



The *EVOLUTION* of the New ABA Model Rule 8.4(g)



BY KIM COLBY

On August 8, 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to knowingly engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected classes.¹ After careful consideration, Christian Legal Society (CLS) opposed the adoption of the broad new rule for a number of reasons spelled out in a letter² submitted to the ABA on March 10, 2016. Additionally, CLS proposed alternative language if the ABA chose to adopt such a rule.

In adopting the rule, the ABA largely ignored lawyers' rights of speech and religious exercise. Influential First Amendment scholar, Professor Eugene Volokh of the UCLA School of Law, has described the new rule as a speech code for lawyers.³ At best, the new rule will chill lawyers' expression of disfavored political and religious viewpoints on controversial contemporary issues. At worst, it will punish dissenters from the current orthodoxy on various social issues.

In March 2016, the ABA received over 450 comment letters,⁴ most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter⁵ questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8 vote).

In July, CLS suggested its members make their views known to the members of the ABA's House of Delegates, who would vote on adoption of the proposed rule in August at the ABA's annual meeting. The *New York Times* and other media outlets noted CLS's opposition.⁶

Five days before the scheduled vote, the language of the proposed rule was again modified. While the rule as adopted was an improvement over the original language sent to the House of Delegates, the new rule failed to adequately address the First Amendment concerns that were a constant theme of the feedback previously received by the ABA.

The comments from CLS and its members almost certainly improved the final rule's language, but the language continues to pose a threat to all lawyers' freedoms of speech and religion. For that reason, CLS will continue to serve as a resource to its members as their state bars determine whether or not to adopt the new rule.⁷ According to the ABA, twenty-three states and the District of Columbia have black-letter rules dealing with "bias" issues, but most of these rules are far narrower than the new Model Rule 8.4(g).⁸ Thirteen states have adopted a comment but not a black-letter rule addressing bias issues, while fourteen states have not adopted a rule or comment addressing bias issues.

To assist lawyers in understanding the new rule, I thought it would be helpful to trace the evolution of Model Rule 8.4(g), as adopted on August 8, 2016, from its origins as Comment [3] accompanying Model Rule 8.4(d) to its final form.

Comment [3] to Model Rule 8.4(d) added in 1998

Model Rule 8.4(d) made it professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” Comment [3] to Model Rule 8.4(d) was added in 1998 and stated:

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

Language comparison:

- Rule or comment: *comment*
- Scope of attorney’s role: “*in the course of representing a client*”
- Mens Rea: “*knowingly*”
- Prohibited conduct: “*knowingly manifests by words or conduct, bias or prejudice*”
- Specific demonstrated harm: “*when such actions are prejudicial to the administration of justice*”
- Protected classes: *eight classes, including “race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status”*
- Enumerated exceptions: *1) legitimate advocacy; and 2) some peremptory challenges*

July 2015 Working Discussion Draft released by the ABA Standing Committee on Ethics and Professional Responsibility

On July 16, 2015, the ABA Standing Committee on Ethics and Professional Responsibility proposed the following language for discussion:⁹

It is professional misconduct for a lawyer to . . .

(g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity,

disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law.

Comment [3] Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge’s finding that preemptory [sic] challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies.

Language comparison:

- Rule or comment: *new rule and revised comment*
- Scope of attorney’s role: “*while engaged [in conduct related to] [in] the practice of law*”
- Mens Rea: “*knowingly*”
- Prohibited conduct: “*knowingly harass or discriminate, with the Comment including “conduct through the acts of another” and adding that the rule “incorporates by reference relevant holdings by applicable courts and administrative agencies”*
- Specific demonstrated harm: *deleted “when such actions are prejudicial to the administration of justice”*
- Protected classes: *added three protected classes “ethnicity, gender identity, marital status”*
- Enumerated exceptions: *none in the rule, but the Comment excepted 1) legitimate advocacy respecting any of the factors but noted that it added the qualifier “when they are at issue in a representation;” 2) limiting practice to clients from underserved populations as defined by any of these factors; 3) declining to represent clients who cannot pay for their services; and 4) some peremptory challenges*

December 2015 Draft Proposal to Amend Model Rule 8.4 of the Standing Committee on Ethics and Professional Responsibility

On December 22, 2015, the ABA Standing Committee on Ethics and Professional Responsibility invited comments on the following proposed language:¹⁰

It is professional misconduct for a lawyer to: . . .

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

Comment [3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.

Language comparison:

- Rule or comment: *new rule and revised comment*
- Scope of attorney's role: *"in conduct related to the practice of law" with the Comment adding that the rule "applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice" but adding that the rule "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment"*
- Mens Rea: *"knowingly" modified "discriminate" but not "harass"*
- Prohibited conduct: *"harass or knowingly discriminate"*

- Specific demonstrated harm: *deleted "when such actions are prejudicial to the administration of justice"*
- Protected classes: *added three protected classes "ethnicity, gender identity, marital status"*
- Enumerated exceptions: *none in the rule, but the Comment excepted 1) conduct unrelated to the practice of law; 2) conduct protected by the First Amendment; 3) referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation; 4) usually not required to represent any specific person or entity; and 5) the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.*

May 2016 Draft Proposal sent to ABA House of Delegates

After the comments were received by the ABA, new language was announced in April 2016. It became readily apparent that the ABA had ignored most of the comments, including concerns expressed by the ABA's own Standing Committee on Professional Discipline. The language sent to the House of Delegates read as follows:¹¹

It is professional misconduct for a lawyer to: . . .

(g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.

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

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

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

Language comparison:

- Rule or comment: *new rule, revised Comment [3], two new comments [4] and [5]*
- Scope of attorney's role: *"in conduct related to the practice of law" with Comment [4] stating that "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"*
- Mens Rea: *none*
- Prohibited conduct: *"harass or discriminate" with Comment [3] stating that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed." Comment [3] stated that "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct*

of a sexual nature." Comment [3] further explained that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application" of the rule. (Emphasis added.)

- Specific demonstrated harm: *deleted "when such actions are prejudicial to the administration of justice"*
- Protected classes: *added three protected classes "ethnicity, gender identity, marital status"*
- Enumerated exceptions: *[rule had one exception that it did not] "limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Comment [4] excepted "conduct undertaken to promote diversity." Comment [5] excepted 1) "legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation;" 2) limiting the scope or subject matter of the lawyer's practice; 3) limiting the lawyer's practice to members of underserved populations;" 4) charging and collecting reasonable fees and expenses for a representation; and 5) "representation of a client does not constitute an endorsement by the lawyer of the client's views or activities."*

Model Rule 8.4(g) and comments adopted by ABA House of Delegates on August 8, 2016

Apparently in response to growing opposition, revised language was sent to the House of Delegates five days before the scheduled vote by the House of Delegates. On August 8, the House of Delegates passed Revised Resolution 109, thereby adopting new Model Rule 8.4(g) and its three accompanying comments:¹²

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) undermines confidence in the

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

Comment [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. 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.

Comment [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).

Language comparison:

- Rule or comment: *new rule, revised Comment [3], and two new Comments [4] and [5]*
- Scope of attorney’s role: *“in conduct related to the practice of law” with Comment [4] explaining that “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” (remains the same as the May 2016 version)

- Mens Rea: *“knows or reasonably should know” (the May 2016 version had no mens rea requirement)*
- Prohibited conduct: *“conduct that . . . is harassment or discrimination” with Comment [3] explaining that “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.” Comment [3] further states that “[h]arassment 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.” Comment [3] states that “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application” of the rule. (Emphasis added.) (largely the same as the May 2016 version except that the phrase “towards others because of their membership or perceived membership in one or more of the groups listed” is deleted in the comments.)*
- Specific demonstrated harm: *deletes “when such actions are prejudicial to the administration of justice” (same as May 2016 version)*
- Protected classes: *adds three protected classes “ethnicity, gender identity, marital status” (same as May 2016 version)*
- Enumerated exceptions: *Rule provides two exceptions: 1) the ability to accept, decline, or withdraw from a representation in accordance with Rule 1.16; and 2) “legitimate advice or advocacy consistent with these rules.” (Emphasis added.) (The May 2016 draft rule had the first exception but did not include the second exception in the rule. The May 2016 version excepted in a comment “legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.” The qualifier in the adopted rule that it protects “legitimate advice or advocacy consistent with these rules” seems circular and inadequate to protect First Amendment concerns). Comment [4] excepts “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.” Comment [5] excepts 1) some peremptory challenges; 2) limiting the scope or subject matter of practice; 3) limiting practice to members of underserved populations;*

4) *charging and collecting reasonable fees and expenses for a representation; and 5) “representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities.”* (The exceptions remained essentially the same as the May 2016 version, except that the “legitimate advocacy” exception was arguably broadened and moved into the rule, and the exception for some peremptory challenges was restored after being omitted in the May 2016 version.)



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Supreme Court, as well as dozens of amicus briefs in federal and state courts. She was also involved in congressional passage of the Equal Access Act in 1984.

ENDNOTES

- 1 American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.
- 2 Letter from David Nammo, Executive Director of Christian Legal Society, to Ethics Committee, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf.
- 3 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.
- 4 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.
- 5 Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the 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%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.
- 6 Elizabeth Olson, “Bar Association Considers Striking ‘Honeys’ from the Courtroom,” *The New York Times*, Aug. 4, 2016, <http://www.nytimes.com/2016/08/05/business/dealbook/sexual-harassment-ban-is-on-the-abas-docket.html?action=click&contentCollection=DealBook&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.
- 7 For updates, regularly visit <http://clsnet.org/pages/legal-professionals/ethics-rules>.
- 8 Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.
- 9 Working Discussion Draft—Revisions to Model Rule 8.4 Language Choice Narrative, Standing Committee on Ethics and Professional Responsibility, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.
- 10 Memorandum re: Draft Proposal to Amend Model Rule 8.4, Standing Committee on Ethics and Professional Responsibility, Dec. 22, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.
- 11 Report to the House of Delegates accompanying Resolution 109, Standing Committee on Ethics and Professional Responsibility, Section on Civil Rights and Social Justice, Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, May 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf.
- 12 See note 1.