, 417 (2006) (“the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern”); *id.* at 418 (“To be sure, conducting these inquiries sometimes has proved difficult.”).

that Professor Aviel briefly mentions in her article.<sup>94</sup> If lawyers' speech is treated as the government's speech, then lawyers have minimal protection for their speech.

Formal Opinion 493 claims that ABA Model Rule 8.4(g) does not "limit a lawyer's speech or conduct in settings unrelated to the practice of law," but fails to grapple with just how broadly the Rule defines "conduct related to the practice of law," for example, to include social settings.<sup>95</sup> In so doing, Formal Opinion 493 ignores the Court's instruction in *Becerra* that lawyers' *professional* speech – not just their speech "unrelated to the practice of law" – is protected by the First Amendment under a strict scrutiny standard.

Formal Opinion 493 concedes that its definition of the term "harassment" is not the same as the EEOC uses,<sup>96</sup> citing *Harris v. Forklift Systems, Inc.*, which ruled that "[c]onduct 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."<sup>97</sup> ABA Model Rule 8.4(g)'s definition of "harassment" in Comment [3] includes "derogatory or demeaning verbal or physical conduct." Of course, this definition runs headlong into the Supreme Court's ruling that the mere act of government officials determining whether speech is "disparaging" is viewpoint discrimination that violates freedom of speech. In Formal Opinion 493, the ABA offers a new definition for "harassment" ("aggressively invasive, pressuring, or intimidating") that is not found in ABA Model Rule 8.4(g). Formal Opinion 493 signifies that the ABA itself recognizes that the term "harassment" is the Rule's Achilles' heel.

## **2. The Aviel article fails to mention *Becerra* and, therefore, is not a reliable source of information on the constitutionality of ABA Model Rule 8.4(g).**

Professor Rebecca Aviel's article, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31 (2018), should not be relied upon in assessing ABA Model Rule 8.4(g)'s constitutionality because it too fails to mention *Becerra*. It seems probable that the article was written before the Supreme Court issued *Becerra*.

Of critical importance, Professor Aviel's article rests on the assumption that "regulation of the legal profession is legitimately regarded as a 'carve-out' from the general marketplace" that "appropriately empowers bar regulators to restrict the speech of judges and lawyers in a

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<sup>94</sup> Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31, 34 (2018) ("[L]awyers have such an intimate relationship with the rule of law that they are not purely private speakers. Their speech can be limited along lines analogous with government actors because, in a sense, they embody and defend the law itself"). The mere suggestion that lawyers' speech is akin to government actors' speech, which is essentially government speech that is unprotected by the First Amendment, is deeply troubling and should be soundly rejected.

<sup>95</sup> Formal Op. 493, *supra* note 89, at 1.

<sup>96</sup> *Id.* at 4 & n.13.

<sup>97</sup> 510 U.S. 17, 21 (1993)

manner that would not be permissible regulation of the citizenry in the general marketplace.”<sup>98</sup> But this is precisely the assumption that the Supreme Court *rejected* in *Becerra*. Contrary to Professor Aviel’s assumption, the Court explained in *Becerra* that the First Amendment does not contain a carve-out for “professional speech.”<sup>99</sup> Instead, the Court used lawyers’ speech as an example of protected speech.

Because she wrote without the benefit of *Becerra*, compounded by her reliance on basic premises repudiated by the Court in *Becerra*, her free speech analysis cannot be relied upon as authoritative. Interestingly, even without the *Becerra* decision to guide her, Professor Aviel conceded that the “expansiveness” of ABA Model Rule 8.4(g)’s comments “may well raise First Amendment overbreadth concerns.”<sup>100</sup>

**C. Under *Matal v. Tam* and *Iancu v. Brunetti*, ABA Model Rule 8.4(g) fails viewpoint-discrimination analysis.**

As the federal district court held in *Greenberg*, under the Court’s analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers’ speech. In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize “disparaging” speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that “*demeans* or offends.”<sup>101</sup> The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.<sup>102</sup>

In *Matal*, all nine justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may “disparage or bring into contempt or disrepute” living or dead persons. Allowing government officials to determine what words do and do not “disparage” a person “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”<sup>103</sup> Justice Alito, writing for a plurality of the Court, noted that “[s]peech that *demeans* on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”<sup>104</sup>

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<sup>98</sup> Aviel, *supra* note 95, at 39 (citation and quotation marks omitted); *see also id.* at 44.

<sup>99</sup> *Becerra*, 138 S. Ct. at 2371.

<sup>100</sup> Aviel, *supra* note 95, at 48.

<sup>101</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring)(emphasis supplied).

<sup>102</sup> *Id.* at 1753-1754, 1765 (plurality op.).

<sup>103</sup> *Id.* at 1751 (quotation marks and ellipses omitted).

<sup>104</sup> *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)(emphasis supplied).

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that “[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate,” particularly “if the ideas or perspectives are ones a particular audience might think offensive.”<sup>105</sup> Justice Kennedy closed with a sober warning:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.<sup>106</sup>

Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the government permitted “a positive or benign mark but not a *derogatory* one,” which “reflects the Government’s disapproval of a subset of messages it finds offensive,” which is “the essence of viewpoint discrimination.”<sup>107</sup> And it was viewpoint discriminatory even if it “applies in equal measure to any trademark that *demeans* or offends.”<sup>108</sup>

In 2019, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination. The challenged terms in *Iancu* were “immoral” and “slanderous” and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that “immoral” and “scandalous” insert a “facial viewpoint bias in the law [that] results in viewpoint-discriminatory application.”<sup>109</sup> The Act was unconstitutional because:

[I]t allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.<sup>110</sup>

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<sup>105</sup> *Id.* at 1767 (Kennedy, J., concurring).

<sup>106</sup> *Id.* at 1769 (Kennedy, J., concurring).

<sup>107</sup> *Id.* at 1766 (Kennedy, J., concurring)(emphasis supplied).

<sup>108</sup> *Id.* (emphasis supplied).

<sup>109</sup> *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).

<sup>110</sup> *Id.*

**D. ABA Model Rule 8.4(g)'s terms "harassment" and "discrimination" are viewpoint discriminatory.**

Because ABA Model Rule 8.4(g) would punish lawyers' speech on the basis of viewpoint, it is unconstitutional under the analyses in *Matal* and *Iancu*. As Comment [3] explains, under ABA Model Rule 8.4(g), "discrimination includes *harmful* verbal . . . conduct that manifests bias or prejudice towards others." And harassment includes "*derogatory* or *demeaning* verbal . . . conduct."

Under the *Matal* and *Iancu* analyses, these definitions are textbook examples of viewpoint discrimination. In *Matal*, the Supreme Court unanimously held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.<sup>111</sup> A rule that permits government officials to punish lawyers for speech that the government determines to be "harmful" or "derogatory or demeaning" is the epitome of an unconstitutional rule.

As explained earlier, viewpoint discrimination occurs when government officials have unbridled discretion to determine the meaning of a statute, rule, or policy in such a way that they can favor particular viewpoints while penalizing other viewpoints. The provision of ABA Model Rule 8.4(g) that exempts "*legitimate* advice or advocacy *consistent with these rules*" permits such unbridled discretion, as do the terms "harmful" and "derogatory or demeaning."<sup>112</sup>

Finally, in addition to unconstitutional viewpoint discrimination, the vagueness in the terms "harassment" and "discrimination" will necessarily chill lawyers' speech. The terms further fail to give lawyers fair notice of what speech might subject them to discipline. At bottom, ABA Model Rule 8.4(g) fails to provide the clear enforcement standards that are necessary when the loss of one's livelihood may be at stake.

**IV. The ABA's Original Claim that 24 States have a Rule Similar to ABA Model Rule 8.4(g) Is Not Accurate Because Only Vermont and New Mexico have Fully Adopted ABA Model Rule 8.4(g).**

When the ABA adopted Model Rule 8.4(g), it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."<sup>113</sup> But this claim has been shown to be factually incorrect. As the 2019 edition of the *Annotated Rules*

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<sup>111</sup> 137 S. Ct. at 1753-1754, 1765 (plurality op.); *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

<sup>112</sup> *See supra*, at p. 18 & n.72.

<sup>113</sup> *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, [https://www.scbar.org/media/filer\\_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod\\_materials\\_january\\_2017.pdf](https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf), at 56-57.



*of Professional Conduct* states: “Over half of all jurisdictions have a specific rule addressing bias and/or harassment – *all of which differ in some way from the Model Rule [8.4(g)] and from each other.*”<sup>114</sup>

No empirical evidence, therefore, supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have conceded, ABA Model Rule 8.4(g) does not replicate any black letter rule adopted by a state supreme court before 2016. Twenty-four states, including New York, had adopted some version of a black letter rule dealing with “bias” issues before the ABA promulgated Model Rule 8.4(g) in 2016; *however, each of these black letter rules was narrower than ABA Model Rule 8.4(g).*<sup>115</sup> Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states had adopted neither a black letter rule nor a comment.

A proponent of ABA Model Rule 8.4(g) observed that “[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely.”<sup>116</sup> He highlighted the primary differences between these pre-2016 rules and ABA Model Rule 8.4(g):

Most contain the nexus “in the course of representing a client” or its equivalent. Most tie the forbidden conduct to a lawyer’s work in connection with the “administration of justice” or, more specifically, to a matter before a tribunal. Six jurisdictions’ rules require that forbidden conduct be done “knowingly,” “intentionally,” or “willfully.” Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word “harass” or variations in their rules.<sup>117</sup>

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<sup>114</sup> Ellen J. Bennett & Helen W. Gunnarsson, Ctr. for Prof. Resp., American Bar Association, *Annotated Model Rules of Professional Conduct* 743, (9<sup>th</sup> ed. 2019) (emphasis supplied).

<sup>115</sup> *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2015), App. B, *Anti-Bias Provisions in State Rules of Professional Conduct*, at 11-32, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/language\\_choice\\_narrative\\_with\\_appendices\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf).

<sup>116</sup> 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, 208 (2017) (footnotes omitted).

<sup>117</sup> *Id.* at 208.

**V. Official Entities in Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have Rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have Abandoned Efforts to Impose it on Their Attorneys.**

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether states, besides Vermont and New Mexico, adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed to survive close scrutiny by official entities in many states.<sup>118</sup>

**A. Several State Supreme Courts have rejected ABA Model Rule 8.4(g).**

The Supreme Courts of **Arizona, Idaho, Montana, New Hampshire, South Dakota, Tennessee, and South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). In August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).<sup>119</sup> In September 2018, the **Idaho** Supreme Court rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).<sup>120</sup> The **Montana** Supreme Court considered but chose not to adopt ABA Model Rule 8.4(g).<sup>121</sup>

In April 2018, after a public comment period, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).<sup>122</sup> The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."<sup>123</sup> In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).<sup>124</sup> The Court acted after the state

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<sup>118</sup> McGinniss, *supra* note 2, at 213-217.

<sup>119</sup> Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf).

<sup>120</sup> Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (Sept. 6, 2018), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ISC%20Letter%20-%20IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf).

<sup>121</sup> *In re Petition of the State Bar of Montana for Revision of the Montana Rules of Professional Conduct*, AF 09-0688, at 3 n.2 (Mar. 1, 2019) ("the Supreme Court chose not to adopt the ABA's Model Rule 8.4(g)"), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/MT%20Petition%20and%20Memo.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Petition%20and%20Memo.pdf).

<sup>122</sup> The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition\\_.pdf](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf).

<sup>123</sup> Tenn. Att'y Gen. Letter, *supra* note 52, at 1.

<sup>124</sup> The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017),

bar's house of delegates, as well as the state attorney general, recommended against its adoption.<sup>125</sup> In July 2019, the **New Hampshire** Supreme Court "decline[d] to adopt the rule proposed by the Advisory Committee on Rules."<sup>126</sup> In March 2020, the Supreme Court of **South Dakota** unanimously decided to deny the proposed amendment to Rule 8.4 because the court was "not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem."<sup>127</sup>

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).<sup>128</sup> The Maine rule is narrower than the ABA Model Rule in several ways. First, the Maine rule's definition of "discrimination" differs from the ABA Model Rule's definition of "discrimination." Second, its definition of "conduct related to the practice of law" also differs. Third, it covers fewer protected categories. Despite these modifications, if challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech.

In June 2020, the **Pennsylvania** Supreme Court adopted a modified version of ABA Model Rule 8.4(g) to take effect December 8, 2020.<sup>129</sup> A federal district court, however, issued a preliminary injunction on the day it was set to take effect. In *Greenberg v. Haggerty*, the court ruled that Pennsylvania Rule 8.4(g) violated lawyers' freedom of speech under the First Amendment.<sup>130</sup>

In September 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule

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<http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01").

<sup>125</sup> South Carolina Op. Att'y Gen. (May 1, 2017), <http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>.

<sup>126</sup> Supreme Court of New Hampshire, Order (July 15, 2019), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>. The court instead adopted a rule amendment that had been proposed by the Attorney Discipline Office and is unique to New Hampshire.

<sup>127</sup> Letter from Chief Justice Gilbertson to the South Dakota State Bar (Mar. 9, 2020), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/Proposed\\_8.4\\_Rule\\_Letter\\_3\\_9\\_20.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf).

<sup>128</sup> State of Maine Supreme Judicial Court Amendment to the Maine Rules of Professional Conduct Order, 2019 Me. Rules 05 (May 13, 2019), [https://www.courts.maine.gov/rules\\_adminorders/rules/amendments/2019\\_mr\\_05\\_prof\\_conduct.pdf](https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf). Alberto Bernabe, *Maine Adopts (a Different Version of) ABA Model Rule 8.4(g)-Updated*, Professional Responsibility Blog, June 17, 2019 (examining a few differences between Maine rule and ABA Model Rule 8.4(g)), <http://bernabepr.blogspot.com/2019/06/maine-becomes-second-state-to-adopt-aba.html>. See The State of New Hampshire Supreme Court of New Hampshire Order 1, July 15, 2019, ("As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g)."), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>.

<sup>129</sup> Supreme Court of Pennsylvania, Order, *In re Amendment of Rule 8.4 of the Pennsylvania Rules of Professional Conduct* (June 8, 2020), <http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%20104446393101837486.pdf?cb=1>.

<sup>130</sup> 491 F. Supp. 3d 12 (E.D. Pa. 2020).

8.4(g).<sup>131</sup> In a letter to the Court, the State Bar President explained that “the language used in other jurisdictions was inconsistent and changing,” and, therefore, “the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions.”<sup>132</sup>

**B. State Attorneys General have identified core constitutional issues with ABA Model Rule 8.4(g).**

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that “if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.”<sup>133</sup> The opinion declared that “[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys’ ability to engage in meaningful debate on a range of important social and political issues.”<sup>134</sup>

In 2017, the Attorney General of **South Carolina** determined that “a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness.”<sup>135</sup> In September 2017, the **Louisiana** Attorney General concluded that “[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid.”<sup>136</sup> Because of the “expansive definition of ‘conduct related to the practice of law’” and its “countless implications for a lawyer’s personal life,” the Attorney General found the Rule to be “unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct.”<sup>137</sup>

In March 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association’s New Model Rule of Professional Conduct Rule 8.4(g)*, attaching his office’s comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).<sup>138</sup> After a thorough analysis, the Attorney General

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<sup>131</sup> The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>.

<sup>132</sup> Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), <https://www.clsnet.org/document.doc?id=1124>.

<sup>133</sup> Tex. Att’y Gen. Op., *supra* note 42, at 3.

<sup>134</sup> *Id.*

<sup>135</sup> South Carolina Att’y Gen. Op., *supra* note 125, at 13.

<sup>136</sup> La. Att’y Gen. Op., *supra* note 42.

<sup>137</sup> *Id.* at 6.

<sup>138</sup> *American Bar Association’s New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att’y Gen. Op. 11 (Mar. 16, 2018), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf>.

concluded that the proposed rule “would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.”<sup>139</sup>

In May 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.<sup>140</sup>

In August 2019, the **Alaska** Attorney General provided a letter to the Alaska Bar Association during a public comment period that it held on adoption of a rule modeled on ABA Model Rule 8.4(g). The letter identified numerous constitutional concerns with the proposed rule.<sup>141</sup> The Bar Association’s Rules of Professional Conduct recommended that the Board not advance the proposed rule to the Alaska Supreme Court but instead remand it to the committee for additional revisions, noting that “[t]he amount of comments was unprecedented.”<sup>142</sup> A second comment period closed August 10, 2020.

**C. The Montana Legislature recognized the problems that ABA Model Rule 8.4(g) poses for legislators, witnesses, staff, and citizens.**

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).<sup>143</sup> The impact of Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative

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<sup>139</sup> Tenn. Att’y Gen. Letter, *supra* note 52, at 1.

<sup>140</sup> Attorney General Mark Brnovich, *Attorney General’s Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), <https://www.clsnet.org/document.doc?id=1145>.

<sup>141</sup> Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (Aug. 9, 2019), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>

<sup>142</sup> Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/Report.ARPCmte.on8\\_.4f.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Report.ARPCmte.on8_.4f.pdf). A subsequent public comment period on a revised proposed rule closed August 10, 2020.

<sup>143</sup> *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65<sup>th</sup> Legislature (Mont. Apr. 25, 2017), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

Committees” greatly concerned the legislature.<sup>144</sup> The Montana Supreme Court chose not to adopt ABA model Rule 8.4(g).<sup>145</sup>

**D. Several state bar associations or committees have rejected ABA Model Rule 8.4(g).**

On December 10, 2016, the **Illinois** State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois.”<sup>146</sup> On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was “overbroad, vague, and imposes viewpoint discrimination” and that it might “have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views.”<sup>147</sup> On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted “not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court.”<sup>148</sup>

**VI. ABA Model Rule 8.4(g) Would Make it Professional Misconduct for Attorneys to Engage in Hiring Practices that Favor Persons Because they are Women or Belong to Racial, Ethnic, or Sexual Minorities.**

A professional ethics expert has explained that “ABA Model Rule 8.4(g)’s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes” and “extends to any lawyer conduct ‘related to the practice of law,’ including ‘operating or managing a law firm or law practice.’”<sup>149</sup> In written materials for a CLE presentation, the expert concluded that ABA Model Rule 8.4(g) “thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.”<sup>150</sup>

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<sup>144</sup> *Id.* at 3. The Tennessee Attorney General similarly warned that “[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently ‘related to the practice of law’ to fall within the scope of Proposed Rule 8.4(g).” Tenn. Att’y Gen. Letter, *supra* note 52, at 8 n.8.

<sup>145</sup> See *supra* note 121.

<sup>146</sup> Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

<sup>147</sup> Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. n Att’y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017), at <https://perma.cc/3FCP-B55J>.

<sup>148</sup> Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

<sup>149</sup> The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues 5-6* (July 12, 2018) (quoting Comment [4] to ABA Model Rule 8.4(g)). The written materials used in the program are on file with Christian Legal Society and may be purchased from the D.C. Bar CLE program. See *supra* note 8.

<sup>150</sup> *Id.* at 6.

He further concluded that ABA Model Rule 8.4(g) would impose a *per se* discrimination ban in hiring practices:<sup>151</sup>

*[L]awyers will also have to comply with the new per se discrimination ban in their personal hiring decisions. Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a “plus” when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms’ head count on the basis of such attributes – but it is nevertheless discrimination. **In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.***

The ethics expert dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) would allow these efforts to promote certain kinds of diversity to continue. Even though Comment [4] states that “[l]awyers may engage in conduct undertaken to promote diversity and inclusion . . . by . . . implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations,” as the ethics expert explained, “[t]his sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment’s reflection it does not—and could not—do that.”<sup>152</sup>

He provided three reasons to support his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would be grounds for disciplinary complaints. *First*, the language in the comments is only guidance and not binding. *Second*, the drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because two exceptions actually are contained in the black letter rule itself, so “[i]f the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.” *Third*, the comment “says nothing about discrimination” and “does not describe activities permitting discrimination on the basis of the listed attributes.” The references could be to “political viewpoint diversity, geographic diversity, and law school diversity” which “would not involve discrimination prohibited in the black letter rule.”

ABA Model Rule 8.4(g)’s consequences for New York lawyers’ and their firms’ efforts to promote diversity, equity, and inclusion provide yet another reason to reject the proposed rule.

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<sup>151</sup> *Id.* at 7 (emphasis supplied).

<sup>152</sup> *Id.* at 5. *See also, id.* at 5-6 (“Perhaps that sentence was meant to equate ‘diversity’ with discrimination on the basis of race, sex, etc. But that would be futile – because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.”)

The substantial value of firms' programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from ABA Model Rule 8.4(g).

## VII. ABA Model Rule 8.4(g) Could Limit New York Lawyers' Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the rule that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." But in one of the two states to have fully adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." The Vermont Supreme Court further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "*a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g).*"<sup>153</sup>

As Professor Rotunda and Professor Dzienkowski explained, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."<sup>154</sup> Rule 1.16 does not address *accepting* clients.<sup>155</sup> Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."<sup>156</sup>

Dean McGinniss agrees that "[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of 'discrimination' based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer."<sup>157</sup> Because Model Rule 1.16 "addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation" but not when they "are *permitted* to decline client representation," Model Rule 8.4(g) seems only

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<sup>153</sup> Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, [https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf) (emphasis supplied).

<sup>154</sup> Rotunda & Dzienkowski, *supra* note 24, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).

<sup>155</sup> A state attorney general concurs that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 52, at 11.

<sup>156</sup> See Rotunda & Dzienkowski, *supra* note 24.

<sup>157</sup> McGinniss, *supra* note 2, at 207-209.



to allow what was already required, not declinations that are discretionary. Dean McGinniss warns that “if state bar authorities consider a lawyer’s declining representation . . . as ‘manifest[ing] bias or prejudice,’ they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g).”<sup>158</sup>

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that “[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination.*”<sup>159</sup> The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of “unlawful discrimination” for purposes of New York’s Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to “opine on whether a lawyer’s refusal to represent a prospective client in a suit against the lawyer’s own religious institution constitutes ‘unlawful discrimination’” for purposes of New York’s Rule 8.4(g).<sup>160</sup> Of course, ABA Model Rule 8.4(g)’s reach goes beyond “unlawful discrimination.”

In *Stropnick v. Nathanson*,<sup>161</sup> the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.<sup>162</sup> As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys’ ability to accept, decline, or withdraw from a representation if ABA Model Rule 8.4(g) were adopted.

### **VIII. Do the Attorney Grievance Committees and Their Staffs have Adequate Resources to Process an Increased Number of Discrimination and Harassment Claims?**

Concerns have been expressed by some state bar disciplinary counsel as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, particularly employment discrimination claims. For example, the Montana Office of Disciplinary Counsel (ODC) voiced concerns about the breadth of ABA Model Rule 8.4(g).<sup>163</sup> The ODC quoted from a February 23, 2016, email from the

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<sup>158</sup> *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 117, at 231-32, as, in Dean McGinniss’ words, “conceding that the United States Conference of Catholic Bishops’ concerns about religious lawyers’ loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule.”

<sup>159</sup> N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

<sup>160</sup> *Id.*

<sup>161</sup> 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).

<sup>162</sup> Rotunda & Dzienkowski, *supra* note 24, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

<sup>163</sup> Office of Disciplinary Counsel, *In re the Model Rules of Professional Conduct: ODC’s Comments re ABA Model Rule 8.4(g)*, filed in Montana Supreme Court, No. AF 09-0688 (Apr. 10, 2017), at 3, [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf).

National Organization of Bar Counsel (“NOBC”) to its members explaining that the NOBC Board had declined to take a position on then-proposed ABA Model Rule 8.4(g) because “there were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters.”<sup>164</sup>

The Montana ODC thought that “any unhappy litigant” could claim that opposing counsel had discriminated on the basis of “one or more of the types of discrimination named in the rule.”<sup>165</sup> The ODC also observed that ABA Model Rule 8.4(g) did not require “that a claim be first brought before an appropriate regulatory agency that deals with discrimination.”<sup>166</sup> In that regard, the ODC recommended that the court consider “Illinois’ rule [that] makes certain types of discrimination unethical and subject to discipline” because it required that “the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency” and required that “the conduct must reflect adversely on the lawyer’s fitness as a lawyer.”<sup>167</sup> The Illinois rule is quite similar to New York’s Rule 8.4(g).

Increased demand may drain the resources of the attorney grievance committees as they serve as tribunals of first resort for an increased number of discrimination and harassment claims against lawyers and law firms, including employment claims. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals’ proceedings. State bar tribunals have their own rules of procedure and evidence that may be significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

The staff of the attorney grievance committees may feel ill-equipped to understand complicated federal, state, and local antidiscrimination and antiharassment laws well enough to understand how they interact with discriminatory and harassment complaints brought under ABA Model Rule 8.4(g). Comment [3] instructs that “[t]he substantive law of antidiscrimination or anti-harassment statutes and case law may guide application of [the rule].” (Note the permissive “may” rather than “shall.”) To avoid this new burden on the staff of the disciplinary and grievance committees, the Montana ODC commended the Illinois rule’s requirement that “the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency.”<sup>168</sup> The Illinois rule further requires that “any right of judicial review has been exhausted” before a disciplinary complaint can be acted upon.<sup>169</sup> New York’s current 8.4(g), of course, incorporates these guardrails.

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<sup>164</sup> *Id.* at 3-4.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 3.

<sup>167</sup> *Id.* at 5.

<sup>168</sup> *Id.* (referring to ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j)).

<sup>169</sup> ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j).

Moreover, under ABA Model Rule 8.4(g), an attorney may be disciplined regardless of whether her conduct is a violation of any other law. Professor Rotunda and Professor Dzienkowski warn that ABA Model Rule 8.4(g) “may discipline the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with discrimination.”<sup>170</sup> Nor is “an allegedly injured party [required] to first invoke the civil legal system” before a lawyer can be charged with discrimination or harassment.<sup>171</sup>

The threat of a complaint under ABA Model Rule 8.4(g) could also be used as leverage in other civil disputes between a lawyer and a former client. It even may be the basis of an implied private right of action against an attorney. Professor Rotunda and Professor Dzienkowski noted this risk:

If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In addition, courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).<sup>172</sup>

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the rule’s proponents that lawyers “should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation.” Instead, the scholars warn that “[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas.”<sup>173</sup>

A lawyer’s loss of his or her license to practice law is a staggering penalty and demands a stringent process, one in which the enforcement standards are clear and respectful of the attorneys’ rights, as well as the rights of others. ABA Model Rule 8.4(g) simply fails to provide the clear enforcement standards that are necessary when the loss of one’s livelihood is at stake.

### **Conclusion**

Because ABA Model Rule 8.4(g) will drastically chill lawyers’ freedom to express their viewpoints on political, social, religious, and cultural issues, and for the additional reasons given in this letter, it should be rejected. At a minimum, there should be a pause to wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out—if and when it is adopted in several other states. There is no reason to subject New York attorneys to the ill-conceived experiment that ABA Model Rule 8.4(g)

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<sup>170</sup> Rotunda & Dzienkowski, *supra* note 24 (parenthetical in original).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

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represents. A decision to not recommend ABA Model Rule 8.4(g) can always be revisited, but the damage its premature adoption may do to New York attorneys would be less easily remedied.

Respectfully submitted,

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## Comment of Professors Josh Blackman, Eugene Volokh, and Nadine Strossen

We are constitutional law professors. One of us teaches at a New York law school. Two of us have commented on ABA Model Rule 8.4(g),<sup>1</sup> and have submitted letters to several jurisdictions that have considered adopting Rule 8.4(g).<sup>2</sup>

Currently, there are two proposals to revise New York Rule 8.4(g). First, on March 19, 2021, the Administrative Board of the New York Unified Court System requested public comment on a proposal to adopt ABA Model Rule 8.4(g), with certain modifications, to replace New York Rule 8.4(g). Second, on April 16, 2021, the New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) sought public comment to replace New York Rule 8.4(g) with a rule it claims “differ[s] significantly from ABA Model Rule 8.4(g).”

Recently, the U.S. District Court for the Eastern District of Pennsylvania declared unconstitutional Pennsylvania’s version of the ABA Model Rule.<sup>3</sup> The Pennsylvania Bar chose not to appeal that ruling. That decision casts serious doubt on the proposals from the Administrative Board and COSAC. We do not think either proposal will pass constitutional muster.

In this joint statement, we will compare and contrast ABA Model Rule 8.4(g), the Administrative Board’s proposal, and the COSAC proposal across nine dimensions: (1) the scope of the rule, (2) the locations where “the practice of law” can occur, (3) the list of prohibited activities, (4) the definition of “discrimination,” (5) the definition of “harassment,” (6) the protected classes, (7) the mens rea requirement, (8) diversity and inclusion, and (9) protection for speech. We will conclude with our recommendations. We also include the text of the proposals in the appendix.

### I. Scope of the rule

- **Current NY Rule 8.4(g):** “A lawyer or law firm shall not . . . unlawfully discriminate *in the practice of law.*”
- **ABA Model Rule:** “engage . . . in *conduct related to the practice of law*”
- **Administrative Board Proposal:** “. . . engage in *conduct related to the practice of law*”
- **COSAC Proposal:** “. . . A lawyer or law firm shall not . . . *engage in conduct in the practice of law*”

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<sup>1</sup> Josh Blackman, ABA Model Rule 8.4(g) in the States, 68 Catholic University Law Review 629 (2020); Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 241 (2017); Eugene Volokh, A Nationwide Speech Code for Lawyers?, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

<sup>2</sup> <http://bit.ly/8-4g-letters>

<sup>3</sup> *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The current version of New York Rule 8.4(g) extends to “the practice of law.” In contrast, the ABA Model Rule and the Administrative Board proposal extend to “*conduct related to the practice of law.*” And the COSAC proposal extends to “*conduct in the practice of law.*” The decision to expand the scope of Rule 8.4(g) is the root cause of many constitutional difficulties. Traditionally, the bar’s core competency was regulating the “practice of law.” And when an attorney is engaged in the practice of law, such as in court or in other forums, his constitutional rights can be abridged. But as the state deviates from this traditional function, it begins to intrude on an attorney’s personal spheres. And in those spheres, attorneys have robust individual rights that cannot be abridged. New York Rule 8.4(g) should remain limited to “the practice of law.”

## II. Locations where “the practice of law” can occur

- **ABA Model Rule:** “Conduct related to the practice of law includes [a] representing clients; [b] interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business or social activities in connection with the practice of law.*”
- **Administrative Board Proposal:** “Conduct related to the practice of law includes [a] representing clients, [b] interacting with witnesses, co-workers, court personnel, lawyers, and others while engaged in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business or social activities in connection with the practice of law.*”
- **COSAC Proposal:** “Conduct in the practice of law includes . . . [a] representing clients; [b] interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business, or professional activities or events in connection with the practice of law.*”

The proposal from the Administrative Board explains that “conduct related to the practice of law” can occur in “bar association, business or *social* activities.” The COSAC proposal uses slightly different language: “bar association, business, or *professional* activities or events in connection with the practice of law.” The word “social” was changed to “professional.” But this change is immaterial, because the COSAC proposal also extends to all “events in connection with the practice of law.” This broad category is broad enough to embrace “social activities.” With these changes, the New York Bar would expand the range of its jurisdiction to social functions. Presentations at a CLE debate would be covered by this rule. Private table conversations at a bar dinner would be covered by the rule. These contexts have little connection to the actual practice of law, but could give rise to discipline.

The government does not have an “unfettered power” to regulate the speech of “lawyers,” simply because they provide “personalized services” after receiving a “professional license.” *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2375 (2018) (*NIFLA*). To be sure, *NIFLA* recognized that there are two categories of lawyer speech that may sometimes be more restrictable. First, the Court has “applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’” *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The proposals, however, are not limited to “commercial speech” (which generally means commercial advertising), and do not simply “require professionals to disclose factual, noncontroversial information.” Moreover, the Court noted that “States may regulate professional conduct, even though that conduct incidentally involves speech.” *Id.* at 2372. But the state cannot flip this rule by regulating speech on the grounds that it incidentally involves professional conduct—indeed, the *NIFLA* Court declared unconstitutional this sort of regulation.

The Administrative Board proposal included the constitutional analysis from ABA Formal Opinion 493. But this opinion failed to even discuss *NIFLA*.<sup>4</sup>

### III. Prohibited activities

- **ABA Model Rule:** “. . . harassment or discrimination . . .”
- **Administrative Board Proposal:** “. . . harassment or discrimination . . .”
- **COSAC Proposal:** “. . . unlawful discrimination, or harassment, whether or not unlawful . . .”

The ABA Model Rule and the Administrative Board proposal would prohibit the same activities: “. . . harassment or discrimination . . .” The COSAC proposal uses slightly more precise language. Harassment would be prohibited, whether lawful or unlawful. But only unlawful discrimination would be prohibited.

### IV. Definition of “discrimination”

- **ABA Model Rule:** “discrimination”
  - Comment [3] “Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. . . . The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”
- **Administrative Board Proposal:** [No definition of discrimination]

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<sup>4</sup> <https://reason.com/volokh/2020/07/15/aba-issues-formal-opinion-on-purpose-scope-and-application-of-aba-model-rule-8-4g/>

- **COSAC Proposal:** “‘Unlawful discrimination’ refers to discrimination under federal, state and local law.”

The ABA Model Rule defines “discrimination” as “harmful verbal or physical conduct that manifests bias or prejudice towards others.” And anti-discrimination law “may” provide a guide. The Administrative Board did not define “discrimination.” (There is a lengthy definition of “harassment,” which we will discuss below.) The COSAC proposal only includes “unlawful discrimination.” And that phrase “refers to discrimination under federal, state and local law.” In some cases, these three categories of discrimination laws may be in conflict. The most restrictive law will control. Generally, federal, state, and local discrimination laws would only govern relationships in the workplace.

The prohibition of “discrimination” is unlikely to run afoul of the First Amendment. The prohibition of “harassment,” however, does raise serious constitutional concerns.

## V. Definition of “harassment”

- **ABA Model Rule:** “harassment”
  - Comment [3]: “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).”
- **Administrative Board Proposal:** “harassment”
  - Comment [5B]: “Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”
- **COSAC Proposal:** (3) “Harassment,” for purposes of this Rule, means conduct that is: a. directed at an individual or specific individuals in one or more of the protected categories; b. severe or pervasive; and c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.
  - Comment [5C]: Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication



Under the ABA Model Rule, the word “harassment” includes “derogatory or demeaning verbal . . . conduct.” The Administrative Board proposal adds an additional adjective: “*harmful*, derogatory, or demeaning verbal . . . conduct.” These words are, in practice, likely to end up being mere synonyms for speech that is offensive and disparaging. And *Matal v. Tam* held that exclusion (even from a government-run benefit program) of “disparag[ing]” or “contempt[uous]” speech was unconstitutionally viewpoint-based. 137 S.Ct. 1744, 1750 (2017). ABA Formal Opinion 493 also did not discuss *Matal v. Tam*.

The Administrative Board proposal includes an additional definition of harassment: “conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive.” But by its terms, that proposal merely “includes” such conduct, rather than being limited to it.

The COSAC proposal advances a three-factor test to define “harassment.” First, the speech must be “directed at an individual or specific individuals in one or more of the protected categories.” We think this element would obviate some of our concerns. Merely speaking about a contentious topic, in the abstract, would not give rise to liability, because it would not be “directed at an individual.” The second element obviates other concerns. Off-hand remarks at a bar function would likely not give rise to liability. The speech must be “severe or pervasive.”

Alas, the third element suffers from the same problem as the ABA Model Rule, the Administrative Board proposal, as well as the unconstitutional Pennsylvania rule: it imposes viewpoint discrimination against “derogatory or demeaning verbal conduct.” No rule with this language can pass constitutional muster. The first two factors cannot overcome this deficiency.

Comment [5C] of the COSAC proposal attempts to mitigate these constitutional concerns. But in the process, it introduces additional grounds of vulnerability. First, it states “Petty slights, minor indignities and discourteous conduct without more do not constitute harassment.” What is a “petty slight” to some may be a “severe intrusion” to others. Second, the phrase “minor indignities” is not much more helpful--just another way of defining offensiveness. The third category simply adds further constitutional problems: “discourteous conduct.” Attempts to police civility in this fashion will simply impose another form of viewpoint discrimination, as well as being potentially unconstitutionally vague. Fourth, the comment defines “severe or pervasive derogatory or demeaning conduct” as “degrading, repulsive, abusive, and disdainful conduct.” These synonyms suffer from the same problems under *Matal v. Tam*: they impose a viewpoint discrimination. And again they would likely be unconstitutionally vague, since all of them (with the possible exception of “abusive”) are not familiar legal terms of art.

The Administrative Board proposal also attempts to narrow the definition of harassment. The Administrative Board proposal states: “Typically, a single incident involving a petty slight,

unless intended to cause harm, would not rise to the level of harassment under this paragraph.” The Administrative Board proposal, however, falls *far* short of the “severe or pervasive” requirement that the COSAC proposal adopts. The word “typically” is a hedge, and suggests that rule will not always apply. Moreover, the phrase “petty slight” is unclear. What may be “petty” to one person can be “severe” to another. Finally, the mens rea requirement in this sentence (“intended to cause harm”) seems to be at odds with the mens rea element in the rule (“lawyer knows or reasonably should know”).

*Greenberg v. Haggerty* declared unconstitutional Pennsylvania’s Rule 8.4(g), which was premised on the ABA Model Rule. That opinion stated:

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual’s right to speak freely, including those individuals expressing words or ideas we abhor. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The definition of harassment in the Administrative Board Proposal and the COSAC proposal are unconstitutional for the same reasons.

## VI. Protected classes

- **ABA Model Rule:** “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status . . .”
- **Administrative Board Proposal:** “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity *or expression*, marital status or socioeconomic status . . .”
- **COSAC Proposal:** “. . . on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender *expression*, marital status, *status as a member of the military, or status as a military veteran* . . .”

The Administrative Board proposal adds one protected category to the list from the ABA Rule: “gender expression.” The COSAC proposal also includes “gender expression,” as well as “status as a member of the military, or status as a military veteran.”

The COSAC proposal eliminates socioeconomic status. We think the elimination of socioeconomic status is prudent: There is no basis for the rules to categorically ban discrimination based on “socioeconomic status”—a term not defined by the rule, but which is commonly used to refer to matters such as income, wealth, education, or form of employment. A law firm, for instance, may prefer more-educated employees—both as lawyers and as staffers—over less-educated ones. Or a law firm may contract with expert witnesses and expert consultants who have had especially prestigious educations or employment. Or a firm may prefer employees who went to high-“status” institutions, such as Ivy League schools. Yet each of these commonplace actions would constitute discrimination on the basis of socioeconomic status under the new rule.

## VII. The mens rea requirement

- **ABA Model Rule:** “. . . engage in conduct that the lawyer *knows or reasonably should know* . . . in conduct related to the practice of law. . . .”
- **Administrative Board Proposal:** “. . . engage in conduct related to the practice of law that the lawyer *knows or reasonably should know* . . . .”
- **COSAC Proposal:** “. . . engage in conduct in the practice of law that the lawyer or law firm *knows or reasonably should know* constitutes . . . .”

All three proposals adopt the same mens rea requirement: “knows or reasonably should know.” We previously commented on a draft proposal from COSAC in February 2021. That draft stated that a “lawyer shall not *knowingly* engage in conduct...” COSAC seems to have reduced the mens rea requirement from “knowingly” to “knows or reasonably should know.” A requirement of “knowingly” would mitigate some of the constitutional problems with this rule. Scierter would avoid unknowing harassment, however that phrase is defined.

## VIII. Diversity and inclusion

- **ABA Model Rule:** “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.”
- **Administrative Board Proposal:** “Paragraph (g) does not prohibit conduct undertaken to promote diversity and inclusion by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”

- **COSAC Proposal:** “This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.”

The drafters of the ABA Model Rule and the Administrative Board proposal recognized an obvious problem: promoting various diversity and inclusion measures could run afoul of Rule 8.4(g). For example, advocating for the use of affirmative action for certain racial groups could constitute “harmful verbal . . . conduct that manifests bias or prejudice towards other” racial groups. To avoid this problem, both the ABA Model Rule and the Administrative Board proposal create several exemptions: it is not misconduct to “promote diversity and inclusion.” Likewise, the COSAC proposal uses similar language.

Yet these rules thus create an explicit form of viewpoint discrimination. Those who speak in ways that promote diversity and inclusion efforts, such as affirmative action policies, are protected. Those who criticize the same diversity and inclusion efforts are not protected. In theory, it would be possible to strip this sentence from the Administrative Board proposal. But that change would be a poison pill. In the absence of this protection for diversity and inclusion efforts, many lawyers and law firms would face potential liability.

## IX. Express protection of speech

- **ABA Model Rule:** [No express protection]
- **Administrative Board Proposal:** [No express protection]
- **COSAC Proposal:** “This Rule does not limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy . . .”
  - Comment [5D]: A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

The COSAC proposal includes two express protections for the freedom of speech. First, the Comment explains that this rule would not prohibit speech protected by the federal or state Constitutions. This comment, though helpful, doesn’t add much. Of course a state ethics rule cannot violate the federal or state Constitutions.

Second, the rule would not “limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public

advocacy.” This rule would obviate some of our concerns with respect to speaking or presenting at CLE or bar functions. But it would still allow punishment for dinnertime conversation at one of these events. A presenter would be safe to discuss a controversial idea. But if an attendee repeated the same exact remarks to colleagues afterwards, he could be held liable.

We recognize that the rule is designed to prohibit sexual harassment in social functions that are related to the practice of law. But the current rule sweeps too broadly. The draft could be improved by protecting the expression of “views on matters of public concern” in *all* contexts.

## Conclusion

It is our opinion that the Administrative Board proposal would be declared unconstitutional for the same reasons that the Pennsylvania rule was declared unconstitutional: it imposes an unconstitutional form of viewpoint discrimination. The COSAC proposal is an improvement, but still permits the imposition of liability for “derogatory or demeaning verbal conduct.” We do not think this element is valid under *Matal v. Tam* (2017).

We recognize that the New York courts, and the attorneys of New York, are eager to take some form of action to address perceived problems in the profession. But the way to resolve these issues is not through adopting an unconstitutional rule. If adopted, Rule 8.4(g) will lead to years of litigation and acrimony. A better course is to adopt a more modest rule on firm constitutional grounding. For example, the rule could only extend to formal “discrimination,” rather than the nebulous term of “harassment.” The rule could be limited to “the practice of law” rather than ancillary conduct. The rule would not extend to social functions. These suggestions could address some of the perceived need for a change, without raising difficult constitutional questions. But in its present form, both proposals will likely meet the same unconstitutional fate.

It would be our pleasure to provide any further insights to inform your deliberations.

Sincerely,

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## Appendix

### Current 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.

#### Pertinent comments to this section of the rule

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

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

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate 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).

### **Current NY Rule 8.4(g)**

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 or sexual orientation. 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;

#### Pertinent comments to this section of the rule

[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).

### **ABA Model Rule 8.4(g)**

It is professional misconduct for a lawyer to:

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

#### Pertinent comments to this section of the rule

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

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

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate 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).

#### **Administrative Board's Proposed Rule 8.4(g)**

A lawyer or law firm shall not:

(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, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

#### Pertinent comments to this section of the rule

[3] Discrimination and harassment by lawyers in violation of paragraph(g) undermine confidence in the legal profession and the legal system. Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a



petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

[4] Conduct related to the practice of law includes representing clients, interacting with witnesses, co-workers, 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 and inclusion 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. 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).

#### **COSAC Proposed Rule 8.4(g)**

A lawyer or law firm shall not:

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

- (1) unlawful discrimination, or
- (2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.
- (3) "Harassment," for purposes of this Rule, means conduct that is:
  - a. directed at an individual or specific individuals in one or more of the protected categories;
  - b. severe or pervasive; and
  - c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm (i) to accept, decline or withdraw from a representation, (ii) to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy, or (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.

(5) “Conduct in the practice of law” includes:

- a. representing clients;
- b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
- c. operating or managing a law firm or law practice; and
- d. participating in bar association, business, or professional activities or events in connection with the practice of law.

Pertinent comments to this section of the rule

[5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no

violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”).



National Legal  
FOUNDATION

May 28, 2021

Professor Roy D. Simon  
Chair, Committee on Standards of Attorney Conduct, New York State Bar Association  
Via email only: Roy.Simon@hofstra.edu

Re: Proposed Amendments to NY Rule 8.4(g)

Dear Professor Simon:

I am the President of The National Legal Foundation (NLF), a public interest law firm dedicated to the defense of First Amendment liberties that has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states. I write this letter on behalf of NLF and its donors and supporters, including those in New York.

The subject of this letter is the proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct (“Rule 8.4(g)”). We understand that the Committee on Standards of Attorney Conduct of the NY State Bar Association is considering these amendments and has requested comments on these proposed changes be addressed to you.

The NLF opposes adoption of the Committee’s proposed amendments, which share many characteristics with the deeply flawed and much criticized ABA Model Rule 8.4(g) (“model rule”). We agree with much of what the Christian Legal Society (CLS) expressed in its comment letter, dated May 25, 2021. Those comments note the substantial body of scholarly and professional criticism focusing on the model rule’s constitutional deficiencies. CLS also ably summarizes the negative track record of the model rule to date, its potential for censoring speech and debate that undergird a free society, its embrace of unconstitutional viewpoint discrimination, and its difficulty gaining traction because of its constitutional infirmities. Given these deficiencies, it is not surprising that several state attorneys general have concluded that the model rule *is* unconstitutional; and most states that have considered proposals to adopt the model rule or its variants have declined to adopt it. We fear that the proposed amendments would impose potentially career-ending sanctions for transgressions that are vaguely and subjectively defined and therefore are subject to abuse and manipulation.

Thank you and the Committee for the opportunity to provide these comments and for your consideration of them.

Sincerely,

Steven W. Fitschen, President  
The National Legal Foundation



# New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

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Mirna M. Santiago  
Co-Chair, Committee on Diversity & Inclusion

Violet E. Samuels  
Co-Chair, Committee on Diversity & Inclusion

Dear Ellen C. Yaroshefsky,

The NYSBA Committee on Diversity and Inclusion offers its strong support for adopting the ABA Model Rule 8.4(g). We attach our detailed report to the COSAC, urging that they recommend this proposal. Our comments were endorsed by the Committee on Legal Aid, the President's Committee on Access to Justice, the Committee on Disability Rights, the Committee on Leadership Development, and the Women in Law Section.

The Committee on Diversity and Inclusion continues to enthusiastically recommend this expansion. It provides a necessary expansion to regulate conduct by attorneys beyond our employment practices, to regulate harassment by attorneys and it eliminates the stringent requirement of exhaustion of remedies. It adopts a reasonable standard that all attorneys are familiar with. The ABA Rule provides people with protection from unlawful misconduct and harassment – this is a standard we should all believe in. We hope the Administrative Board will adopt ABA Model Rule 8.4(g), We believe that doing so will aid the Court in fulfilling its strong commitment to eliminating race bias in New York's courts.

If we can provide you with any additional information, please do not hesitate to contact us.

Sincerely,

Mirna M. Santiago and Violet E. Samuels  
Co-Chairs, Committee on Diversity and  
Inclusion  
On behalf of the Committee



Mirna M. Santiago  
Co-Chair, Committee on Diversity & Inclusion

Violet E. Samuels  
Co-Chair, Committee on Diversity & Inclusion

November 19, 2020

## **Draft of comments of NYSBA Committee on Diversity and Inclusion in Support of Adoption of the ABA Model Rule of Professional Conduct 8.4(g)**

### **I. ABA Model Rule of Professional Conduct 8.4 Misconduct.**

The Committee on Diversity and Inclusion strongly urges COSAC to recommend adoption, in every respect, of the current ABA Model Rule of Professional Conduct 8.4(g), which reads as follows:

A lawyer or law firm shall not:

\*\*\*

(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, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

#### *Comments*

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes harmful verbal or physical conduct that manifests bias or prejudice towards others and includes

conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Petty slights, annoyances, and isolated incidents (unless of a substantial nature) do not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

[4] Conduct related to the practice of law includes representing clients, interacting with witnesses, co-workers, 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 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. 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).

## **II. Changes required to bring New York Rules of Professional Conduct Rule 8.4(g) in line with ABA Model Rule of Professional Conduct 8.4(g).**

~~It is professional misconduct for a~~ A lawyer ~~to~~ or law firm shall not:

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(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, 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.

### *Comments*

[3] Discrimination and harassment by lawyers in violation of paragraph(g) undermine confidence in the legal profession and the legal system. ~~Such discrimination~~ Harassment includes harmful verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Petty slights, annoyances, and isolated incidents (unless of a substantial nature) do not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment ~~and derogatory or demeaning verbal or physical conduct. Sexual harassment includes, which involves~~ 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~~ co-workers, 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~~ Paragraph(g) does not prohibit 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).

### **III. Rationale for Proposed Changes.**

Expanding the language of New York Rules of Professional Conduct Rule 8.4(g) by adoption of ABA Model Rule of Professional Conduct 8.4(g) will strengthen ethics protections for all protected classes and advance the goal of eliminating harassment and discrimination in the legal profession. These goals are the essence of the mission of the Committee on Diversity and Inclusion and, indeed, are core to every leader of the New York State Bar Association. Our Association has long stated "its commitment to enhancing diversity at every level of participation". As this Association noted on the death of George Floyd, government officials, and this Association's officials, "bear a grave and immense responsibility to comport themselves judiciously and with respect for all concerned in their every word and deed"; we are "richer and more effective" because of our diversity and because of the respect that each diverse member of our profession receives.

The current New York Rules of Professional Conduct Rule 8.4(g) is flawed due to its limitations:

A. The current rule requires that an attorney's conduct be "unlawful". This excludes some types of discrimination and harassment that should be prohibited but may not be unlawful.

B. The current New York Rules of Professional Conduct Rule 8.4(g) is also inadequate because of its focus on employment discrimination. The Committee on Diversity and Inclusion knows that there are many other instances where harmful discrimination or harassment on the basis of being a member of a protected class occurs within the practice of law.

By way of example, the Special Advisor on Equal Justice in the New York State Courts, Secretary Jeh Johnson, concluded in his report dated October 1, 2020 (<http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>), "that almost

every attorney of color we spoke with...reported incidents in which they were mistaken for someone other than an attorney or otherwise subjected to disparate treatment.” “...These instances take several forms...” and highlight the different contexts in which these arise:

- Being mistaken for a criminal defendant
- Being mistaken for an interpreter
- Being mistaken for another attorney of color
- Being asked to show identification to enter the courthouse while white attorneys are not
- Being questioned about sitting in the front row of the courtroom reserved for attorneys and comments from judges and court officers on how they carry themselves or are dressed.” Id. p. 66

While the circumstances in each instance would require examination, they highlight the different contexts in which the issue might arise.

In far more graphic terms, consider the complaints gathered by tenant advocates in the Bronx Housing Court and reported to the Courts in 2018, and again to Secretary Johnson in 2020 (attached). These include:

- A white male landlord’s attorney referred to women “he’d like to finger” to a queer, female attorney of color.
- A white male attorney refers to a female attorney of color as an “attorney” (using air quotes, as if not really an attorney) when referring to her.
- Landlord’s attorney makes paralegals in hallway take out cameras to take video of tenant in tight fitting clothing.
- As my opponent and I approached the bench to argue a motion, I realized that the court interpreter for my client was not present. I informed the judge that we had to wait for the interpreter to return before we could start the argument. The landlord's lawyer groaned and audibly sucked her teeth. She slammed her papers and stomped away from the bench. I interpreted her body language and behavior as that of an angry person. I asked her, "why are you so angry, because we have to wait for an interpreter?" The landlord's lawyer responded, in open court, in front of an entire congregation, "NO! I'm angry because SHE [pointing to my client] does not know how to speak English! How long has she been here!?"

- A white male attorney tells a queer female attorney of color that she is on his “to-do” list but knows he “can’t have it.”

- A landlord’s attorney followed me in the elevator to make fun of what I was wearing and tried to get other landlord’s attorneys to join her in on it. She started saying that there was something wrong with millennials (of which I am a part) and that I should learn that the world is not a nice place. I did not even have a case on with her that day and the attack was completely unprovoked.

*See also* 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 (Exhibit B), offering an excellent discussion of such examples.

Again, depending upon the specific circumstances in each instance, many of these examples are offensive and harmful yet not prohibited by the current New York Rules of Professional Conduct Rule 8.4(g) Misconduct. Now is the time for our Rules of Professional Conduct to regulate ongoing, continuous acts, comments, and words of discrimination or harassment on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

C. The current New York Rules of Professional Conduct Rule 8.4(g) is inadequate because it requires exhaustion of all other remedies -- even if, under the circumstances, it would be unreasonable to expect the victim of one or two acts of discriminatory conduct to file a lawsuit or pursue other administrative proceedings.

D. The current New York Rules of Professional Conduct Rule 8.4(g) is inadequate because it does not specifically proscribe harassment. Our rules, specifically, should prohibit attorneys from harassing people while engaged in the practice of law, whether it be harmful, derogatory, or demeaning verbal or physical conduct towards a person on the basis of a protected attribute, or sexual advances, requests for sexual favors, unwelcome verbal or physical conduct of a sexual nature and other such behavior.

#### **IV. The Necessary Standard.**

The Committee on Diversity and Inclusion believes that it is necessary and appropriate to hold lawyers to the standard of what the lawyer knows, or reasonably should know, constitutes

discriminatory or harassing conduct in connection with the practice of law. Our failure to hold ourselves to this standard makes the public skeptical and distrusting of attorneys. We are among the guardians of justice for all; when we are not held to this standard, it damages confidence in the rule of law and trust in our profession for allowing such behavior.

As indicated in the October 8, 2020 Memorandum from the COSAC 8.4(g) Subcommittee and the July 15, 2020 Formal Opinion 493 of the ABA Standing Committee On Ethics And Professional Responsibility, the proposed modifications to Rule 8.4(g) reaffirm that the conduct to be regulated is confined to that which occurs in the course of the practice of law. Most significantly, however, the proposed modifications would eliminate the current requirements that the proscribed conduct be unlawful or, to the extent applied in the employment context, severe or pervasive. At the same time, ABA Formal Opinion 493 makes clear, “only conduct that is found harmful will be grounds for discipline,” and the discipline to be imposed, if any, “will depend upon 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.” Further, in the context of harassment or discrimination on the basis of race, sex and the other above-defined categories, it is proposed that the existing Rule be amended to proscribe as professional misconduct such conduct that the accused attorney “knows or reasonably should know” to be harassment or discrimination.

Subject to the below clarifications and cautionary considerations, on their face these modifications are entirely necessary to the ethical and professional standards by which attorneys should be governed in the conduct of their legal practice and the state’s regulation of the legal system and the administration of justice.

More specifically, the proposed modifications, as noted in COSAC’s preliminary memo and ABA Formal Opinion 493, also cite valid examples of conduct which, if established, would constitute legitimate concerns worthy of regulation under the New York Rules of Professional Conduct, even if not, as currently required, unlawful or in certain instances, severe or pervasive. The key, in each instance, is not merely the allegations, but whether and on what basis such allegations, if contested, can be, and are, established by the evidence presented. Toward that end, ABA Formal Opinion 493 makes clear, “Whether conduct violates the Rule must be

assessed using a standard of reasonableness”; “[t]he 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.” That standard of reasonableness is reflected in the proposed addition of the alternative requirement that the accused attorney either must know or “reasonably should know” that the conduct ascribed to him or her constitutes the alleged harassment or discrimination contemplated by the Rule.

It would not suffice if the Rule simply required that the accused attorney “knows” the conduct in question constitutes harassment or discrimination. Why? The proposed modifications, as noted, eliminate the current standard that the conduct be illegal. If we accept that, and we do, we would be left merely with the standard that the individual knew – at the time(s) in question -- the conduct amounted to harassment or discrimination. That, it can be argued, would leave the door open to an accused’s refutation of the allegation simply on the basis he or she was unaware the conduct could be so construed. The Bar cannot minimize the seriousness of allegations of harassment or discrimination by an attorney in the course of his or her practice. The proposed modification is, as it must be, more demanding: whether an accused attorney was aware or unaware of the import of his or her conduct will not suffice in this context; rather, the Rule should be regarded as breached as to this element if the evidence establishes either that the accused knew the conduct to constitute harassment or discrimination, or that he or she reasonably should have known it was improper:

A. “Reasonably Should Know” is the accepted standard of the ABA Model Rules of Professional Conduct and New York Professional Rules of Conduct. Both the U.S. Supreme Court and courts in New York have also upheld this standard in court decisions and disciplinary hearings.

As further expressed in the ABA’s Standing Committee of Ethics and Professional Responsibility’s Formal Opinion 493, “whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is formally harmful would be grounds for discipline.” ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 493 (2020). As articulated in the ABA Model Rules of Professional Conduct, “reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question (MODEL RULES OF PROF’L CONDUCT r.1.0 (j)).

(2020)); "reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer (MODEL RULES OF PROF'L CONDUCT r.1.0 (h). (2020)); "knowingly", "known" or "knows" denotes actual knowledge of the fact in question (MODEL RULES OF PROF'L CONDUCT r.1.0 (f). (2020)). Such knowledge may be inferred from circumstances. *Id.*

Similarly, under the New York Rules of Professional Conduct, "reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question (N.Y. RULES OF PROF'L CONDUCT r.1.0 (s). (2018)); "reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer (N.Y. RULES OF PROF'L CONDUCT r.1.0 (q). (2018)). When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation. *Id.* "Knowingly", "known", "know" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. N.Y. RULES OF PROF'L CONDUCT r.1.0 (k). (2018).

B. The Standing Committee of Ethics and Professional Responsibility has stated, "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. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 493 (2020).

C. The U.S. Supreme Court has held that "one of the fundamental tenets of the professional responsibility of a lawyer is that he should maintain a degree of personal and professional integrity that meets the highest standard." *Cleveland Bar Assoc. v. Stein*, 29 Ohio St. 2d 77, 81, 278 N.E.2d 670 (1927). Conduct that "creates an objectively hostile or abusive work environment" is conduct that "a reasonable person would find hostile or abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

D. New York courts, in various circumstances, have articulated their justification for such standards. As long ago articulated by the Court of Appeals, "The power to compel attorneys to adhere to their professional obligations is of a continuous nature which may be exercised at any time when the occasion arises." *Leviten v. Sandbank*, 291 N.Y. 352, 357 (1943). See also

Matter of In re Hennessey, 155 AD3d 1425, 1426 (3d Dept 2017), where the court upheld a decision to disbar an attorney after he “engaged in intentionally deceptive conduct that adversely reflected on his fitness as a lawyer and was prejudicial to the administration of justice”; Revson v. Cinque & Cinque, 70 F. Supp. 2d 415, 416 (SDNY 1999), where the court held that the attorney’s “Rambo” tactics (including repeated attacks in an “offensive and demeaning fashion,” calling the attorney “a disgrace to the legal profession,” seeking “a conviction that [is] invariably in your interest to make life miserable for your opponent”) constituted a “pattern of offensive and overly aggressive conduct” toward opposing counsel and his law firm, inconsistent with the need to practice civility as a lawyer.

E. More than ever, including in these times of racial inequality, the ABA must continue to hold lawyers to the necessary “reasonably should know” standard. The Bar has “a responsibility to maintain public confidence in the legal profession.” *Dorsainvil v. Parker*, 14 Misc. 3d 397, 400 (Sup. Ct. 2006). The “reasonably should know” standard is necessary to hold a lawyer to a professional standard and maintain the public’s confidence in attorneys and their integrity.

## **V. A Cautionary Note.**

The serious impact of any allegation on an attorney’s career or reputation also cannot be ignored or underestimated and, accordingly, the mere allegation that he or she was or should have been aware of the import of the conduct alleged, devoid of the facts to support that allegation, is not enough. What cannot be lost in the analysis is not merely the import of the conduct alleged, but the need of the disciplinary body to establish the facts – the evidence – of what, if anything, occurred. While that may seem obvious, there are reasons for this concern. Two such reasons in particular warrant discussion: Implicit Bias; and Artificial Intelligence.

### **Implicit Bias:**

- Does the proposed modification eliminating the requirement that the conduct in question be unlawful open the door to the establishment of a claim of discrimination based upon an assertion of implicit bias – a term that, generally, heretofore has been defined as “unconscious” bias?
  - Particularly where perhaps the leading creator and proponent of the concept, Anthony Greenwald, and his colleague Calvin K. Lai, as recently as this year, have

questioned the very definition and underpinnings of the concept of implicit bias, and concluded the “*theory needed to confidently guide [its] applications remains insufficiently developed?*” Annual Review of Psychology, Implicit Social Cognition, 2020, 71: 419-445, <https://doi.org/10.1146/annurevpsych.2020.71.419> (emphasis added).

- Where, accordingly, Dr. Greenwald and fellow creators of the testing designed to measure such implicit bias now have come not only to disclaim the reliability of such tests as accurate predictors of an individual’s behavior and propensity to discriminate, but emphatically, and unequivocally, have declared that such testing “should not be used ... to make decisions about others, to measure somebody else’s automatic racial preference, or to decide whether an individual should or should not serve on a jury,” and expressly have cautioned that “[u]sing [such testing] as the basis for making significant decisions about self or others could lead to undesired and unjustified consequences”? Greenwald, Banaji and Nosek, Understanding and Interpreting IAT Results, Project Implicit, <https://implicit.harvard.edu/implicit/demo/background/under-standing.html> (emphasis added).

- Where these creators of the testing now additionally have warned -- “attempts to diagnostically use such measures for individuals risk undesirably high rates of erroneous classification”? Id. (emphasis added).

- Where these and other quotes have stressed a more recent consensus among many social psychologists that, if anything, the use of such tests as a basis for “social framework evidence” will be regarded as an improper substitution of one stereotype for another – particularly where the individual in question (here, the accused attorney) has not even taken the test in question and no such proffer is made – and no correlation, let alone the prerequisite causation, is established between the circumstances of the testing and those of the facts at hand? )” See, e.g., Greenwald and Lai, “Annual Review of Psychology, Implicit Social Cognition,” p. 10 supra, “In the last 20 years, research on implicit social cognition has established that social judgments and behavior are guided by attitude and stereotypes of which the actor may lack awareness,” and, as above noted, cannot accurately be measured.



- What of the proposed addition of the requirement that the attorney “knows or reasonably should know” of the impropriety of his or her conduct? As we understand this modification, an accused attorney could not simply avoid responsibility for his or her actions, as established by the evidence, simply by denying his or her awareness –“didn’t know”-- that the actions established were improper. But, are we also correct in our understanding that the Rule, even as so modified, quite appropriately, would not recognize a claim that the accused reasonably should know of the impropriety of his or her actions if predicated solely upon an alleged stereotypical assumption, devoid of any evidence that he or she in fact “acted” or otherwise “relied” upon that stereotypical assumption, e.g., no evidence, but, rather, only a stereotypical assumption that there is an inherent bias, generally, on the part of all males against females as to a female’s inability to assert herself in a leadership capacity? See, in this connection, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), where the Supreme Court made clear a stereotypical assumption, absent evidence of reliance upon that stereotypical assumption, will not suffice; (as the Court put it, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”) To conclude otherwise, we believe, would be to warrant disciplinary action against a male attorney simply on the assumption that he knew or must have known of this stereotypical assumption, despite the absence of any evidence that he acted or otherwise relied upon that assumption or that the assumption in any other way was even a factor in the conduct or decision at issue.

### **Artificial Intelligence:**

- In addressing the issues posed by the proposed modifications in the Rule, we cannot ignore the possible impact of, and concerns raised by, the increased utilization of artificial intelligence and its algorithms as predictors of behavior, traits, qualifications or performance, ostensibly to promote diversity and inclusion or otherwise to mitigate the possibility of unlawful bias or other such conduct – conduct that ultimately well may fall within the purview of a Rule 8.4(g) inquiry.

- These concerns were raised by David Lopez, former and longest-serving General Counsel of the U.S. Equal Employment Opportunity Commission when testifying on March 4, 2019 before a Congressional Subcommittee: “Bad data input leads to bad results,” and “these digital tools present an even greater potential for misuse if they lock in and exacerbate our

country's long-standing disparities based on race, gender, and other characteristics" (House Subcommittee on Consumer Protection and Commerce of the U.S. House Committee on Energy and Commerce: "Inclusion in Tech: How Diversity Benefits All Americans").

- Mr. Lopez, citing "mishaps," "abuses" and even "horrors," offered an abundance of "cautionary tales ... about the failure of predictive analytics to live up to our ideals of nondiscrimination, opportunity, and privacy." He noted "an alarming number of mishaps with employment screening emanating from the elevation of statistical correlation between some variable" and "purported job performance, qualifications or qualities" and the "tendency of such results themselves to reflect stereotypes and bias." "Algorithms," he stressed, are often predicated on data that amplifies rather than reduces the already present biases in society - - racial, ethnic, and socio-economic - in part because these issues may not be noticed or a consideration to the people creating the technology" or might even produce results reflective of their own individual "[s]ubjective judgments" and "innate biases."

- How these considerations may impact upon determinations to be made in the course of a Rule 8.4(g) inquiry remains to be seen. However, it is important to remember and remain aware of these considerations where pertinent to that inquiry in a given case.

- To the extent implicit bias, stereotypical assumptions and the analytics may be at issue in such an inquiry,, Mr. Lopez - notwithstanding the serious concerns about the reported "mishaps," "abuses" and "horrors" he himself recounted -- nonetheless testified: while the "science of implicit bias" is predicated upon "the more subtle" and "automatic association of stereotypes or [subjective] attitudes about particular groups," [p]eople can have conscious values that are still betrayed by their implicit biases," and those unconscious biases "are frequently better at predicting discriminatory behaviors than people's conscious values and intentions."

- Mr. Lopez's optimism notwithstanding, as noted above, Dr. Greenwald and fellow creators of the concept, have now acknowledged, after all these years, the foundational theoretical definition, "unconscious" bias, no longer is viable and "seems unlikely to be established in the near future, " and that the testing devised to date is unable to serve, and should not serve, as a reliable predictor of discriminatory behavior. [Citation to be supplied.]

## **VI. An Expanded New York Rules of Professional Conduct Rule 8.4(g) is Critical.**

When lawyers fail to regulate their own conduct by outlawing discriminatory and harassing conduct, others become skeptical and distrustful of our profession. ABA Formal Opinion 493 notes that, “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.” ABA Formal Opinion 493 examines the typical concerns raised against Model Rule 8.4(g). It notes that “courts have consistently upheld professional conduct rules similar to Rule 8.4(g) against First Amendment ... and other constitutional challenges based on vagueness and overbreadth...”; that “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 the lawyer (id. p. 11), and that it affords attorneys notice of the behavior it proscribes. The Rule, it points out, is not overly broad and is similar to rules that the courts have consistently upheld to regulate behaviors of attorneys. Finally, as emphasized above and noted by the ABA’s Standing Committee on Ethics and Professional Responsibility, Model Rule 8.4(g) is needed to maintain the public’s confidence in the justice system.

## **VII. Why We Can’t Wait.**

The Committee on Diversity and Inclusion urges COSAC to issue a report recommending adoption of the ABA Model Rule 8.4(g) in its entirety as New York Rules of Professional Conduct 8.4(g). The Committee notes that COSAC has studied Model Rule 8.4(g) many, many times. COSAC is well familiar with the arguments in favor of and against adopting all terms of ABA Model Rule 8.4(g). Like the court’s review of race equity in its own system, COSAC’s review of 8.4(g) “comes at a particularly tense moment for race relations in America. Black Americans watch an unrelenting parade of video images of their people’s lives snuffed out like animals at the hunt, at the hands of law enforcement in this jurisdiction and beyond. ...this is a moment that demands a strong and pronounced rededication to equal justice under law by the New York State Court system.” How we as attorneys govern ourselves within our court system is central to eliminating race equity issues in New York’s justice system.

After years of study, we believe that COSAC should be prepared to issue a report in support of this Association’s adoption of the ABA Model Rule of Professional Conduct 8.4(g) in time for consideration at the April 10, 2021 House of Delegates meeting. This meeting will be

about six weeks before the anniversary of George Floyd’s death on May 25, 2020. Under our rules, your report would have to be issued by January 24, 2021. The time to act is now.

The Committee on Diversity and Inclusion stands ready to aid COSAC in its support for expanding Model Rule 8.4(g) to ensure that New York’s lawyers act equitably towards each other and towards all stakeholders of New York’s justice system.

Very truly yours,

*Mirna M. Santiago*

Mirna Martinez Santiago  
Co-Chair, Committee on Diversity & Inclusion

*Violet E. Samuels*

Violet E. Samuels  
Co-Chair, Committee on Diversity & Inclusion

On behalf of the New York State Bar Association’s Committee on Diversity and Inclusion

# BRONX SOLIDARITY!

## **Bronx Housing Court Culture, Bias & Incivility – Examples from Bronx Solidarity!/Tenant Representatives 2017-2018**

While leaving the bench after argument in front of a Judge, landlord’s attorney (who is a white, middle-aged man), repeatedly berated his tenant advocate adversary (who is a women of color, law graduate). He stated she was unqualified, needed to go back to law school, called her a “little girl” and who needed to talk to her “mommy” (supervisor), does not know how to practice in Housing Court and a number of other disparaging remarks. This was in the courtroom- with no reprimand from the Judge, court officer or any other court personnel. This continued in the hallway, where attorney got close to law graduate’s face, screamed at her, pointed his finger at her and accused her of making misrepresentations.

While attempting to negotiate a case in the hallway in front of Part K, a female tapped the arm of a white male landlord’s attorney. The male landlord’s attorney then shouted "You're lucky you're a woman, or I would hit you. If you weren't a woman, I would hit you. If you were a man, I would hit you. My instinct when I feel someone touch me is to just ...." He then made a quick half-punch gesture towards the female's face, as if half-punching her, then punched his right fist into his left fist several times.

While serving a male landlord’s attorney with a motion to dismiss in court, he told me “you fuck me on all my cases, you fucked me so hard on that other case we had together.”

A white male attorney tells a queer female attorney of color that she is on his “to-do” list, but knows he “can’t have it.”

While discontinuing a case in housing court, male landlord’s attorney began yelling at attorney, “You fucked my client! You fucked my client out of \$40,000!” and went on to say that based on this case and a previous case with the same tenant’s attorney, he would never give the attorney any adjournments or do any favors for the attorney in the future.

While trying to settle a pending Order to Show Cause during a court appearance, an experienced female landlord’s attorney got upset and called attorney "a little piece of shit."

A client, an African American male, overheard a landlord’s attorney call another tenant the "n-word" under his breath as the landlord’s attorney was walking out of the courtroom. Client tried to file a formal complaint with the court but was unable to do so.

While waiting in the attorney line to get a court file, an attorney observed a white male landlord’s attorney try to cut the line. Several people protested and the landlord’s attorney stated "I'm an attorney." Someone else said, "We're all attorneys." The landlord’s attorney then turned to the first person in line, a black woman, and said, "Really? You're an attorney?"

A landlord's attorney screamed at me for using the attorney room and told me multiple times to "get the fuck out." This same attorney has called me “emotional”, “bitchy” and “a cunt.”

A white male landlord’s attorney referred to women “he’d like to finger” to a queer, female attorney of color.

A while male landlord’s attorney told a female attorney that he could not describe male attorneys but could identify any female in the courthouse “by her ass.”

## BRONX SOLIDARITY!

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An Arabic speaker from Morocco was frustrated that the interpreter provided by the court was from Yemen and their dialects were mutually unintelligible, and he attempted to explain his frustration to the court attorney in conference. Suddenly the judge exclaimed "YOU'RE SCARING ME!"

.....  
On several occasions a landlord's attorney refused to speak to me without conferencing with court attorney, and walks away. When I have a white male co-worker cover the same case, that landlord's attorney is very civil with my colleague.

.....  
Landlord's attorney was menacing and threatening to my client in court. He got in the tenant's face and said "Go ahead, hit me! I know you want to."

.....  
A landlord's attorney who I worked with for the first time immediately started being aggressive with me upon my asking for a zero balance breakdown. Immediately refused to speak to me outside of the presence of the judge, then made misrepresentation to the judge about our interaction and negotiations that never occurred. The next time on, she refused to speak to me again despite many attempts to speak about the case, and made misrepresentations (lied) in front of the judge a second time. She was extremely aggressive, and yelled at her own client and the judge in addition to me.

.....  
Landlord's attorney made disparaging remarks about my client, saying that he was a "dirtbag, a lowlife, and a deadbeat."

.....  
I have been questioned by court staff repeatedly whether I'm actually an attorney and whether I speak English.

.....  
While in housing court, a landlord's attorney pointed at a tenant in the hallway and said "whoa, look there, that's weird." I asked "what" and the landlord's attorney responded, "she's white, you don't see that often here."

.....  
Male landlord's attorney completely refused to deal with a case that was on the calendar and repeatedly yelled at me (female tenant's attorney) that he would not be doing anything on this case and for her to go away. Finally after approaching him for a third time, he yelled at me "I'm going to buy you a dictionary, so you can look up the word "nothing" when I tell you I'm doing nothing on the case!" Multiple attempts by the court attorney and court officers to have the landlord's attorney deal with the case were unsuccessful.

.....  
A white male ADA in part Z stated to woman of color tenant attorney: "I feel bad for your boyfriend or husband, you are so inflexible. You don't compromise. You are so difficult."

.....  
A male landlord's attorney in front of Judge's court attorney and ADA to female tenant attorney: "we should discuss this settlement over drinks this evening."

.....  
Landlord's attorney made disparaging remarks about my client, saying that he and his wife were disgusting.

.....  
Landlord's attorney called my client a "cuckoo bird," a "nut job," and "crazy."

.....  
Landlord's attorneys have commented on my appearance and it has made me feel very uncomfortable.

.....  
In the hallway outside the courtroom, landlord's attorney said to tenant attorney that the tenant "should go back to where she came from." The tenant is a lawful permanent resident who was born in Trinidad.

## BRONX SOLIDARITY!

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In the housing court attorney room, a landlord's attorney commented that tenants "should learn to speak English."

Two landlord's attorneys nearly come to blows over counter space, threaten to "take this outside."

A male judge asked his female court attorney and court officer to stand up so that the gallery could compliment their looks.

A landlord's attorney told a tenant attorney that the tenant was a fucking scumbag and the tenant attorney was a fucking scumbag for representing the tenant.

I once witnessed a landlord's attorney shout and berate a woman of color tenant attorney for over a half hour loudly in the court hallway.

A landlord's attorney complains to a court attorney about adjourning the case for an ELS attorney to assess the case for conflicts and appear. The court attorney says take it up with the mayor. The landlord's attorney says loud enough for everyone in the courtroom to hear: "you know what I wish? I wish the mayor was bike riding two days ago." (Referring to the driver who plowed a truck down the Hudson River bike path, killing eight people and injuring eleven people.)

Landlord's attorney takes settlement off the table to a tenant attorney on ELS intake for "interfering" with the landlord-attorney's cases and refuses to provide a rent breakdown

While being shown photos of pet dogs, a male landlord's attorney "joked" about only kissing the female dogs on the mouth.

A male attorney "guided" a female attorney out of the courtroom by putting his hands on her arm and the small of her back.

A white male attorney refers to a female attorney of color as an "attorney" (using air quotes, as if not really an attorney) when referring to her.

Court attorneys regularly ask a female attorney of color if she is a paralegal.

A female attorney is regularly referred to as "honey," "sweetie," and "baby" by male attorneys.

A male attorney asks to see photos of a female attorney in traditional cultural attire/dress in order to settle a case favorably.

A white male attorney referred to a female court officer as a pedophile when she walked down the stairs with two little girls trying to find their mother.

A female landlord's attorney substantially more experienced than me was making comments about the way the ELS process works. Hoping to have a productive conversation, I started, "I understand where you are coming from" but she cut me off immediately, saying, "you can't possibly understand. You don't. I have been practicing for far longer than you, so you can't understand!" Needless to say, I was no longer interested in having a productive conversation.

While negotiating in the hallway, landlord's attorney called my client a piece of shit and said my client always wheels in his wheelchair and begs for rent just because he is in a wheelchair.

## BRONX SOLIDARITY!

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A landlord's attorney refused to acknowledge a tenant by her preferred name – which reflected her gender – and insisted on calling the tenant by the name given to the tenant because of the tenant's sex at birth.

A landlord's attorney called a tenant a bitch.

A landlord's attorney yelled at another attorney at court using profanity, including “fuck you.”

Landlord's attorney yells at female attorney in hallway, then as she walked away called her a “cunt.”

Landlord's attorneys yell at opposing counsel in hallway and courtrooms.

Landlord's attorney said opposing counsel was dumb but sexy.

Landlord's attorney makes paralegals in hallway take out cameras to take video of tenant in tight fitting clothing.

Landlord's attorneys engage in uncivil and unprofessional behavior in court and in hallways, yelling at staff, opposing counsel, and tenants. They rip up stipulations and throw them on the ground, and tell paralegals and other attorneys that they don't know what they are talking about.

Landlord's attorney yelled at a *pro se* tenant who tapped him on the arm to get his attention and told her “don't fucking touch me.”

Landlord's attorney, unhappy with ruling by judge, packs up all his papers, says he is done, and starts to walk out on trial. Judge says, “we are going to go ahead without you.” He argues for another 10 minutes until 4:25 pm, and then the case is adjourned.

Landlord's attorney physically pushed opposing counsel.

Landlord's attorney says slanderous things about tenants in front of judges – snide asides accusing tenants of engaging in illegal activities, sex work, child abuse – when such allegations are unfounded and irrelevant to the proceeding.

Landlord's attorney told *pro se* tenant that she didn't care if the tenant's brother had died.

Landlord's attorney threatened to file frivolous sanctions motion.

I have witnessed landlord's attorneys treat attorneys of color in an unprofessional manner (using micro-aggressions, questioning their professionalism, using hostile behavior) compared to their white counterparts.

After the conclusion of aggressive negotiation, the male landlord's attorney patted the female supervising attorney on her shoulder without any warning.

While working on a case in housing court, a male landlord's attorney asked tenant attorney if they were a client and went on to say, “you look like a client or a paralegal.” The tenant attorney identifies as Latino/a.

Landlord's attorney calls female tenant attorney sweetie, sweetheart.

Landlord's attorney makes reference to a tenant attorney identifying as Latino/a as ‘looking spicy.’”



## BRONX SOLIDARITY!

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.....  
Landlord's attorney screams and refuses to speak about a case because they have a high volume of cases, and are unprepared and unaware of the case.  
.....

Tenant attorneys have to chase landlord's attorneys and wait until they are ready to come to the part after telling them that the judge called the case.  
.....

A female tenant's attorney was bullied and berated in court and on record by a male landlord's attorney and called "arrogant" and "rude." Tenant's attorney asked if landlord's attorney had a breakdown, he said no, attorney asked him why not, and he scoffed at attorney, didn't answer, went into the courtroom and put the case up for conference without informing attorney. He refused to answer questions about the breakdown, said he wanted to settle or have a judgment despite not providing proof of missing rent. While Judge was off bench and attorneys of the parties were in conference with court attorney, the landlord's attorney said "I thought I was dealing with an attorney." Both attorneys were forced to come back after lunch, unnecessarily, at which time the landlord's attorney pleasantly provided a breakdown as if nothing had happened. His berating continued on the record, for example when the Judge asked tenant attorney a question, he interrupted tenant attorney's attempt to answer with "You see Judge, you can't get any answers out of her, she never any answers." Judge barely asked him to stop.  
.....

White woman is tenant attorney, White Man is landlord's attorney, and Black African American woman is the client. In the hallway before an appearance in court the landlord's attorney called the client a "bitch" and calls the tenant attorney a "piece of shit."  
.....

I made an application to adjourn my order to show cause because there was no interpreter for my client. The landlord's lawyer opposed the adjournment and said something to the effect, on the record, "If Legal Aid did not take non-English-speaking clients, we wouldn't have this problem".  
.....

As my opponent and I approached the bench to argue a motion, I realized that the court interpreter for my client was not present. I informed the judge that we had to wait for the interpreter to return before we could start the argument. The landlord's lawyer groaned and audibly sucked her teeth. She slammed her papers and stomped away from the bench. I interpreted her body language and behavior as that of an angry person. I asked her, "why are you so angry, because we have to wait for an interpreter?" The landlord's lawyer responded, in open court, in front of an entire congregation, "NO! I'm angry because SHE [pointing to my client] does not know how to speak English! How long has she been here!?"  
.....

Judges and landlords frequently ask tenant attorneys of color if they are tenants/will not refer to them as attorneys.  
.....

A landlord's attorney, who is male, asked me, a female, if I would tell his wife that he is talking to me because I was so beautiful that she would consider it cheating.  
.....

A male landlord's attorney repeatedly refers to female tenant attorneys as "honey" and "sweetie" after being asked to stop.  
.....

Court interpreter (approximately 60 year old Latino male) discussing case with landlord's attorney (30 year old black male) and tenant (young Latina). Landlord's attorney asks about settling the case. The court interpreter, instead of translating what tenant is saying, states "she's saying the usual stuff about repairs." Totally dismissing and silencing tenant's concerns. There was no court attorney there or other neutral party. Interpreter before/ after conference continued personal conversation with landlord's attorney laughing and joking  
.....

## BRONX SOLIDARITY!

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I overheard an exchange between a landlord's lawyer and a *pro se* litigant. The landlord's lawyer was a middle-aged woman. The *pro se* litigant was a man of African descent. He could have been American, Caribbean or African. I do not know. The exchange began calmly but the landlord's lawyer quickly became nasty and passive-aggressive when the tenant disputed the alleged amount owed. She insulted the man and suggested that he did not know what he was talking about because he was crazy. The man reacted to the landlord's lawyer's insults and passive-aggressive behavior by raising his voice at her. His message was basically, "stop doing what you are doing", although he did not use those exact words. But because he began yelling, a couple of court officers appeared. One officer was a white man. The other officer was an African-American woman. The white lawyer began talking to white officer. "That man is acting crazy... I think he is crazy... maybe he's off his meds... maybe he's on drugs...." Thankfully, the white officer did not react to her words. But I think he did not react because of the presence and tactics employed by the African-American officer.

The African-American officer talked to the man. She asked him if he was ok. His initial response was, "NO! I'M NOT OK!" and he described to the African-American officer what the landlord's lawyer said to him." The African-American officer chided the white attorney. The African-American officer asked the man again if he was ok. He said, "Yeah, I'm ok". "You sure you good?" "Yeah, I'm calm now." And the officers returned to their parts and no one was arrested.

I believe the white lawyer intentionally antagonized the man in an attempt to get him arrested. I believe that was the white attorney's intent because she said things like, "I think he's crazy and might be on drugs". This suggests that the man was erratic and uncontrollable and needed to be subdued. In other words, it played off of the angry Black man trope. I am confident that that man would have been arrested but for the presence and tact of the female African-American court officer. I also believe this anecdote highlights the importance of having diversity in every layer of the court/justice system. This is an easily attainable way to change the culture of Bronx Housing Court.

.....  
A landlord's attorney followed me in the elevator to make fun of what I was wearing and tried to get other landlord's attorneys to join her in on it. She started saying that there was something wrong with millennials (of which I am a part ) and that I should learn that the world is not a nice place. I did not even have a case on with her that day and the attack was completely unprovoked.

.....  
I can think of 2 landlord's attorneys (one is 70 year old white male attorney, the other is 50 year old white male attorney). Every time there is a case with them, they ask me, 30 year old white woman tenant's attorney, to procure them photocopies of the motion, the stipulation and the HPD report. I have repeatedly told them they can't ask opposing counsel to make them copies- they both have paid staff at housing court with them.

.....  
I overheard a landlord's attorney screaming at a *pro se* tenant saying over and over again in a very loud voice that she was illiterate and could not read. I calmly approached him and asked him not to speak to her that way. Then he started screaming at me and asking me why I cared. I informed him that we had a duty of professionalism as attorneys. I then tried to walk away and he followed me down the hallway screaming at me and asking me why it was my business until a court officer told him to stop.

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## BRONX SOLIDARITY!

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A month after Tenant advocate started (in May 2017) and made a small error on a stipulation, and the landlord's attorney started yelling at advocate in the middle of the hallway, asking if the tenant advocate even graduated from law school and promising to get advocate disbarred. The yelling continued into the court room, where the court attorney asked that advocate get supervisor. Supervisor came. The landlord's attorney asked to meet in the judge's chambers the next day. In the meeting the next time, she made incredible accusations against tenant advocate saying that advocate maliciously made an error on the stipulation, even though she knew for a fact the advocate had been working there for less than one month. She also, for absolutely no reason, accused advocate of signature fraud because she said advocate had a different signature on a motion than on stipulations. She insisted that advocate apologize to her again, despite apologizing several times. Once attorneys were done in the judge's chambers, she followed advocate outside yelling at advocate to apologize again. She even waited for advocate outside the bathroom in which advocate was crying so she could continue to yell at advocate about apologizing to her.

.....  
In the hallway, 60 year old white woman attorney calls 30 year old woman tenant's attorney a "piece of shit" when dispute arose about tendering checks without a signed receipt.

.....  
60 year old white man landlord's attorney calls 30 year old white woman tenant's attorney, "why do you have to be such an asshole" following negotiation discussions where tenant's attorney pointed out defenses and counterclaims would not be waived.

.....  
While discussing a motion that a female tenant attorney was not served with, a male landlord's attorney screamed that he doesn't want to have anything to do with the female attorney's organization anyway because they are all a bunch of assholes. This happened in a quiet court room. No court personnel said anything to the landlord's attorney.

.....  
A landlord's attorney told me that she was going to get me fired because I separated a stipulation which she apparently wanted so ordered but had not told me. She made a huge scene in the court room to take down my name to call the head of the legal organization I work for and promised that I would get fired.

.....  
At the court attorney's table waiting to be called before judge. White woman is tenant attorney, and two middle-age white men representing landlord are at the table as well. The Latina court attorney asks attorneys to move twice so she can conference cases. The landlord's attorneys refuse to move and don't break eye contact with their cell phone screens. One other chair is pulled in so clerk can conference and continue to do her job, ignoring landlord's attorneys.

.....  
As a tenant's attorney (30 year old white woman) I have regularly emailed one opposing counsel (60 year old white male attorney, sole owner at his firm of 3 associates) about cases for the past two years. The majority of emails are fine, or go unanswered, or the response is a simple: yes those terms are fine, or no. I can count perhaps 3-4 occasions when this owner has responded by email accusing me of "jerking him around" and "being difficult" and "lying" or "why can't you be nice." I remember feeling personal boundaries were crossed when he sends me these emails from his personal device late at night.

.....  
In court hallway, 60 year old male attorney calls 30 year old female attorney a leech for requesting a rent ledger on first appearance with counsel.

.....  
When male attorney advised LL attorney in court that a new attorney would appear and argue a motion on the return date, LL attorney said that the new attorney could "suck my d\*\*k." The male attorney recited that commentary in his reply affirmation. At hearing on the motion, the new attorney pointed out that

## BRONX SOLIDARITY!

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paragraph of the reply affirmation to the judge, who brushed it off without addressing LL attorney's unprofessional conduct.

.....  
When tenant's (T) attorney was late to court due to train trouble, a colleague checked in for her. LL attorney was not in the Part or on the floor when T attorney arrived. T attorney then conferenced two cases on other floors and returned to the Part. About that time, LL attorney appeared and told T attorney that she was in trouble because the supervising judge was on her way. The supervising judge then appeared in the Part (which was not her Part) with the court file in her hand – given to her by LL attorney. The supervising judge asked to speak with T attorney behind closed doors. She then asked why T attorney was late and other irrelevant questions. Concluding the exchange the supervising judge observed, "I don't even know why I was brought down here" (presumably by the LL attorney) and then left.

.....  
While in housing court, a male landlord's attorney put his hand on a tenant attorney's back while calling her "sweetie."

.....  
A Judge, on numerous occasions, would ask tenant questions about their case and before tenant could answer or while attempting to answer, would tell tenant to be quiet or shut up because he thought tenant did not understand his question, when in fact tenant did (related this afterwards). The same judge would also ridicule tenant and chuckle at tenant. This caused tenant to dread going in front of the judge, never knowing what to expect from his behavior.

.....  
When a male tenant attorney asked a male landlord's attorney to discuss a contentious case with him, the landlord's attorney refused. The tenant attorney insisted, which resulted in the landlord's attorney dismissing him and making a hand gesture appearing to mimic a sexual act.  
.....

## Concurring Opinion, Michael I. Bernstein:

I wholeheartedly agree with, and endorse, the need for the above recommended changes in the Committee's Report, mindful of their implementation subject to the standards and precedent there discussed. I do so, moreover, in the belief application of such changes, once made, will not be insensitive to legitimate First Amendment issues, as appropriate. That said, certain comments no doubt included in good faith in the Committee's Report, for reasons I state below, prompt concerns I cannot ignore. Those concerns involve critical issues of due process and fundamental issues of fairness, however articulated, to which any attorney who may be subject to accusations of the kind expressed in the report necessarily would be entitled. They are concerns, I respectfully submit, that cannot and should not be compromised. We cannot forget we are submitting our report in our capacity as objective representatives of the Bar and of the NYSBA, focused on the ethical and professional standards by which attorneys are to be governed in the conduct of their legal practices, and sensitive to the state's needs for regulation of the legal system and the administration of justice. No matter what "hat" we may wear in our respective legal practices, or in our capacity as citizens, I would hope these are concerns we all share.

In Sections III and VII of the Committee Report, references are made to the "death of George Floyd" as a reminder of the need to act now on the recommended changes, particularly with respect to "race equity" and "race relations" issues. Discussion was had as to whether the term "death" was inadequate and should be replaced either by the terms "murder" or "killed" – even though there had yet to be an adjudication in the case at hand. Also discussed was the passage in Section VII: "Like the court's review of race equity in its own system, COSAC's review of 8.4(g) 'comes at a particularly tense moment for race relations in America. Black Americans watch an unrelenting parade of video images of their people's lives snuffed out like animals in the hunt, at the hands of law enforcement in this jurisdiction and beyond ....' How we as attorneys govern ourselves within our court system is central to eliminating race equity issues in New York's justice system." As one horrified by the videos that have been shown on public media, I was and remain truly concerned by what I saw and heard of the circumstances of Mr. Floyd's death. I also know, however, various issues have been raised in this case and, as noted above, no adjudication has yet been reached. While careful and detailed analysis of Mr. Floyd's and these other cases well might be elsewhere appropriate, I find their inclusion and the vague reference to "the hands of law enforcement" in this report highly inappropriate in the context of the report and our mission, particularly in the form of the above-quoted passage with its broad-scale generalizations and imagery, devoid of identification, concrete analysis or specific factual correlations. If anything, inclusion of the passage may even undermine confidence on the part of some in the recommendations of the Committee.\*

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\* In examining these concerns, we must remember, as the Committee's Report emphasizes (p. 7), "the proposed modifications [in Rule 8.4(g)] would eliminate the current threshold requirements that the prescribed conduct be unlawful or, to the extent applied in the employment context, severe or pervasive," or to the requirement that there first be an exhaustion of all other remedies before an 8.4(g) complaint can be filed (p. 6).



# New York State Bar Association

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## Committee on Disability Rights

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December 3, 2020

Dear President Karson and Delegates:

On behalf of the NYSBA Disability Rights Committee we write to support the adoption of the ABA Model Rule of Professional Conduct 8.4(g) as recommended.

First, we applaud the efforts of the NYSBA, President Karson, and the Committee on Diversity and Inclusion. The Broad initiatives seeking to expand diverse and inclusive equal opportunities for historically disenfranchised segments of society is empowering. As a Committee, the DRC appreciates the initiatives that encompass disability rights and meaningful participation. It is a privilege to have NYSBA leadership reach out to our committee for consideration and comment.

The Rule as proposed reiterates clearly obligations inherent in the ethical practice of law. The Rule recognizes that as lawyers our responsibility extends beyond what we "argue" to how we act. Our profession is first and foremost recognizing the equal rights and dignity of the people we work with and represent. While it is unfortunate there remains a need to codify professionally what is espoused in the Declaration of Independence and Constitutions, it is laudable the need is recognized and appropriately addressed. The NYSBA has always been a leader in the advancement of human and civil rights. The good works of the Committee on Diversity and Inclusion as well as leadership in taking affirmative action to address continuing inequities demonstrates the fortitude that has been a hallmark of this Association.

Wherefore, the NYSBA Disability Rights Committee supports and strongly recommends adoption of the Committee of Diversity and Inclusion Report and Recommendation.

Thank you for your time, attention and consideration of this matter.

Respectfully,

Joseph J. Ranni, Co-Chair

Alison Morris, Co-Chair



COMMITTEE ON LEGAL AID  
PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

May 28, 2021

TO: Members of the House of Delegates

FROM: NYSBA Committee on Legal Aid  
and President's Committee on Access to Justice

RE: Report of the Committee on Standards of Attorney Conduct

The Committee on Legal Aid and President's Committee on Access to Justice jointly urge the House of Delegates to approve policy in support of ABA Model Rule 8.4(g), with the inclusion of additional protected statutes and with incorporation of language on harassment, rather than the proposed amendments to ABA Model Rule 8.4(g) as recommended by the Committee on Standards of Attorney Conduct.



Roy Simon &lt;roy.d.simon@gmail.com&gt;

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**RE: Proposed amendments to NY Rule 8.4**

1 message

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**Bartosiewicz, Gina** <GBartosiewicz@nysba.org>  
To: Roy Simon <roy.d.simon@gmail.com>

Wed, May 5, 2021 at 11:30 AM

Hi Roy,

Thank you for reaching out for clarification.

The Trial Lawyers are commenting on the COSAC Report on Rule 8.4(g) which prohibits a lawyer or law firm from "unlawfully discriminating in the practice of law". The section's position is that the amendments to the existing Rule are not needed.

I hope this helps!

Thanks,

Gina

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**From:** Roy Simon <roy.d.simon@gmail.com>  
**Sent:** Wednesday, May 5, 2021 10:42 AM  
**To:** Bartosiewicz, Gina <GBartosiewicz@nysba.org>  
**Subject:** Proposed amendments to NY Rule 8.4

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Gina -- Tom Richards forwarded the comments (below) from the Trial Lawyers Section on proposed amendments to Rule 8.4. I am the Chair of COSAC and I just want to clarify something. Two sets of proposed amendments to Rule 8.4 are currently circulating. One proposal was circulated by the New York Courts and would adopt ABA Model Rule 8.4(g) verbatim. The other proposal was circulated by COSAC and is much more specific than the ABA Model Rule. Which one was the Trial Lawyers Section commenting on?

If you were commenting on the COSAC proposal (circulated April 16, 2021), can you elaborate on which parts are vague and unneeded? Is it the TLS position that we should eliminate existing Rule 8.4(g), which prohibits a lawyer or law firm from "unlawfully discriminating in the practice of law"? Or is the position simply that amendments to existing Rule 8.4(g) are not needed? COSAC would like to improve its proposal and your clarification would help us to do that. Many thanks. Be well.

--

Professor Roy D. Simon

Chair, NYSBA Committee on Standards of Attorney Conduct ("COSAC")



**From:** Bartosiewicz, Gina <[GBartosiewicz@nysba.org](mailto:GBartosiewicz@nysba.org)>  
**Sent:** Wednesday, May 5, 2021 9:19 AM  
**To:** Richards, Thomas <[TRICHARDS@NYSBA.ORG](mailto:TRICHARDS@NYSBA.ORG)>  
**Cc:** William S. Friedlander <[wsf@friedlanderlaw.com](mailto:wsf@friedlanderlaw.com)>  
**Subject:** Proposed Amendments to Rule 8.4 of the New York Rules of Professional Conduct | Trial Lawyers Section

Good morning,

On behalf of the Chair of the Trial Lawyers Section, William Friedlander (copied) please note that at a special meeting of the Trial Lawyers Executive Committee on May 4<sup>th</sup>, 2021, the Committee has voted to not take a position on the Proposed Amendments to Rule 8.4 of the New York Rules of Professional Conduct due to it being vague and unneeded.

Thank you,



**Gina Bartosiewicz**, Sections and Meetings Liaison

New York State Bar Association

One [Elk Street, Albany, NY 12207](#)

**direct:** 518.487.5671 | **main:** 518.463.3200 | **email:** [gbartosiewicz@nysba.org](mailto:gbartosiewicz@nysba.org) | [www.nysba.org](http://www.nysba.org)



May 28, 2021

New York State Bar Association  
Committee on Standards of Attorney Conduct (COSAC)  
By email (roy.simon@hofstra.edu)

**Re: Comment Letter Opposing Proposed Rule 8.4(g)**

Pacific Legal Foundation submits this comment letter in response to the COSAC's request for public comment regarding Proposed Rule 8.4(g).

Pacific Legal Foundation writes to express concerns regarding the First Amendment implications of Proposed Rule 8.4(g). The rule would impair freedom of speech and freedom of expression in the legal profession, and particularly penalize public interest lawyers who engage in litigation concerning controversial topics such as race and sex discrimination.

The Rejection of ABA Model Rule 8.4(g)

The Proposed Rule is modeled after ABA Model Rule 8.4(g), a proposal that has been rejected by nearly every state to consider it.

In 2016, the American Bar Association proposed Model Rule 8.4(g), which makes it professional misconduct 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.” Model Rules of Prof'l Conduct R.8.4: Misconduct (Am. Bar Ass'n 2016). The rule utilizes a broad definition of “conduct related to the practice of law,” which includes not only “representing clients; interacting with witnesses” and other in court activities, but also “participating in bar association, business, or social activities in connection with the practice of law.” *Id.* Comment 4.

After many years of intense deliberation, only two states—Vermont and New Mexico—have adopted Model Rule 8.4(g) in full into their own Rules of Professional Conduct, and Pennsylvania and Maine have adopted variations of the rule. Maine adopted a variation of Model Rule 8.4(g), which does not bar discrimination on the basis of marital status or socio-economic status and which does not extend to participation in bar association, business, or social activities. Pennsylvania's stripped down version of Model Rule 8.4(g) was nevertheless enjoined by the federal district court. *Greenberg v. Hagerty*, 2:20-cv-03822 (filed Aug. 6, 2020).

On the other hand, many other states have expressly rejected the adoption of Model Rule 8.4(g). The Attorneys General of several states published opinions arguing that the rule would violate the Constitution.<sup>1</sup> For instance, Alaska Attorney General Kevin Clarkson filed a comment letter urging the Alaska Bar Association Board of Governors to reject Model Rule 8.4(g). Attorney General Clarkson raised a variety of serious First Amendment concerns, including the potential for the rule to intrude on freedom of association by penalizing lawyers who participate in private associations with exclusive membership practices or who advocate for policies that may be deemed discriminatory. Kevin Clarkson, Letter Re: Proposed Rule of Professional Conduct 8.4(f) submitted to the Alaska Bar Association (Aug. 9, 2019), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>.

#### Problems with the Rule

A wide variety of First Amendment and Constitutional Law scholars have also written criticizing Model Rule 8.4(g) for its potential to stifle or censor attorney speech.<sup>2</sup>

This scholarship raises a series of overlapping concerns which apply to Proposed Rule 8.4(g). First, the rule might penalize speech if it is seen as “derogatory,” or “demeaning”—highly subjective terms that provide little guidance to New York attorneys.<sup>3</sup> COSAC’s Proposed Rule 8.4(g) includes several additional vague terms such as “degrading,” “repulsive,” and “disdainful.” This might include, for instance, a presentation arguing against race-based

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<sup>1</sup> ABA Model Rule of Professional Conduct 8.4(g) and Louisiana State Bar Association proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att’y Gen. Op. 17-0114 (Sept. 8, 2017), <https://perma.cc/9TWR-8GY9>; S.C. Att’y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), <https://perma.cc/ED72-3UGM>; American Bar Association’s New Model Rule of Professional Conduct 8.4(g), Tenn. Att’y Gen. Op. 18-11 (Mar. 16, 2018), <https://perma.cc/DZY2-YG23>; whether adoption of the American Bar Association’s Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney’s statutory or constitutional rights (RQ-0128-KP), Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016), <https://perma.cc/M248-HKGG>.

<sup>2</sup> Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>; Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(G): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).

<sup>3</sup> Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) The First Amendment and ‘Conduct Related to the Practice of Law,’* 30 Geo. J. Legal Ethics 241, 245 (2017).

affirmative action due to the impact of “mismatch theory,” or a speaker who argues that “low-income individuals who receive public assistance should be subject to drug testing.”<sup>4</sup>

Second, the rule will apply to CLE presentations, academic symposia, and even to conversations at a local bar dinner, which will stifle conversations about significant legal topics of controversy.<sup>5</sup> As Professor Eugene Volokh put it, the rule could be applied to dinner conversations “about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on.”<sup>6</sup> COSAC’s proposed rule similarly applies to attorneys when they are “participating in bar association, business, or professional activities or events in connection with the practice of law.”

Third, the rule penalizes attorneys for speech that they “reasonably should know” would cause offense.<sup>7</sup> This mens rea requirement places attorneys at risk of discipline for speech that they were not aware would or could cause any offense, further exacerbating the chilling effect on attorney speech.<sup>8</sup>

These are just a few of the many well-founded criticisms of the ABA rule.

COSAC’s Proposed Rule 8.4(g) does attempt to remedy some of the shortfalls of ABA Model Rule 8.4(g). In particular, the rule states that it does not “limit the ability of a lawyer or law firm to accept, decline, or withdraw from representation.” And that the rule places no limits on a lawyer’s ability “express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy.” The inclusion of this language is a significant improvement. The definition of harassment included in the rule is also an improvement as it tracks much more closely with federal harassment law which requires severe and pervasive conduct.

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<sup>4</sup> *Id.* at 246.

<sup>5</sup> Eugene Volokh, *A speech code for lawyers, banning viewpoints that express ‘bias,’ including in law-related social activities*, Volokh Conspiracy (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?noredirect=on>.

<sup>6</sup> *Id.*

<sup>7</sup> Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol’y 173, 205 (2019).

<sup>8</sup> *Id.*

Unfortunately, because the Proposed Rule still relies on highly subjective concepts such as “offensive” and has an extremely lax mens rea requirement, there is still significant risk that the Proposed Rule will create uncertainty and stifle speech on important matters of public policy. These caveats also fail to protect a lawyer from investigation for protected speech and would require lawyers to suffer reputational harm and a prolonged process before constitutional rights could be vindicated.

#### Reliance on Local Law Raises Constitutional Concerns

But even more troublingly, the current version of Model Rule 8.4(g) contains a carve out wide enough to swallow up all of these improvements. Specifically, Model Rule 8.4(g) contains no definition for the crucial term “unlawful discrimination.” Instead, this term is to be defined “under federal, state and local law.”

In New York in particular this is an enormous First Amendment problem. New York City is known for having one of the nation’s most expansive anti-discrimination laws. New York City Human Rights Law defines harassment in a fashion that is far broader and more burdensome on speech than federal anti-discrimination standards. Under federal law, an employer or public accommodation can only be liable where there is discriminatory conduct or severe and pervasive harassment that creates a hostile work environment. In contrast, under the NYCHRL, anything that is more than a “petty slight or trivial inconvenience” can result in liability if it is intended to “demean, humiliate, or offend a person.” *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 79–80, 872 N.Y.S.2d 27, 40–41 (2009). And the burden is on the employer or public accommodation to prove that its actions were just a “petty slight or trivial inconvenience,” which may unduly burden and chill expressive activity. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (concluding that a defense of truth in defamation cases was inadequate to protect First Amendment freedoms, because fear of liability would “dampen[] the vigor and limit[] the variety of public debate”).

Indeed, cases involving provisions of the NYCHRL have found discrimination based on little more than stray remarks or jokes based on protected characteristics. For instance, in *Benzinger v. NYSARC, Inc. New York City Chapter*, 385 F. Supp. 3d 224, 229 (S.D.N.Y. 2019), a security services provider was found liable because one of its security guards laughed at racist comments made by the building porter, because the laughter “could constitute an indirect declaration that Plaintiff’s patronage ... was unwelcome or objectionable.” The services provider was found liable even without any independent evidence of intent to demean, and solely because of the subjective impact that the laughter had. *In the Matter of Commission on Human Rights ex. rel. Christina Spitzer and Kassie Thorton v. Mohammed Dahbi*, 2016 WL 7106071, at \*1 (taxi driver

asked gay couple to stop kissing in his vehicle).<sup>9</sup> See also *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 80, 872 N.Y.S.2d 27, 41 (2009) (“One can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable.”); *Golston-Green v. City of New York*, 184 A.D.3d 24, 123 N.Y.S.3d 656, 670 (2020) (“A single comment being made in circumstances where that comment would, for example, signal views about the role of women in the workplace may be actionable under the City Human Rights Law” (internal quotation marks omitted)).

The New York City Human Rights Commission has gone even further in guidance documents interpreting New York City civil rights law. For instance, a September 2019 document declared that even a single usage of the words “illegal alien” could be considered unlawful discrimination if it is determined to have been done with the intent to demean, humiliate, or offend.<sup>10</sup> This could include “comments or jokes.” Indeed, any inquiry at all into immigration status might constitute discrimination because such inquiries can make an individual feel “unwelcome, objectionable, or not acceptable.” The NYCHRC has imposed a similarly expansive interpretation against the misgendering of individuals. And the NYCHRC has investigated companies merely for using images in advertising that it deemed offensive.<sup>11</sup>

Incorporating such an expansive interpretation of discrimination into the New York Rules of Professional Conduct would chill attorney speech throughout the State of New York and especially in New York City. Attorneys would be reasonably worried that their words might be seen as demeaning, humiliating or offensive.

#### The Rule is Incompatible with Recent Supreme Court Precedent

In the last few years, the Supreme Court has issued several decisions which make it clear that the Proposed Rule would be presumptively unconstitutional and would likely be invalidated as a content-based and viewpoint-based restriction of professional speech. Its 2018 decision in

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<sup>9</sup> Other examples include: the New York Department of Education being fined after a middle-school vice principal showed a group of teachers a transphobic meme, <https://www1.nyc.gov/site/cchr/enforcement/2019-settlements.page>; see also <https://nypost.com/2016/12/13/assistant-principal-accused-of-sharing-transphobic-meme/m>; and a Home Depot was fined after an employee became upset and used racist language at a black customer. <https://www1.nyc.gov/site/cchr/enforcement/2019-settlements.page>.

<sup>10</sup> <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/immigration-guidance.pdf>.

<sup>11</sup> [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Prada\\_Settlement\\_Press\\_Release.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Prada_Settlement_Press_Release.pdf)

*National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), is particularly on point. In that case, the Supreme Court invalidated a law which imposed speech requirements on clinics offering services to pregnant women. The Court explained that content-based regulations of professional speech “pose[] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information” and are accordingly subject to strict scrutiny. *Id.* at 2374. The Court emphasized that attorney speech cannot be regulated to impose “invidious discrimination of disfavored subjects.” *Id.* at 2375.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), the Supreme Court invalidated restrictions on the registration of “offensive,” “immoral,” and “scandalous” trademarks. The Court emphasized that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,” and that such restrictions are viewpoint-based and strongly disfavored. *Matal*, 137 S. Ct. at 1763. The First Amendment does not tolerate a “happy-talk” requirement. *Id.* at 1765.

If it was not clear beforehand, these cases make clear that a restriction on professional speech, merely because some may find it offensive, is unconstitutional.

#### The Rule Risks Stifling a Wide Variety of Lawyer Conduct and Expression

To illustrate some of the problems with the Proposed Rule, consider the following hypothetical scenarios. How would the proposed rule apply if someone who was offended by an attorney’s speech filed a complaint? And how would a New York attorney reading the vague and overly broad rule ever know?

1. A public interest lawyer in New York brings a lawsuit on behalf of Asian high school students student who argues that Mayor de Blasio discriminated against them by changing the admissions policies at the city’s selective high school based on racial stereotypes and a belief that Asians are over represented.<sup>12</sup> As part of that lawsuit, the New York attorney also argues that the use of affirmative-action creates a “mismatch” and that therefore “racial preference policies often stigmatize minorities, reinforce pernicious stereotypes, and undermine the self-confidence of beneficiaries,”<sup>13</sup> which results in minority students performing worse in the selective schools. In arguing the case, the attorney writes an op-ed and appears in radio and television interviews arguing that the Supreme Court should outlaw all forms of affirmative action because these

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<sup>12</sup> <https://pacificlegal.org/case/christa-mcauliffe-pt0-v-de-blasio/>

<sup>13</sup> Richard Sander and Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, *The Atlantic* (Oct. 2, 2012).

- policies violate the ideal of equal protection under the law. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
2. Another New York attorney intervenes on behalf of a group of African-American high school students who are likely to benefit from the affirmative action policies. He argues that because of the legacy of slavery and segregation that it is necessary for African-American students to be the beneficiaries of affirmative action policies, and affirmative action is needed to counteract systemic racism which favors white Americans. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
  3. At a CLE event, two New York attorneys agree to debate whether the state of New York should introduce rent control legislation. The speaker arguing in favor of rent control argues that absentee landlords are profiteering off the poor and that rent control is needed to mitigate their greed. The speaker arguing against rent control extols the virtues of private property ownership and entrepreneurship and argues that renters need to work harder in order to meet the rising cost of rent rather than demand subsidies from landlords. How does the prohibition against discrimination on the basis of socioeconomic status in the Proposed Rule apply to either attorney's statements?
  4. A New York attorney files an amicus brief arguing that the President has plenary authority to exclude individuals from admission to this country on the basis of their ethnicity or religion. How does the prohibition against discrimination on the basis of religion and national origin in the Proposed Rule apply to this speech?
  5. Relatedly, another New York attorney writes an op-ed critiquing the attorney by name and calling her a racist and an islamophobe. How does the prohibition against discrimination on the basis of race and religion in the Proposed Rule apply to this speech?
  6. A New York attorney represents the KKK when their petition to hold a rally in a town in New York is denied. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
  7. Relatedly, a New York attorney represents Antifa when their counter protest at the KKK rally is shut down due to security concerns. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
  8. A New York attorney attends a pro-life rally and shares a picture of her attending the rally on her social media feed which includes several other New York attorneys that she knows are strongly pro-choice. How does the prohibition against discrimination on the basis of sex in the Proposed Rule apply to this speech?
  9. A New York attorney who is a member of the Boomer generation shares an article on social media which calls Millennials lazy and entitled. The following day in his law firm's lunch room the attorney discusses the article with another attorney within earshot

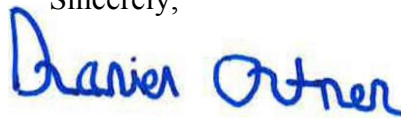


of several young associates. How does the prohibition against discrimination on the basis of age in the Proposed Rule apply to this speech?

10. A New York attorney wears a MAGA hat to a social event hosted by the New York State Bar Association and refuses to take the hat off even after another attorney informs him that she is offended because she sees the hat as a symbol of racism and sexism. How does the prohibition against discrimination on the basis of race and sex in the Proposed Rule apply to this speech?

Whatever the answers to each of these real-world-based hypotheticals, they show that the broad and unclear scope of the Proposed Rule threatens to stifle attorney speech on a wide variety of important issues of public concern. The Proposed Rule should accordingly be rejected.

Sincerely,



Daniel Ortner  
Attorney\*

*\* Licensed to practice law in the Commonwealth of Virginia and in the State of California.*



Roy Simon &lt;roy.d.simon@gmail.com&gt;

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**Comment on COSAC's proposed amendments to 8.4(g)**

1 message

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**Phillips, James** <jcphillips@chapman.edu>  
To: "roy.simon@hofstra.edu" <roy.simon@hofstra.edu>

Thu, May 27, 2021 at 12:20 PM

## EXTERNAL MESSAGE

Dear Professor Simon,

I wholeheartedly agree that harassment is unbecoming of the legal profession and has no place in our field. However, the cure should not be worse than the disease. I therefore oppose COSAC'S proposed amendments in to 8.4(g) in their current form for several reasons.

First, the proposal violates the First Amendment because it is viewpoint discriminatory. *See Matal v. Tam*, 137 S. Ct. 1744, 1753-54 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019). Second, it is overbroad and will chill attorney's speech. And third, its attempts to just regulate professional speech and not private speech do not withstand constitutional scrutiny in light of *NIFLA v. Becerra*, 138 S.Ct. 2361, 2371-72 (2018).

Sincerely,

James Phillips

Assistant Professor of Law

Fowler School of Law

Chapman University

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Roy Simon &lt;roy.d.simon@gmail.com&gt;

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**Opposition to proposed COSAC 8.4(g) rule**

1 message

**Zachary Greenberg** <zgreenb1@gmail.com>

Thu, May 27, 2021 at 3:43 PM

To: roy.simon@hofstra.edu

## EXTERNAL MESSAGE

Dear Professor Simon,

I write to register my opposition to the New York Bar Association's Committee on Standards of Attorney Conduct's Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct.

The proposed amendment would violate the First Amendment rights of New York attorneys by unduly restricting their expressive freedoms. The proposed rule suffers from the same constitutional defects as the 8.4(g) rule variant adopted by the Disciplinary Board of the Supreme Court of Pennsylvania, which was [struck down](#) by a federal district court last year in my response to [my lawsuit](#).

I urge you and the COSAC to read about [this litigation](#), especially the [court's decision](#), and refrain from enacting this limitation on attorney free speech rights. Your failure to do so may result in another successful First Amendment lawsuit against you and all those responsible for promulgating this rule, to the detriment of the New York Bar Association and all those it claims to represent.

(The views expressed in this message are my personal views and do not represent those of any organization.)

I'd be happy to discuss further. Thank you for your consideration.

Best,  
Zach

Zachary Sam Greenberg

New York Attorney Registration Number: 5534334

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**BT**

**APRL Listserv <APRL@LISTSERV.APRL.NET>**

**on behalf of**

**Barker, William T. <00000005c1dd3518-dmarc-request@LISTSERV.APRL.NET>**

Sat 4/24/2021 8:42 PM

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To:

- APRL@LISTSERV.APRL.NET

**EXTERNAL MESSAGE**

I have now had a chance to look at the New York and DC proposals in light of Bill’s comments, and I have a few thoughts to offer.

I agree that that the requirement that the discrimination or harassment be directed at another person is an improvement, though the interpretation in ABA 493 gets somewhat close to the same result.

I don’t think that the change from “related to the practice of law” to “in the practice of law” makes as big a difference as Bill does. In part, that is because I don’t see Model Rule 8.4(g) reaching the substance of CLE presentations (or law review articles for that matter), a point on which ABA 493 agrees with me. I see that subject covered by the exclusion for “legitimate advocacy” (which I do not see as limited to advocacy on behalf of a client). Moreover, as I have argued before, prohibitions in the rule must be interpreted narrowly and exclusions broadly where necessary to avoid constitutional questions.

I do not favor a limitation to prohibition of conduct already prohibited by other law. In particular, I oppose limiting the prohibition to “severe and pervasive” conduct. Given the other limitations, including both those in Model Rule 8.4(g) and those in the NY proposal, I see no reason why that limitation is necessary. The severity of the conduct should simply affect whether charges are brought and the discipline imposed.

T.

Barker

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**From:** APRL Listserv <APRL@LISTSERV.APRL.NET> **On** **Behalf** **Of** William Hodes  
**Sent:** Sunday, April 18, 2021 7:54 PM  
**To:** APRL@LISTSERV.APRL.NET  
**Subject:** Re: NY proposal for Rule 8.4(g) - This is much bigger deal than noted so far

**[WARNING: EXTERNAL SENDER]**

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Many have noted the good work that Ellen Yaroshefsky and Roy Simon and other Empire Staters have done, aided and abetted by Marcy Stovall and other Nutmeg Staters. But describing it as "clarifying" or "simplifying" or "tightening up" the Model Rule version doesn't do the project justice.

Instead, along a couple of the key axes, the New York version of Rule 8.4(g) is the Anti-Model Rule, specifically rejecting or replacing the most problematic aspects of the ABA version that have caused so much controversy (and litigation).

First, changing from "conduct related to the practice of law" to "conduct in the practice of law" is huge. The ABA language can (easily) be stretched to cover (almost) everything that a lawyer does, and therefore doesn't do much of anything to contribute to the meaning of the Rule. (The same problem attends Model Rule 1.6, BTW. As many of us have pointed out, protecting all information "relating to the representation" is so broad that it can lead to strained and even absurd results.)

By contrast, "in the practice of law" is both more focused and connects more readily with existing legal ideas. This

change will remove from regulation much that should not be regulated by the Bar at all, but worked out by courageous friends and colleagues in the real world at large--at least that is what I argue in a little piece that will be in the next (electronic) issue of *The Professional Lawyer* shortly: "See Something, Say Something; Model Rule 8.4(g) is Not OK."

I don't think the drafters in New York or Connecticut intended this, BTW, but I think the change will take CLE presentations right out of the picture. (If I give a talk about legal ethics or civil rights injunctions or workers compensation, am I engaged in "conduct in the practice of law?" If so, law professors who are not admitted in the state in which they teach, or who are not lawyers at all, should be pressing the panic button!)

(Yes; there is a Black Letter definition in the New York version that includes some Bar activities, but the fit with the rest of the text is poor, and it might cover some Bar activities, but not others.)

Second, limiting situations calling for discipline to those involving "severe or pervasive" conduct was not only *rejected* by the ABA, but was given as a chief reason why federal and state civil rights provisions were insufficient, and had to be augmented by "lawyer only" provisions. The worry that bad actors could too easily "get away with" conduct that wasn't severe or pervasive enough was explicit in the materials accompanying the House of Delegates package.

Third, explicitly adopting existing definitions of what is and is not "lawful" discrimination, rather than using existing law to merely inform new definitions inserted in the ABA Comments, is also obviously huge.

(This will not end contentious debate, but it will "remand" it to the confines of existing debates. In particular, I wonder if disparate impact analysis will or will not be imported into the special world of legal employment. If so, law firms that pay bonuses and compete for former Supreme Court law clerks are going to be in big trouble, because the number of non-white clerks has been minuscule, no matter the judicial or political philosophy of any of the justices who have served on the Court.)

Another big change is the clarification that verbal attacks must be aimed at specific individuals in order to be disciplinable. That will remove *most* of the chilling effect of the most "out there" claims of being "unsafe" and the like. And I think there is a good chance that the ABA will see the wisdom of making *that* change, at least (because it came up at the online discussion and was greeted favorably by Barbara Gillers and others.)

My prediction: within 3 years, most states rejecting or not adopting Model Rule 8.4(g) will adopt something much closer to the New York version, AND within 5 years, the ABA will go along with most of it.

Bill Hodes

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## MEMORANDUM

From: NYSBA Women in Law Section (“WILS”)  
To: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)  
Date: May 28, 2021  
Re: Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct

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### **Introduction**

The NYSBA Women in Law Section (“WILS”) submits this memorandum in response to the April 16, 2021 memorandum (the “April 16 Memo”) by the NYSBA Committee on Standards of Attorney Conduct (“COSAC”) regarding its proposed amendments to Rule 8.4(g) of the New York Rules of Professional Conduct (“New York Rule 8.4(g)”) and its request for comments. We respectfully refer COSAC to its April 16 Memo for the text of its proposed amended rule and related materials.

WILS endorses the COSAC proposal to amend New York Rule 8.4(g) to align it more closely with ABA Model Rule of Professional Conduct 8.4(g) (“ABA Rule 8.4(g)”) and specifically with the proposed amendments that would (i) include, as unethical conduct by attorneys, discriminatory and harassing conduct in the practice of law (not only discrimination in the context of the employment relationship); (ii) expand the list of protected categories; and (iii) eliminate the requirement to bring a complaint to an administrative tribunal prior to a disciplinary proceeding.

Notwithstanding this endorsement, the majority of the WILS’ Executive Committee members who reviewed and voted on the proposed amendments objects to (i) the inclusion of the “severe and pervasive” standard in the definition of harassment in paragraph 8.4(g)(3); and (ii) the use of the phrase “unlawful discrimination” rather than “discrimination” in paragraph 8.4(g)(1).

### **Background**

In or about November 2020, the NYSBA Committee on Diversity and Inclusion circulated its memorandum urging COSAC to adopt the language of ABA Rule 8.4(g) to replace New York Rule 8.4(g). The Committee on Diversity and Inclusion’s memorandum included examples of discriminatory and harassing conduct by attorneys that might be deemed unethical under the language of the ABA rule but not under the then-current New York Rule 8.4(g).

WILS' Executive Committee supported the recommendation of the Committee on Diversity and Inclusion that COSAC adopt the language of ABA Rule 8.4(g) to replace New York Rule 8.4(g).

### **Current Proposal and WILS' Response**

In its April 16 Memo, COSAC does not propose adopting ABA Rule 8.4(g) but proposes a different set of amendments to New York Rule 8.4(g).

WILS' Executive Committee circulated the April 16 Memo for comments and sought votes on two key questions: (i) should the "severe and pervasive" standard be removed from the definition of harassment in paragraph 8.4(g)(3); and (ii) should the word "unlawful" be removed from "unlawful discrimination" in paragraph 8.4(g)(1).

More than 75% of WILS Executive Committee – 23 of 26 members -- consented to addressing the COSAC report and these issues in particular pursuant to email and responded to the issues.

Of the WILS Executive Committee members who responded,

- (i) A majority voted in favor of deleting the "severe and pervasive" standard from the definition of harassment in paragraph 8.4(g)(3) and one (1) voted in favor of replacing "severe and pervasive" with a lower standard for finding harassing conduct in violation of the ethics rule; and
- (ii) a majority voted in favor of removing the word "unlawful" from the rule against discrimination in paragraph 8.4(g)(1).

The reason for removing "severe and pervasive" from the amended rule 8.4(g) is that the "severe and pervasive" standard is not the law in New York. That standard was removed from the definition of harassment in the most recent amendments to the New York State Human Rights Law ("NYS HRL"). In addition, that standard is not part of the definition of harassment under the New York City Human Rights Law.

We note that the NYS HRL does provide a new standard for harassing conduct, which is conduct that "rise[s] above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences." NYS Executive Law Section 296(1)(h). This standard could be incorporated into the amended Rule 8.4(g)(3).

The reason for removing the word "unlawful" from the rule against discrimination is that, as an ethics rule, New York Rule 8.4(g) should provide greater protection than a legal statute. Some members of the WILS Executive Committee suggested that the amended Rule 8.4(g) should include a standard, but a lower standard than "unlawful" for finding discriminatory conduct in violation of the ethics rule.

WILS' Executive Committee members also raised concerns about whether the proposed amended New York Rule 8.4(g) provides sufficient protections for attorneys who, in the course of their practice (for example, employment law or family law), may need to use materials that are harassing or discriminatory because such materials are evidence in a case. The concern is whether, by using the materials in depositions, negotiations, filings or otherwise would be considered harassment under amended Rule 8.4(g). One answer suggested by members of WILS' Executive Committee is that protection is provided by the language in ABA Rule 8.4(g) and the amended New York Rule 8.4(g)(4) as follows: "This Rule does not limit the ability of a lawyer or law firm . . . (iii) to provide advice, assistance or advocacy to clients consistent with these Rules." The WILS members who raised this concern suggest that, if subparagraph (4) does provide the protection sought, then the comments to the proposed amended rule should so state, but if subparagraph (4) does not provide the protection sought, that the rule be further amended to provide such protection.

Subject to the foregoing, WILS endorses the COSAC proposal to amend New York Rule 8.4(g).

We are submitting this memorandum today, as required by COSAC, but will advise COSAC if we receive any additional or supplemental responses from our Executive Committee.

Thank you.

Terri Mazur, Chair, Women in Law Section

Sheryl Galler, Chair-Elect, Women in Law Section

Linda Redlisky, Secretary, Women in Law Section