DISTRICT OF COLUMBIA BAR
RULES OF PROFESSIONAL
CONDUCT REVIEW COMMITTEE

PROPOSED AMENDMENT
TO RULE 8.4 OF THE
D.C. RULES OF PROFESSIONAL CONDUCT

As approved by the Board of Governors for
submission to the District of Columbia Court of
Appeals in April 2021

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of the District of Columbia Bar
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This report reflects the work of the Rules Review Committee beginning in October 2016. The following individuals served as members of the Committee at some point during the consideration of issues and/or recommendations presented in this report in whole or in part.

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Executive Summary

The D.C. Bar has a responsibility to lead the profession in promoting equal justice under law. This should include working to eliminate discrimination, harassment, and bias—not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. Lawyers who demonstrate bias and engage in discrimination in connection with the practice of law undermine and damage the profession, both by limiting opportunities for certain individuals to participate in the practice of law and by damaging the public's perception of the profession.

The D.C. Rules of Professional Conduct currently contain two rules that address harassment and/or discrimination: D.C. Rule 9.1, which prohibits discriminatory conduct that violates employment law; and D.C. Rule 8.4(d), which prohibits conduct that "seriously interferes with the administration of justice." Comment [3] to Rule 8.4 clarifies that paragraph (d) prohibits "offensive, abusive or harassing conduct that seriously interferes with the administration of justice," and may include words or actions that "manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."

In 2016, the American Bar Association ("ABA") took an affirmative step to address discrimination, harassment, and bias in the legal profession by adding new paragraph (g) to ABA Model Rule of Professional Conduct 8.4 to prohibit conduct by a lawyer related to the practice of law that involves harassment or discrimination against members of specified groups. Prior to adoption of Model Rule 8.4(g), the Model Rules contained only Comment [3] to Model Rule 8.4, which was similar to Comment [3] to D.C. Rule 8.4.

In 2016, the D.C. Bar Rules of Professional Conduct Review Committee began studying whether the District should amend the D.C. Rules to adopt a provision similar to Model Rule 8.4(g). For reasons detailed in this report, the Rules of Professional Conduct Review Committee recommends adopting new proposed Rule 8.4(h) to expand the scope of the existing anti-harassment and anti-discrimination provision found in D.C. Rule 8.4(d), similar to Model Rule 8.4(g), but with some modifications.

The Committee reached this final proposal after publishing for public comment in 2019 a proposal to essentially adopt ABA Model Rule 8.4(g) as a revised D.C. Rule 9.1. The Committee received 52 comments in response which were largely critical of the 2019 proposed rule, principally, although not exclusively, on First Amendment grounds. Upon careful consideration of the issues identified in the comments, the Committee revised its proposal.

The new proposal leaves Rule 9.1, a rule that has existed in the District for 30 years without issue, unchanged. As with ABA Model Rule 8.4(g), proposed Rule 8.4(h) moves the D.C. Rules' current prohibition on harassing and discriminatory conduct from a comment to Rule 8.4 to a "black-letter rule" that, like Model Rule 8.4(g), sets a standard for how members of the D.C. Bar should interact with others with respect to the practice of law.

Currently, D.C. Rule 8.4(d) addresses discrimination and harassment only in the context of the administration of justice, which narrows the reach of the rule to a lawyer's conduct while representing a client before a tribunal. Proposed Rule 8.4(h) includes harassing and discriminatory behavior by a lawyer directed at another person with respect to the practice of law, which would include such abusive conduct that occurs outside of a courtroom and/or the representation of a client.

Proposed Rule 8.4(h) would prohibit conduct that a lawyer knows or reasonably should know constitutes harassment or discrimination based on protected categories directed at another person. The proposed rule would not limit a lawyer's ability to accept, decline, or withdraw from a matter, or to provide legitimate advice or engage in legitimate advocacy; and the proposed rule leaves unchanged the existing D.C. Rule (Rule 3.4(g)) regarding peremptory challenges to jurors.

Proposed Rule 8.4(h) is not intended to chill speech on controversial topics, but rather to prohibit harassing and discriminatory conduct *directed at another person or persons* by a lawyer with respect to the practice of law. Equal justice before the law and respectful treatment of all persons are core principles that lie at the heart of our legal system. Lawyers, as officers of the court and advocates for fair and equal justice, have a special responsibility to ensure that harassment and discrimination have no place in the legal profession.

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FROM: Rules of Professional Conduct Review Committee

SUBJECT: Proposed Amendment to Rule 8.4 of D.C. Rules of Professional Conduct

DATE: March 9, 2021

> *"Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment."*[1]

I. Introduction

Despite federal and state anti-discrimination laws, which have been in existence for decades, discrimination, harassment, and bias persist in our profession. In 2016, the American Bar Association ("ABA") took an affirmative step to address these problems in the legal profession by adding new paragraph (g) to ABA Model Rule of Professional Conduct 8.4 to prohibit conduct by a lawyer related to the practice of law that involves harassment or discrimination against members of specified groups. According to the ABA Standing Committee On Ethics and Professional Responsibility's Report and Resolution On Model Rule 8.4(g) ("ABA Report"), the goal of the ABA was bring into the black letter of the Rules an anti-discrimination and anti-harassment provision.[2] The ABA's decision to do so was consistent with other actions taken

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[1] Remarks of ABA President Paulette Brown, public hearing on amendments to ABA Model Rule 8.4, San Diego, California (February 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf.

[2] ABA Report (Aug. 2016) at 4-5, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.pdf

by the ABA to eliminate bias in the legal profession and the justice system.[3] By adding this black letter rule, the ABA is "making an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment" and it also "clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice."[4]

For the reasons discussed below, the Rules of Professional Conduct Review Committee of the D.C. Bar ("Rules Review Committee" or "Committee") proposes that the Bar's Board of Governors ("Board") recommend to the D.C. Court of Appeals that it adopt an amended version of ABA Model Rule 8.4(g) and its accompanying Comments by amending the text of D.C. Rule 8.4 and the Comments to this rule by adopting new paragraph (h), replacing the text of current comment [3] with new language, and adding new comments [4] through [7] as set forth below.[5]

Proposed Rule 8.4(h) states:

> It is professional misconduct for a lawyer to:
>
> (h) engage in conduct directed at another person, with respect to the practice of law, that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status. This Rule does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules.

Proposed Comments to Proposed Rule 8.4(h) follow:

> [3] Paragraph (h) reflects the premise that the concept of human equality and respect for all individuals lies at the very heart of our legal system. A lawyer whose conduct demonstrates hostility or indifference toward the principle of equal justice under the law may thereby manifest a lack of

[3] *Id*.

[4] *Id*. at 4.

[5] As discussed below in Section III, the Committee, after considering Model Rule 8.4(g), initially proposed to amend existing D.C. Rule 9.1 by inserting language from Model Rule 8.4(g). After receiving numerous public comments in response to the Committee's proposal, the Committee decided to change its proposal as set forth in this report.

character required of members of the legal profession. Discrimination and harassment by lawyers in violation of the Rule undermine confidence in the legal profession and the legal system.

[4] Discrimination includes conduct that manifests an intention to treat a person as inferior, to deny a person an opportunity, or to take adverse action against a person, because of one or more of the characteristics enumerated in the Rule. Harassment includes derogatory or demeaning verbal or physical conduct based on the characteristics enumerated in the Rule. In addition, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. Anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (h).

[5] Conduct with respect 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 events and work-related social functions.

[6] A lawyer's use of peremptory challenges is exclusively addressed by Rule 3.4(g). A lawyer does not violate Rule 8.4(h) 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).

[7] Rule 9.1 addresses discriminatory and harassing behavior in the context of employment that would violate applicable law. Misconduct that occurs in the context of employment could potentially violate both Rule 9.1 and Rule 8.4(h).

In this Report, the Committee sets forth its justification for the adoption of Rule 8.4(h). In Section II, the Committee reviews a number of factors pertaining to the state of the legal

profession that underlie both the ABA's decision to adopt Model Rule 8.4(g) and the Committee's decision to recommend adoption of Proposed Rule 8.4(h). Section II also reviews the ABA's stated goals in adopting Model Rule 8.4(g); analyzes the text of Model Rule 8.4(g); and discusses how other jurisdictions have responded to Model Rule 8.4(g).

In Section III, the Committee describes its initial attempt to address the issues set out in Section II by amending current Rule 9.1 rather than by adopting proposed Rule 8.4(h). It further discusses the public comments it received in response to its initial proposal and describes and explains the Committee's decision to modify the previously circulated proposal in light of those comments.

II. Background

Equal justice before the law and respectful treatment of all persons are core principles that lie at the heart of our legal system. Lawyers, as officers of the court and advocates for fair and equal justice, have a special responsibility to ensure that harassment and discrimination have no place in the legal profession. When a lawyer discriminates against or engages in harassment of persons that the lawyer encounters while engaged in conduct related to the practice of law, the lawyer undermines the public's confidence in the legal profession and the legal system generally. The ABA House of Delegates adopted Model Rule 8.4(g) with the goal of decreasing discrimination and harassment in the legal profession. Model Rule 8.4(g) expanded the scope of existing rules that focused on discrimination and harassment in the context of the administration of justice to include all encounters "related to the practice of law."

As with other changes to the Model Rules, the District of Columbia Bar's Rules of Professional Conduct Review Committee considered whether the D.C. Bar should adopt the ABA's changes or modify the District's existing rules on discrimination to more closely conform to the Model Rule. For the reasons discussed below, the Committee proposes that the Board of Governors recommend that the D.C. Court of Appeals adopt a modified version of Model Rule 8.4(g) and its comments as new D.C. Rule 8.4(h) and accompanying comments.[6]

[6] Note that the D.C. Rules of Professional Conduct already have a Rule 8.4(g), which states that it is professional misconduct "to seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter."

A. Bias and its Negative Impact in the Workplace

Racial and gender inequities still exist in the legal profession. Researchers are starting to look at potential factors (apart from intentional or overt discrimination) to explain these inequities. Many now believe that bias in the workplace is one such factor.

Bias takes many forms, but the result is always the same – members of a certain demographic group within the workforce are wrongly excluded from experiences and opportunities for which they are qualified. The biases people harbor, whether consciously or in their subconscious,[7] cause them to have attitudes about other people based on characteristics such as race, ethnicity, age, gender, and appearance (height, weight, hair color, etc.) and to bring these irrelevant factors into the decision-making process. There, such biases play a role in personal assessments of candidates and employees and influence the decision to hire, fire, and promote in the workplace.

That these influences may be unintentional does not change the fact that they are unfair. The negative effects of bias in the workplace, in the legal profession, or elsewhere, can be destructive. They can affect every aspect of the employment lifecycle from hiring to firing. Below are examples of bias affecting the workplace:

- Resumes with ethnic sounding names pushed down in the selection for interviews;[8]

- Women more frequently interrupted in business meetings than men;[9]

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[7] The most common type of bias in the workplace is implicit bias. It operates at a level below more obvious, conscious prejudice, and affects our decisions in a much more subtle way. Implicit means that we are either unaware of the existence or mistaken about the source of a thought or feeling. *See, e.g.,* R. Zajonc, *Feeling and thinking: Preferences need no inferences*, 35 AMER. PSYCHOLOGIST 151 (1980), http://web.mit.edu/curhan/www/docs/Articles/15341_Readings/Affect/Zajonc_1980_Feeling_and_thinking.pdf. Implicit biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness and are thus not accessible through introspection. *See Understanding Implicit Bias,* The Kirwan Institute for the Study of Race and Ethnicity, The Ohio State University, http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (last visited Jan. 7, 2021).

[8] Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,* 94 THE AMERICAN ECONOMIC REVIEW 991, 993 (2004), https://cos.gatech.edu/facultyres/Diversity_Studies/Bertrand_LakishaJamal.pdf.

[9] How often are women interrupted by men? Here's what the research says. https://www.advisory.com/daily-briefing/2017/07/07/men-interrupting-women (last visited Jan. 7, 2021).

- Women law firm partners earning 30 percent less than male law firm partners;[10]

- Memorandum of law written by black associate evaluated more critically than identical memorandum written by white associate; [11]

- Women lawyers held to tougher standard than male lawyers when it comes to anger;[12]

- Women and minority judicial candidates systematically receive lower qualification ratings from the ABA than do white males with identical qualifications;[13]

- Female Supreme Court Justices interrupted more often than male Justices;[14]

- Women's performance reviews are more likely to include critical feedback and negative personality criticism than those of men.[15]

It can hardly be questioned that these findings contribute to the creation of a workplace that feels inhospitable to women and minorities and contributes to the following documented consequences for the profession:

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[10] 2018 Partner Compensation Survey published by legal recruiter Major Lindsey & Africa, https://info.mlaglobal.com/2018-partner-compensation-survey (last visited Jan. 7, 2021).

[11] Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf (last checked Jan. 7, 2021).

[12] Elizabeth Olson, Women Lawyers Held to Tougher Standard When It Comes to Anger, https://news.bloomberglaw.com/business-and-practice/women-lawyers-held-to-tougher-standard-when-it-comes-to-anger (last checked Jan. 7, 2021)

[13] Susan Hagen-Rochester, Is American Bar Association Biased Against Women and Minorities, https://www.futurity.org/aba-biased-women-minority-judicial-nominees/ (last visited Jan. 13, 2021).

[14] Tonja Jacobi and Dylan Schweers, Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates, Harvard Business Review (April 11, 2017), https://hbr.org/2017/04/female-supreme-court-justices-are-interrupted-more-by-male-justices-and-advocates (last visited Jan. 12, 2021).

[15] Kieran Snyder, The abrasiveness trap: High-achieving men and women are described differently in reviews (August 26, 2014),https://web.stanford.edu/dept/radiology/cgi-bin/raddiversity/wp-content/uploads/2017/12/TheAbrasivenessTrap.pdf (last visited Jan. 13, 2021).

- Lawyers of color constituted more than 20 percent of lawyers who left their law firms in 2018 even though they represented only 7 percent of the lawyers in the law firms surveyed.[16]

- More than 31 percent of all first- and second-years who left their firms in 2018 were members of racial or ethnic minority groups.[17]

- Minority lawyers also represented 30 percent of all departures among midlevel associates (third- through fifth-years) and 23 percent of senior associates (those in their sixth, seventh or eighth year) in 2018.[18]

- Although women represented only 36 percent of the lawyers in the law firms surveyed, more than 49 percent of all first- and second-years who left their firms in 2018 were women.[19]

- Women also represented 46 percent of all departures among midlevel associates (third- through fifth-years) and 46 percent of senior associates (those in their sixth, seventh or eighth year) in 2018.[20]

- Women represented approximately 41 percent of all attorneys who left their firms in 2018 and 47 percent of departing associates.[21]

- At three of the leading arbitral entities, fewer than 30 percent of the available arbitrators are women.[22]

- 76 percent of lead counsel in civil cases are men.[23]

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[16]Vault/MCCA Law Firm Diversity Survey 2019 Report, https://www.mcca.com/wp-content/uploads/2020/03/2019-Vault_MCCA-Law-Firm-Diversity-Survey-Report.pdf.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Paige Smith, Lack of Arbitrator Diversity Is an Issue of Supply and Demand (May 15, 2019), https://news.bloomberglaw.com/business-and-practice/lack-of-arbitrator-diversity-is-an-issue-of-supply-and-demand (last visited Jan. 13, 2021).

[23] 2017 NYSBA Study: If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR, https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Com%20Fed%20Women%20Initiatives%20Report%20Amended.pdf.

- 87 percent of lead counsel in class actions are men.[24]

- 90 percent of attorneys serving on firm executive or management committees are white.[25]

The Committee acknowledges that no disciplinary rule or process can correct the structural, institutional, and unconscious biases described above. However, it is important to understand these kinds of biases in order to understand why the legal profession looks like it does. Additionally, the fact that bias exists and impacts the ability of many lawyers to succeed in the profession is all the more reason for the Bar to take steps that are within its power to promote diversity within the profession, such as adopting an anti-harassment and anti-discrimination rule.

B. Lack of Diversity in the Legal Profession

Diversity in the legal profession is a compelling interest to the Bar because its members are the public's ambassadors to the courts both as advocates and members of the judiciary.[26] Despite efforts to address the underrepresentation of women and minorities, recent studies confirm that widespread gender and racial bias permeates the hiring and promotion of women and minorities in the legal profession. As recently as 2019, the U.S. Department of Labor's Bureau of Labor Statistics reported that 86.6 percent of lawyers are white, surpassing all other professional fields.[27]

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[24] *Id.*

[25] Vault/MCCA Law Firm Diversity Survey 2019 Report. https://www.mcca.com/wp-content/uploads/2020/03/2019-Vault_MCCA-Law-Firm-Diversity-Survey-Report.pdf.

[26] *See, generally, Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 438 (Tenn. 2007), *quoting* Edward M. Chen, *The Judiciary, Diversity, and Justice for All,* 91 CAL. L. REV. 1109, 1117 (2003) (footnote omitted) ("The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?"); Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004) ("The lack of racial and ethnic diversity at the capstone of the legal profession, the judiciary, is one of the most compelling and contentious issues surrounding judicial selection in the United States."). *See also* Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241 (2015); Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271 (2014); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

[27] *See* U.S. Department of Labor's Bureau of Labor Statistics (percentage of white lawyers greater than that of white professionals in other fields, including architects, accountants, and physicians),

Statistics reveal the lack of racial diversity in the legal profession. Although 22 percent of students at ABA-accredited law schools are Black or Latino, [28] according to the 2019 Vault/Minority Corporate Counsel Association (MCCA) Law Firm Diversity Survey, Blacks and Latino make up only 7 percent of attorneys in the 238 firms surveyed. [29] Specifically, only 5 percent of associates and 2 percent of partners are Black, and only 5 percent of associates and 3 percent of partners are Latino. Native Americans/Pacific Islanders only represent 0.25 percent of the lawyers at surveyed law firms.

Although half of all law school graduates since the mid-1980s have been women, they still represent only 22 percent of law firm partners. Studies show that men are five times more likely to make partner than women, even controlling for other factors, including law school grades and time spent out of the workforce or on part-time schedules. In addition, a recent study found that 35 percent of female lawyers have been sexually harassed at work but 77 percent of female harassment victims never reported the incident.[30]

Not surprisingly, the lack of gender and racial diversity pervades the federal and state judiciary. On the federal bench, as of October 2019, 73 percent of all sitting judges are men and 80 percent of judges are white.[31] Only 33 percent of active U.S. district court judges and 35 percent of federal courts of appeals judges are women. A similar problem exists in state courts. According to the Gavel Gap, minorities represent only 20 percent of all state court judges.[32] Also, according to the National Association of Women Judges, in state high courts only 36 percent of judges are women, in state intermediate appellate courts

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https://www.bls.gov/cps/cpsaat11.htm., https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/. The *Washington Post* article reports that the legal profession is one of the least racially diverse professions in the nation.

[28] Law School Enrollment by Race & Ethnicity (2018), https://www.enjuris.com/students/law-school-race-2018.html.

[29] Vault/MCCA Law Firm Diversity Survey 2019 Report. https://www.mcca.com/wp-content/uploads/2020/03/2019-Vault_MCCA-Law-Firm-Diversity-Survey-Report.pdf.

[30] Sam Skolnik, *More Than Third of Female Lawyers Harassed at Work, Survey Shows*, BNA (Nov. 29, 2018), https://news.bloomberglaw.com/business-and-practice/more-than-third-of-female-lawyers-harassed-at-work-survey-shows (last visited Jan. 13, 2021).

[31] Sam Hananel, *New CAP Report Shows Stunning Lack of Diversity in Federal Judiciary* (October 3, 2019), https://www.americanprogress.org/press/release/2019/10/03/475346/release-new-cap-report-shows-stunning-lack-diversity-federal-judiciary/.

[32] The Gavel Gap, https://gavelgap.org/ (last visited Jan. 13, 2021).

only 39 percent, and in state trial courts only 33 percent.[33] Keep in mind that women represent on average 50 percent of all law school graduates since the mid-1980s and yet their representation in the state and federal judiciary remains well below that level.

C. ABA Efforts to Combat Discrimination, Harassment and Bias

When adopted in 1983, the ABA Model Rules did not directly address either discrimination or harassment. Beginning in 1998, however, the ABA turned its attention to these issues, first adopting Comment [3] to Model Rule 8.4(d). Model Rule 8.4(d) states that it is "professional misconduct to. . .(d) engage in conduct that is prejudicial to the administration of justice."

The newly-added Comment [3] stated:

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

But this initial step was limited in scope: Comment [3] prohibited lawyers from "knowingly manifest[ing] by words or conduct bias or prejudice" only when "representing a client." Moreover, Comment [3] limited the reach of Model Rule 8.4 to circumstances "when such actions are prejudicial to the administration of justice." In short, Comment [3] failed to cover a wide range of employment and workplace conduct as well as discrimination and harassment in interacting with the public and in professional situations in which lawyers interact with each other, such as bar activities and work travel.

In 2014, the ABA's Standing Committee on Ethics and Professional Responsibility (SCEPR) began considering whether to adopt a new model rule to address harassment, discrimination, and bias that occur in the other circumstances that do not involve client representation or pose a threat to "the administration of justice," as that term is commonly understood. There was also an interest in making sure that the Model Rules directly addressed discrimination and harassment rather than relegating the prohibition on such conduct to a comment. At a February 2016 hearing on amending Model Rule 8.4, ABA

[33] *National Database on Judicial Diversity in State Courts (2019),* https://www.nawj.org/statistics/2019-us-state-court-women-judges.

President Paulette Brown emphatically made the point that, "comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[34] President Brown argued that amending the Model Rules to expressly prohibit discrimination and harassment would serve two important purposes: (1) telling the public that the legal profession will not tolerate prejudice, bias, and discrimination; and (2) "clearly put[ting] lawyers on notice that refraining from such conduct is . . . is a specific requirement" of professional responsibility, the violation of which could expose a lawyer to sanctions.[35]

The ABA adopted Model Rule 8.4(g) in 2016. It states:[36]

> 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, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The ABA also adopted three new comments that explain the scope of the new rule. They state:

> [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).

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[34] American Bar Association Public Hearing (Feb. 7, 2016), *supra* note 1.

[35] ABA Report, *supra* note 2, at 4-5.

[36] The complete text of Model Rule 8.4 and comments is found at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/.

> [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).

D. ABA Formal Opinion 493

In July 2020, the ABA released Formal Opinion 493, *Model Rule 8.4(g): Purpose, Scope, and Application*, providing further guidance on and interpretation of the rule. Opinion 493 makes several critical points concerning the application of Model Rule 8.4(g):

> Rule 8.4(g) covers conduct related to the practice of law that occurs outside the representation of a client or beyond the confines of a courtroom. In addition, it is not restricted to conduct that is severe or pervasive, a standard utilized in the employment context. However, and as this opinion explains, conduct that violates paragraph (g) will often be intentional and typically targeted at a particular individual or group of individuals, such as directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature.[37]

[37] ABA Formal Op. 493 at 1.

Furthermore, the determination "[w]hether conduct violates the Rule must be assessed using a standard of objective reasonableness . . . ."[38] Significantly, the opinion notes that "the Model Code of Judicial Conduct has long contained a provision prohibiting judges from engaging in this sort of discriminatory and harassing conduct and requiring that judges ensure that lawyers appearing before them adhered to the same restrictions."[39]

In addition, the opinion points out that "Rule 8.4(g) prohibits conduct that is not covered by other law, such as federal proscriptions on discrimination and harassment in the workplace. Although conduct that violates Title VII of the Civil Rights Act of 1964 would necessarily violate [Model Rule 8.4](g), the reverse may not be true."[40] New Comment [4] "identifies the scope of 'conduct related to the practice of law,' listing such activities as: '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.'"[41]

Comment [3] defines the terms "harassment" and "discrimination" as those terms are used in Model Rule 8.4(g). The opinion notes that "[h]arassment is a term of common meaning and usage under the Model Rules. It refers to conduct that is aggressively invasive, pressuring or intimidating."[42] The opinion further notes that "[p]reventing sexual harassment is a particular objective of Rule 8.4(g). As Comment [3] makes clear, sexual harassment encompasses 'unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.'"[43] With respect to the term "discrimination," Comment [3] states that it "includes harmful verbal or physical conduct that manifests bias or prejudice toward others."[44]

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[38] *Id.*

[39] *Id.* at 3 n.8. This footnote goes on to point out that the 2017 the revision to the ABA *Standards for Criminal Justice: Prosecutorial Function and Defense Function* stated that both a prosecutor and a defense attorney "should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."

[40] *Id.* at 4 (internal footnotes omitted).

[41] *Id.* at 6 (internal footnotes omitted).

[42] *Id.* at 7 (internal footnotes omitted).

[43] *Id.* (Internal footnotes omitted). The opinion points out that "this type of behavior falls squarely within the broader, plain meaning of harassment and is consistent with the term's application throughout the Model Rules." *Id*. the opinion goes on to cite other places in the Model Rules that prohibit harassment, as well as a court decision.

[44] *Id.* at 8. The opinion further points out that "bias or prejudice can be exhibited in a number of ways, some overlapping with conduct that also constitutes harassment." *Id.*

Finally, the ABA opinion discusses the exclusion from Rule 8.4(g)'s scope for "legitimate advice or advocacy consistent with these Rules" and Comment [5]'s discussion of other "specific circumstances that do not violate (g)."[45] The opinion notes that "a judge's determination that a lawyer has utilized peremptory challenges in a discriminatory manner, alone, will not subject the lawyer to discipline."[46] Similarly, "limiting one's practice to providing representation to underserved populations, consistent with the rules of professional conduct and other law, will not constitute a violation."[47]

E. Response to Model Rule 8.4(g) by Other Jurisdictions

To date, Vermont has adopted the Model Rule verbatim effective September 2017.[48] Other jurisdictions, including Colorado, Missouri, Maine, New Hampshire, New Mexico, and Pennsylvania have recently amended their Rules of Professional Conduct to closely align with Model Rule 8.4(g), with modifications. For instance, New Mexico's rule does not include "socioeconomic status" as a defined group.[49] Similarly, Maine's rule does not include "marital or socioeconomic status," does not define law practice to include "bar association, business or social activities," and alters the definition of discrimination and harassment.[50] Missouri, Colorado and New Hampshire limited the reach of their rules to conduct in connection with representation of a client or when acting as a lawyer. Pennsylvania defined the terms "harassment or discrimination" in accordance with applicable federal, state or local statutes or ordinances.[51] Separately, California adopted a rule prohibiting a lawyer from unlawful harassment or discrimination in connection with the representation of a client or the operation of a law firm.[52]

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[45] *Id*. at 6. This report will discuss the opinion's discussion of First Amendment issues in discussing public comments to the Committee's proposed rule.

[46] *Id.*

[47] *Id.*

[48] American Samoa, the Northern Mariana Islands, and the US Virgin Islands followed their standing policy to adopt Model Rule 8.4(g) in its entirety. *See* Amer. Samoa HCR R. 104; NMI R. Att'y Disc. & P. R. 3(1); V.I. Sup. Ct. R. 303(a).

[49] *See* NM. R. Prof. Conduct 8.4(g).

[50] *See* ME. R. Prof. Conduct 8.4(g). The Committee's proposed Rule 8.4(h) adopts Maine's definitions of "discrimination" and "harassment," as discussed below.

[51] *See* PA. R. Prof. Conduct 8.4(g). A challenge to Pennsylvania's rule that was filed in 2020 is currently being litigated. *Greenberg v. Haggerty*, CIVIL ACTION No. 20-3822 (E.D. Pa. Dec. 7, 2020).

[52] CA R. Prof. Conduct 8.4.1.

Several states, including Arizona, Idaho, Louisiana, Montana, Nevada, North Dakota, South Carolina, Tennessee, and Texas have debated and rejected proposals to incorporate changes based on Model Rule 8.4(g).[53] These states have generally cited First Amendment concerns and the chilling of lawyers' speech as their reasons for rejecting Model Rule 8.4(g). The Committee addresses these First Amendment concerns in Section III B. below (Public Comments).

The Committee has identified only five states: Alaska, Georgia, Hawaii, Kentucky, and Virginia — that have no obvious provisions in their ethics rules that could be read to address harassment or discrimination within the legal profession. Another seven states – Alabama, Kansas, Louisiana, Montana, Nevada, Oklahoma, and South Dakota – have adopted Model Rule 8.4(d) only, without any additional language or comments. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." While most states that have Model Rule 8.4(d) also have comments specifically noting that conduct involving harassment or discrimination may violate the rule, this commentary is arguably not necessary to effect the anti-harassment and anti-discrimination aspects of the rule.

Every other U.S. jurisdiction (38 in all, including the District of Columbia) includes in its rules, comments, or both, some explicit reference to harassing or discriminatory behavior. Some of these states have rules that are as expansive (or arguably even more expansive) than Model Rule 8.4(g).[54] Some have only Model Rule 8.4(d) with accompanying comments noting that harassing and discriminatory behavior that interferes with the administration of justice violates the rule. However, the Committee is not aware of evidence of improper enforcement actions against lawyers or evidence that lawyers feel "chilled" in the practice of law under the existing rubric of rules.

F. Existing D.C. Anti-Discrimination and Anti-Harassment Rules

1. D.C. Rule 9.1

The D.C. Bar adopted Rule 9.1 in 1991. This Rule, which was modeled on the D.C. Human Rights Act and proposed by a D.C. Court of Appeals judge, provides that "[a] lawyer shall not discriminate against any individual in conditions of employment because of the

[53] *See, States split on new ABA Model Rule limiting harassing or discriminatory conduct*, ABAJ., https://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct.

[54] For example, Illinois and Indiana already had in place antiharassment and antidiscrimination provisions before Model Rule 8.4(g) was adopted by the ABA in 2016. IL R 8.4(j); IN R. 8.4(g).

individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap." Rule 9.1 has no counterpart in the Model Rules or in the rules of any other jurisdiction.

But Rule 9.1 prohibits discrimination only with respect to conditions of employment. And as stated in Comment [1], "[t]he Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law." Comments [2] and [3] further confirm the connection between Rule 9.1 and the D.C. Human Rights Act:[55]

> [2] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.
>
> [3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. *See* §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

Rule 9.1 was well-received when it was proposed, and one commenter to the proposed revisions described the rule as "the gold standard." Nonetheless, its identified limitations result in its being unable to address much of the conduct prohibited by Model Rule 8.4(g) and the proposed Rule 8.4(h).

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[55] *See* D.C. Legal Ethics Opinion 222, in which the Legal Ethics Committee, in its only opinion interpreting the scope of Rule 9.1, determined that:

> [a] member of the District of Columbia Bar who works in Virginia for a legal defense organization does not violate Rule 9.1 even though the lawyer engages in acts of employment discrimination in Virginia and Maryland that would violate that Rule and the D.C. Human Rights Act if done within the District of Columbia, because these acts are not unlawful in the states where committed.

2. D.C. Rule 8.4(d)

D.C Rule 8.4(d) is identical to Model Rule 8.4(d), both of which state:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (d) engage in conduct that seriously interferes with the administration of justice.

Although not identical in wording, Comment [3] to D.C. Rule 8.4 is effectively identical in its purpose to that of Comment [3] to the version of Model Rule 8.4 that existed before the ABA adopted Model Rule 8.4(g). The District of Columbia version of Comment [3] states:

> [a] lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion national origin, disability, age, sexual orientation, or socioeconomic status.[56]

Because the current version of Comment [3] maintains the requirement that the conduct "seriously interferes with the administration of justice," the D.C. Rules of Professional Conduct remain subject to the criticisms that led the ABA to adopt Model Rule 8.4(g): that "Comments are not Rules; they have no authority as such"; and that the D.C. version of Rule 8.4 "fails to cover bias and prejudice in other [*i.e.,* unrelated to the administration of justice] professional capacities . . . ." [57]

The existing Rule 8.4 and Comment [3] are attached as Appendix A.

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[56] The Model Rule version required that the conduct be "prejudicial to" rather than "seriously interfere with" the administration of justice. In addition, the Model Rule's prohibition applied only in circumstances where the lawyer was "representing a client."

[57] ABA Report, *supra* note 1, at 2.

3. D.C. Courts Code of Judicial Conduct Rule 2.3

The current absence in the D.C. Rules of a proscription on discrimination and harassment in the legal profession stands in stark contrast to Rule 2.3 of the Code of Judicial Conduct for the District of Columbia Courts which provides as follows:

> Rule 2.3. Bias, Prejudice, and Harassment.
>
> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
>
> (D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.[58]

The Comments to this Rule provide that a judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Comment [2] provides examples of manifestations of bias or prejudice, including "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." Even more importantly, Comment [5] indicates that a "judge's obligation

[58] *See* Rule 2.3 of the Code of Judicial Conduct for the District of Columbia Courts. Rule 2.3 of the Model Code of Judicial Conduct contains identical provisions, except that paragraph (C) references "gender" instead of "gender identity or expression."

not to engage in bias, prejudice, or harassment in the performance of judicial duties applies to conduct toward court personnel" and a "judge should not engage in, or tolerate, any such conduct." Specifically, the Comment establishes that "concerning a judge's supervisory duties, a judge should hold court personnel supervised by the judge to similar standards." It is noteworthy that while Rule 2.3(C) mandates that judges require lawyers in proceedings before the court to refrain from engaging in discriminatory and harassing behavior, such conduct is not currently proscribed by the Rules of Professional Conduct.

III. Proposal

A. Committee Action

The Committee initially proposed adopting a slightly modified version of the Model Rule in place of Rule 9.1, as well as modifying Comment [3] to Rule 8.4 to create a cross-reference to the new Rule 9.1. The Committee's previous report, which was published on February 4, 2019, as part of the request for comments, is attached as Appendix B.

In response, the Committee received 52 separate comments, which are described below. Following its consideration of the comments, the Committee has made three key changes to its proposal. First, the Committee recommends leaving existing Rule 9.1 untouched and adopting the modified proposed rule as Rule 8.4(h). This approach offers several advantages. It keeps in place Rule 9.1, a time-tested and well-known rule. In addition, the new proposed Rule would be adopted as a subsection of Rule 8.4, more closely mirroring the Model Rule.

Second, the Committee's proposed Rule 8.4(h) modifies Model Rule 8.4(g) by adding the words "directed at another person" to address the concern expressed in a number of comments that the proposed modifications to Rule 9.1 set out in its earlier report infringe on First Amendment-protected expressive speech. Although the Committee believes that this concern is misplaced, inserting "directed at another person" in proposed Rule 8.4(h) provides additional protection against lawyers being sanctioned for exercising First-Amendment-protected rights. Rather, the proposed Rule targets harassing and discriminatory conduct "directed at a person."[59] Third, the Committee offers further

[59] First Amendment issues are addressed in the Committee's discussion of public comments received, *infra.* As for the Committee's decision to insert the words "directed at another person," the Committee notes that, even though Model Rule 8.4(g) does not contain this language, ABA Formal Opinion 493 concludes its discussion regarding the scope of Model Rule 8.4(g) by pointing out that "as this opinion explains, conduct that violates paragraph (g) will often be intentional and typically targeted at a particular individual or group of individuals, such as a directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature." Formal Opinion 493 at 14. Furthermore, the text of Formal Opinion 493 points out that "a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial,

guidance on the meaning of the terms "harass" and "discriminate" in Comment [4] to the proposed rule.

As with the ABA's adoption of Model Rule 8.4(g), adoption of proposed Rule 8.4(h) moves the D.C. Rules' current prohibition on harassing and discriminatory conduct from a comment to a "black-letter rule" that, like Model Rule 8.4(g), sets a standard for how members of the D.C. Bar should interact with others with respect to the practice of law. While the Committee initially proposed to incorporate the substance of Model Rule 8.4(g) into Rule 9.1, creating a single rule that would encompass the prohibitions found in each, the Committee ultimately decided that accomplishing the substantive goal of expanding the reach of Rule 8.4(d), Comment [3] by proposing a new Rule 8.4(h), while leaving existing Rule 9.1 as it is, would be as effective with the benefit of being easier to understand.

There is inevitably some overlap between Rule 9.1 and proposed Rule 8.4(h). Most instances of misconduct under Rule 9.1 would violate Rule 8.4(h) as well (the reverse is not true due to the narrow circumstances in which Rule 9.1 applies).

With these changes, the Committee has taken meaningful steps to address the concerns of those who claimed the original proposal was unconstitutionally vague and overbroad. The proposed rule is a reasonable step forward for the Bar.

B. Public Comments

In February 2019, the Committee published its initial proposal, a revision of Rule 9.1, for public comment. In response, the Committee received 52 separate comments, some with multiple signers, which were almost universally critical of the proposed rule. One national organization submitted comments in opposition and also circulated a form letter to its membership, which resulted in 27 other comments along nearly identical lines. Additional organizations also submitted comments, as did a number of law professors, one of whom sent a letter joined by 35 of his colleagues. After careful consideration of the comments, the Committee made substantial changes to its proposal to clarify the scope and intent of the rule.

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ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law." In addition, the overwhelming number of examples used in Formal Opinion 493 in both its text and the several hypotheticals that appear at the end of the opinion to explain its scope focus on situations in which the prohibited statement was directed at an individual or group of individuals. *See id*. at 13-14 hypotheticals 4 and 5; and, *e.g.*, *In re McCarthy,* 938 N.E.2d 698 (Ind. 2010); *In re Dempsey*, 986 N.E.2d 816 (Ind. 2013). The Committee concluded that proposed Rule 8.4(h) should expressly include this limitation for purposes of clarity.

The public comments submitted fall generally into the following five categories:

- Freedom of Speech
- Freedom of Religion and Association
- Lack of *Mens Rea* to Establish a Violation
- Lack of Justification for the Rule
- Practical Impediments to Adopting and Enforcing the Rule.

1. Freedom of Speech

A number of commenters asserted that the proposed Rule infringes on First Amendment rights to free speech. At the outset, the Committee notes that freedom of speech is not absolute. It does not include the right to shout "Fire" in a crowded theater,[60] utter so-called fighting words,[61] publish obscene materials,[62] or publish information about troop movements during wartime.[63] So, too, for speech that constitutes harassment, which long has been forbidden in the context of employment by federal law,[64] District of Columbia law,[65] and Rule 9.1 of the D.C. Rules. Harassment is a well-defined term in the employment law context.[66]

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[60] *Schenck v. United States*, 249 U.S. 47, 52 (1919).

[61] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-74 (1942).

[62] *Roth v. United States,* 354 U.S. 476, 481 (1957).

[63] *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring, *quoting Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

[64] 42 U.S.C. §§ 2000e—2000e-17 (2018); *Faragher v. City of Boca Raton*, 524 US 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

[65] *See* D.C. Ann. Code. § 2-1401.01 *et seq.*

[66] The U.S. Equal Employment Opportunity Commission describes "harassment" as follows:

> Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. * * * Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Further, the speech of lawyers acting in a professional capacity has long been subject to additional restrictions that are viewed as necessary to the integrity of the justice system. For example, with certain narrow exceptions, a lawyer may not reveal client confidences or secrets,[67] nor may she make a false statement of fact or law to a tribunal,[68] communicate *ex parte* with a judge or juror during a proceeding,[69] make potentially prejudicial extrajudicial statements about a case,[70] make false statements of material fact or law to third persons,[71] communicate directly with represented persons[72] or solicit business in or near the D.C. Courthouse.[73] Lawyer misconduct in the form of spoken words at depositions or in court also is a recognized basis for discipline.[74] The Model Rules, and those of other jurisdictions, including the D.C. Rules, limit the exercise of some First Amendment rights for the privilege of practicing law. For example, Rule 7.1 restricts the First Amendment commercial speech of lawyers in ways that non-lawyers are not limited.[75] Also, Rule 5.4(b) limits a lawyer's right of association and Rule 3.6 limits the ability of a lawyer to speak publicly about a matter.[76] In summary, "[A] layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into

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U.S. Equal Employment Opportunity Commission, "Harassment" (downloaded from https://www.eeoc.gov/laws/types/harassment.cfm) (last visited Jan. 14, 2021).

[67] D.C. R. Prof. Conduct 1.6. This restriction also applies to confidences and secrets of prospective clients. D.C. R. Prof. Conduct 1.18(b).

[68] D.C. R. Prof. Conduct 3.3(a).

[69] D.C. R. Prof. Conduct 3.5(b).

[70] D.C. R. Prof. Conduct 3.6 (lawyers generally); *id.* 3.8(f) (prosecutors).

[71] D.C. R. Prof. Conduct 4.1.

[72] D.C. R. Prof. Conduct 4.2.

[73] D.C. R. Prof. Conduct 7.1(e).

[74] *E.g., Florida Bar v. Norkin*, 132 So.3d 77 (Fla. 2014) (written and oral disparagement and humiliation of opposing counsel); *In re Golden*, 496 S.E.2d 619 (S.C. 1998) (insulting comments to adverse party during deposition).

[75] Dennis Rendleman, *The Crusade against Model Rule 8.4(g)*, OCTOBER 2018 | ETHICS IN VIEW, https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/ (describing the limitations under the Model Rules, which are equally applicable to their D.C counterparts).

[76] *Id.*

some infraction of our statutory law. . . A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics."[77]

With this background, the Committee offers several specific responses to commenters' concerns that the proposed rule is an unconstitutional limitation on speech.[78]

a. Chilling Effect

A number of commenters object to a rule that would bar discrimination and harassment in connection with the practice of law on the ground that the rule would have a chilling effect on the ability to participate in debates in the context of continuing legal education classes and elsewhere on controversial issues of public importance, such as same-sex marriage, gender identify and bathroom selection, or restrictions on immigration from Muslim countries. These commenters are concerned that expression of opinions that others might find offensive raises the risk of disciplinary charges for violating the proposed rule.

The Committee has considered these objections and concludes that they fail to take account of (1) limitations in the proposed rule that protect against application of the rule in the manner envisioned by the commenters; and (2) the experience of other jurisdictions with respect to rules similar to proposed Rule 8.4(h).[79]

First, the Committee notes that hypothetical (2) in Formal Opinion 493 considers application of Model Rule 8.4(g) in the context of the circumstances hypothesized by the commenters: a lawyer speaking against "a race-conscious process in admitting African-American students to highly-ranked colleges and universities, . . . at a CLE program."[80] The SCEPR, which authored Opinion 493, answered that the lawyer would not be subject to discipline under Model Rule 8.4(g) because even though the CLE program would be "conduct related to the practice of law," the statement "would not constitute 'conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . race.'"[81] SCEPR further noted that:

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[77] *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633, 638 (S.C. 2011), *quoting In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. 1957)).

[78] The Standing Committee on Ethics and Professional Responsibility Resolution and Report on Model Rule 8.4 filed with the ABA House of Delegates, May 2016.

[79] The Committee acknowledges that the commenters did not have the benefit of ABA Formal Opinion 493 and certain modifications this Committee has made to the initial proposal after it was circulated for public comment.

[80] ABA Formal Opinion 493 at 13-14.

[81] *Id.*

> *[a] general point of view, even a controversial one, cannot reasonably be understood as harassment or discrimination contemplated by Rule 8.4(g). The fact that others may find a lawyer's expression of social or political views to be inaccurate, offensive, or upsetting is not the type of 'harm' required for a violation*.[82]

The Committee notes that in addition to the SCEPR's analysis in Opinion 493, the hypothetical conduct would not violate proposed Rule 8.4(h) because the statements expressed were not "directed at another person."

Furthermore, the objection concerning "chilling effect" fails to take into account the experience of jurisdictions in applying provisions similar to those in proposed Rule 8.4(h). The ABA Report issued in connection with Model Rule 8.4(g) points out that "[t]wenty-two states and the District of Columbia . . . have adopted anti-discrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct."[83] The ABA Report notes that "[t]he supreme courts of the jurisdictions that have black letter rules with anti-discrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. When appropriate, they are disciplining lawyers for discriminatory and harassing conduct."[84] Furthermore, neither the rules nor the associated comments have been struck down on First Amendment grounds.

Finally, the Committee observes that these commenters seem to have overlooked the fact the Supreme Court has consistently upheld ethical rules enacted to regulate the legal profession's speech and conduct in the face of First Amendment objections.[85] For example,

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[82] *Id.* (emphasis added). In another explanatory hypothetical in Opinion 493, the SCEPR points out that the same result would pertain to "[a] lawyer [who] is a member of a religious organization, which advocates, on religious grounds, for the ability of private employers to terminate or refuse to employ individuals based on their sexual orientation." Id.

[83] ABA Report, *supra* note 1, at 5 n.11 and accompanying text.

[84] *Id.* at 6 (footnote omitted). Footnote 15 to the ABA report collects cases in which state courts have imposed sanctions on attorneys for conduct that would violate the proposed Rule 8.4(h) or existing Rule 9.1. With respect to the 13 jurisdictions identified in the ABA Report that "have decided to address [discrimination and harassment] in a Comment similar to the current Comment [3] in the Model Rules" -- which prohibits lawyers when representing clients from "knowingly manifest[ing] by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status . . ." -- there has been a similar absence of a surge of cases. *Id.*

[85] State court decisions that have routinely upheld rules of professional conduct restricting lawyers' speech against First Amendment challenges of "vagueness" and "overbreadth" are discussed in the next section of this report.

in *Florida Bar v. Went For It, Inc.*, the Supreme Court stated that on various occasions it has "accepted the proposition that States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."[86] The Court held that a state may generally regulate practices that have "demonstrable detrimental effects . . . on the profession it regulates."[87] The Court further noted that "the Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered."[88]

Likewise, in *Gentile v. State Bar of Nevada*, the Supreme Court noted that First Amendment rights of lawyers are not protected to the same extent as persons engaged in other businesses and that they must be balanced against the state's interest in regulating a specialized profession.[89] In that case, the Supreme Court "engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue."[90]

Similarly, in *Ohralik v. Ohio State Bar Association*, the Supreme Court stated that:

> [T]he State bears a special responsibility for maintaining standards among members of the licensed professions. The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' While lawyers act in part as 'self-employed businessmen,' they also act as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.[91]

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[86] 515 U.S. 618, 625 (1995) (internal quotation marks omitted).

[87] *Id.* at 631.

[88] *Id.* at 635. *Accord, e.g., Ky. Bar. Ass'n v. Blum,* 404 S.W. 3d 841, 855 (2013) (regulation of lawyers' speech "is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of the license granted by the court.")

[89] 501 U.S. 1030 (1991)

[90] *Id.* at 1073.

[91] 436 U.S. 447, 460 (1978) (internal citations and quotation marks omitted).

Because of the requirement that the speech in question is "directed at another person," Proposed Rule 8.4(h) is properly viewed not as prohibiting speech but abusive behaviors that threaten the credibility of lawyers and are inconsistent with the profession's values. In effect, the proposal would take a standard of conduct long required in office settings and extend it to other professional settings in which lawyers are engaged in activities connected to the practice of law. The First Amendment does not displace Title VII and state law prohibitions against employment discrimination.[92] For example, in *Robinson v. Jacksonville Shipyards*, the court concluded that offensive "pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment" and noted that even "if the speech at issue is treated as fully protected, and the Court must balance the governmental interest in cleansing the workplace of impediments to the equality of women, the latter is a compelling interest that permits the regulation of the former and the regulation is narrowly drawn to serve this interest."[93] Simply stated, sexual harassment laws regulating workplaces do not violate the First Amendment.[94]

b. Vagueness and Overbreadth

(1) "Harassment" and "Discrimination"

Many of the comments in opposition to the proposal contend that it is unconstitutionally vague and overbroad due to the lack of clarity around the terms "harassment" and "discrimination," noting in particular that the definition in the comments contained words such as "derogatory" and "demeaning," which are themselves subject to interpretation and provide no ascertainable standard of conduct. Similar comments were made with respect to other words and phrases in the proposed definition, such as "harmful" and "manifests bias or prejudice." A review of relevant case law generally supports that courts will find a term to be unconstitutionally vague if it fails to provide "an ascertainable standard of conduct."[95] The courts also have noted that it is important that rules—particularly those that may subject an individual to discipline—"give fair notice of conduct that is forbidden or required."[96] In sum, the courts have indicated that to avoid vagueness problems, a rule should clearly define any potentially vague terms.

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[92] *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 854 (Cal. 1999).

[93] 760 F. Supp. 1486, 1535-1536 (M.D. Fla. 1991).

[94] *See generally* J.M. Balkin, *Free Speech and Hostile Environments*, 99 Colum. L. Rev. 2295 (1999).

[95] *See, e.g., Smith v. Goguen*, 415 U.S. 566, 577-78 (1974).

[96] *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012).

The Committee does not agree that the originally proposed rule was vague. Similar challenges to other ethical rules have generally failed. The courts have, in fact, upheld professional conduct terms significantly less well-defined than what was proposed for "harassment" and "discrimination." For example, in *Grievance Administrator v. Fieger*, the court rejected a vagueness challenge to ethical rules requiring lawyers to "treat with courtesy and respect all person involved in the legal process" and prohibiting "undignified or discourteous conduct toward [a] tribunal."[97] In *Fieger*, the court noted, "while [certain professional conduct rules] are undoubtedly flexible, and the [disciplinary authority] will exercise some discretion in determining whether to charge an attorney with violating them, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[98] Similarly, in *Howell v. State Bar of Texas*, the Court rejected an overbreadth challenge to the rule prohibiting conduct prejudicial to the administration of justice.[99] In *Chief Disciplinary Counsel v. Zelotes*, the Court again rejected a vagueness challenge to "conduct prejudicial to the administration of justice" and concluded that "although the plain text of rule 8.4(4) may lack detail and precision, . . . its meaning is clear from the rules, the official comments to the rules, and case law interpreting rule 8.4(4) or rules that substantively are identical."[100] In *In re Anonymous Member of South Carolina Bar*, the Court rejected a vagueness and overbreadth challenge to the following civility requirement: "To opposing parties and their counsel, I pledge fairness, integrity, and civility . . . ."[101] Finally, in *Canatella v. Stovitz*, the Court rejected vagueness, overbreadth, and under-inclusiveness challenges to the following ethical terms: "willful," "moral turpitude," "dishonesty," and "corruption," among other terms.[102]

The Committee also notes that a number of D.C. Rules, including some focused on communication, already forbid lawyers from engaging in harassing behavior:

- Rule 3.2 (Expediting Litigation): (a) In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to **harass** or maliciously injure another. . . .

[97] 719 N.W.2d 123 (Mich. 2006).

[98] *Id.* at 139.

[99] 843 F.2d 205 (5th Cir. 1988).

[100] 98 A.3d 852 (Conn. 2014), aff'd, 102 A.3d 1116 (Conn. 2014).

[101] 709 S.E.2d 633, 637 (S.Car. 2011).

[102] 365 F.Supp 1064, 1073, 1076 (N.D. Cal. 2005), *aff'd,* 213 Fed.Appx. 515 (9th Cir. 2006).

- Rule 3.5 (Impartiality and Decorum of the Tribunal): A lawyer shall not (c) communicate, either ex parte or with opposing counsel, with a juror or prospective juror after discharge of the jury if:

  (1) The communication is prohibited by law or court order;

  (2) The juror or prospective juror has made known to the lawyer a desire not to communicate; or

  (3) The communication involves misrepresentation, coercion, duress, or **harassment**; or . . . .

- Rule 7.1 (Communications Regarding a Lawyer's Service): (b) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

  (1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

  (2) The solicitation involves the use of coercion, duress or **harassment**; or . . . .

None of these rules define the terms "harass" or "harassment." These rules also use the terms "coercion," "duress," and "maliciously injure," all similarly undefined. Rule 7.1 is particularly noteworthy because it explicitly limits a lawyer's ability to communicate with prospective clients about the possibility of a representation and as such could inhibit a lawyer's ability to make a living. And yet, the Committee is not aware of any successful challenges to this rule (nor Rule 3.2 or Rule 3.5), nor is the Committee aware of any problematic prosecutions under these rules.

In Formal Opinion 493 the ABA's SCEPR further analyzed the terms "harassment" and "discrimination" as they appear in Model Rule 8.4(g). Harassing behavior is described as conduct that is "aggressively invasive, pressuring, or intimidating."[103] With respect to discrimination, the SCEPR noted that conduct that constitutes discrimination may overlap with conduct that is harassing in nature and provided, as an example of discrimination, the "[u]se of a racist or sexist epithet with the intent to disparage an individual or group of individuals."

[103] ABA Formal Op. 493, at 7 (2020).

While the Committee disagrees with the criticism that the terms "harassment" and "discrimination" are vague, it did take steps to narrow the proposed rule by limiting it to behavior "directed at another person." In addition, after careful consideration the Committee further refined the definitions of both "harassment" and "discrimination" to provide clearer guidance to lawyers as to the meaning of each term.

(2) "With Respect to the Practice of Law"

Some commenters object to the proposed rule on grounds it applies to any conduct of an attorney that is in any way related to the practice of law, which they believe is vague and not readily determinable. They claim that it is difficult to ascertain what conduct is related to the practice of law and what conduct is not. The Committee disagrees.

First, the Committee notes that this issue was addressed in the ABA's report accompanying the issuance of proposed Model Rule 8.4(g). The Committee finds what was said there both persuasive and equally applicable to the proposal for D.C. Rule 8.4(h):

> Some commenters expressed concern that the phrase, "conduct related to the practice of law," is vague. "The definition of the practice of law is established by law and varies from one jurisdiction to another." The phrase "conduct related to" is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges. The proposed scope of Rule 8.4(g) is similar to the scope of existing anti-discrimination provisions in many states.
>
> Proposed new Comment [4] explains that conduct related to the practice of law includes, "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities *in connection with the practice of law*." The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.
>
> ***
>
> As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their

> association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. "Conduct related to the practice of law" includes these activities.[104] (Emphasis added.)

The Committee also agrees with the ABA's rationale for the scope of Model Rule 8.4(g):

> [I]nsofar as proposed Rule 8.4(g) applies to "conduct related to the practice of law," it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice. Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction's highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in all conduct related to the practice of law.[105]

Proposed Rule 8.4(h) establishes standards for lawyers' behavior towards others in a variety of professional situations in order to uphold the integrity of and respect for the legal profession. More specifically, the proposed rule provides protection for members of groups who are mistreated and marginalized based on a multitude of characteristics, and creates a more welcoming and inclusive environment in the legal profession. Discrimination and harassment in connection with the practice of law is unacceptable behavior for lawyers and the proposed rule prohibits such conduct regardless of whether it occurs while representing a client, participating in a bar association event, or during travel for that person's firm or employer or otherwise in connection with the practice of law.

c. Committee Proposed Changes in Response to Comments

In response to objections that the proposed rule was unconstitutionally vague and addressed speech protected by the First Amendment, the Committee proposes the following revision:

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[104] ABA Report, *supra* note 2, at 8-11 (footnotes omitted). Proposed Comment [5] is the provision that corresponds with Comment [4] to the Model Rule.

[105] *Id.* at 10.

> It is professional misconduct for a lawyer, with respect to the practice of law, to engage in conduct *directed at another person* that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status. (Emphasis added).

This change makes clear that the target of this rule is abusive behavior by a lawyer directed at another person in connection with the lawyer's practice of law, as opposed to statements about the lawyer's political positions or beliefs, or general statements made when debating such issues or presenting at a CLE course. The Committee believes that this language, which both clarifies and narrows the rule, should address most of the constitutional concerns raised by commenters on the original proposal.

2. Freedom of Religion and Association

Concerns that the proposed Rule 9.1 could adversely affect protected freedom of religion and association also were expressed by a number of commenters. They argue that the proposed Rule unnecessarily impinges on one's freedom of religion and association. But the proposed Rule does not include any language that relates to a specific faith (or absence of faith), nor does the Rule or its associated comments include any suggestion that the proposed Rule is intended to impede anyone's practice of religion. It does not, for example, prohibit attending religious services or engaging in religious practices, even when those practices include speech that addresses gender issues or legal arguments that may touch on potentially discriminatory or harassing positions in other contexts.

Moreover, membership in (or association with) affinity bar organizations or groups, such as the Christian Legal Society or the American Association of Jewish Lawyers, who advocate for or oppose certain political or religious positions does not fall within the definitions of "harassment" and "discrimination." Advocating for a political or religious position, even an "unfavored" position, is within the rights of individuals in the United States and is distinct from an attorney personally engaging in discriminatory conduct toward an individual within the attorney's practice of law. Lawyers have long been called upon to represent "unpopular" causes, organizations, and individuals; this notion is central to our system of justice and embedded in the Rules of Professional Conduct.[106] The

[106] Rule 1.2(b): A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.
Rule 1.2 cmt [3]: Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

proposed Rule makes this clear by stating that it "does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these rules."

Commenters opposed to the proposed rule also argue that they would not be able to express their views supported by their religious beliefs and shared by their bar association, such as disagreeing with same-sex marriage, or the ability to work with the colleagues or clients they wish, and therefore their religious liberty would be infringed.[107] However, the proposed Rule permits lawyers to accept or decline matters in their discretion; indeed, the rule excludes from its coverage the entire area of accepting and terminating representation. The proposed rule expressly states that it "does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation" and that it "does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules."

Also, conduct that is discriminatory is not absolutely accorded constitutional protections under the First Amendment. In *Hishon v. King & Spalding,* the Supreme Court held that First Amendment association did not protect discriminatory conduct in a case where lawyers were held civilly liable for refusing partnership to women.[108] In writing for a unanimous Court, Chief Justice Warren Burger decided that *Hishon* had a contract that was subject to Title VII provisions, and that there was no language that could exclude decisions about partnerships from its purview. He further observed that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[109] In other words, an individual's constitutional right of expression and association does not preclude application of Title VII-type protections. Subsequent Supreme Court decisions clarified this position by holding that only anti-discrimination laws that "substantially interfere" with an organization's "ability to achieve its expressive goals" are unconstitutional.[110] That is not the case here. Prohibiting invidious harassment and discrimination in the practice of law does not interfere with the D.C Bar or the rights of its members to achieve their expressive goals.

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[107] S*ee Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018).

[108] *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

[109] *Id.* at 78 (*quoting Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

[110] *See Roberts v. United States Jaycees,* 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club,* 481 U.S. 537 (1987); *New York State Club Assn. v. New York City,* 487 U.S. 1 (1988).

3. Lack of *Mens Rea* to Establish a Violation

Some commenters argued that the "knows or reasonably should know" language of the proposed Rule is unfair because it makes a lawyer liable for conduct that the lawyer "knows or reasonably should know" is "harassment or discrimination." Their concern is that a District of Columbia. attorney could violate the rule without actually realizing he or she had done so. However, this standard – "knows or reasonably should know" – is widely used throughout the D.C. Rules. In fact, the terms "knows" and "reasonably should know" are defined at Rule 1.0 (f), (j), and (k), which state:

> (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
>
> (j) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
>
> (k) "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.

The terms "knows" and "reasonably should know" are used in six different D.C Rules:

- Rule 2.3(b): When the lawyer *knows or reasonably should know* that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

- Rule 3.4(a): A lawyer shall not: (a) obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer *reasonably should know* that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to rule 1.6; (note also the use of the adjective "good-faith.")

- Rule 3.6: A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer *knows or reasonably should know* will be disseminated by means of mass public communication and

will create a serious and imminent threat of material prejudice to the proceeding.

- Rule 3.8(e): the prosecutor in a criminal case shall not: (e) intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor *knows or reasonably should know* tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

- Rule 4.3(b): When the lawyer *knows or reasonably should know* that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

- Rule 5.1(c)(2): A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if the lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, and *knows or reasonably should know* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Also, these terms (or their equivalent) are used in six comments to the D.C. Rules:

- Rule 1.0 Comment [6]: In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm *knows or reasonably should know* that there is a need for screening.

- Rule 3.4 Comment [3]: Paragraph (a) permits, but does not require, the lawyer to accept physical evidence (including the instruments or proceeds of crime) from the client or any other person. Such receipt is, as stated in paragraph (a), subject to other provisions of law and the limitations imposed by paragraph (a) with respect to obstruction of access, alteration, destruction, or concealment, and subject also to the requirements of paragraph (a) with respect to return of property to its rightful owner, and to the obligation to comply with subpoenas and discovery requests. The term "evidence" includes any document or physical object that the lawyer *reasonably should know* may be the subject of discovery or subpoena in any

pending or imminent litigation. See D.C. Bar Legal Ethics Committee Opinion No. 119 (test is whether destruction of document is directed at concrete litigation that is either pending or almost certain to be filed).

- Rule 4.4 Comment [3]: On the other hand, where writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent, the receiving lawyer commits no ethical violation by retaining and using those materials. See D.C. Legal Ethics Committee Opinion 256. Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not address the legal duties of a lawyer who receives a writing that the lawyer *knows or reasonably should know* may have been wrongfully obtained by the sending person. See D.C. Bar Legal Ethics Committee Opinion 318.

- Rule 5.1 Comment [4]: . . . . Subparagraph (c)(2) extends that responsibility to any lawyer who is a partner or person in comparable managerial authority in the firm in which the misconduct takes place, or who has direct supervisory authority over the lawyer who engages in misconduct, when the lawyer *knows or should reasonably know* of the conduct and could intervene to ameliorate its consequences.

- Rule 5.1 Comment [5]: The existence of actual knowledge is also a question of fact; whether a lawyer *should reasonably have known* of misconduct by another lawyer in the same firm is an objective standard based on evaluation of all the facts, including the size and organizational structure of the firm, the lawyer's position and responsibilities within the firm, the type and frequency of contacts between the various lawyers involved, the nature of the misconduct at issue, and the nature of the supervision or other direct responsibility (if any) actually exercised. The mere fact of partnership or a position as a principal in a firm is not sufficient, without more, to satisfy this standard. Similarly, the fact that a lawyer holds a position on the management committee of a firm, or heads a department of the firm, or has comparable management authority in some other form of organization or a government agency is not sufficient, standing alone, to satisfy this standard.

- Rule 5.4 Comment [5]: Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests

> in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers *know or reasonably should know*. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

The Committee also notes that Opinion 344 reads a "reasonably should know" standard into Rule 1.7(b)(1), and perhaps the rest of Rule 1.7(b) as well:

> The second part of [Rule 1.7(c)(1)] – *i.e.*, that the lawyer must disclose the existence and nature of the conflict and adverse consequences – assumes that the lawyer knows, or reasonably should know, that a specific client will, in fact, take a position adverse to another specific client before any obligation to disclose is triggered. We therefore read Rule 1.7(b)(1) to prohibit only those representations in which the lawyer can identify (i) the nature of the conflict and (ii) the specific client or clients who might be affected.

In conclusion, the phrase "reasonably should know" is used throughout the D.C. Rules and its scope and applicability has never been questioned. The Committee believes that the standard is appropriate in this instance; failure to include the "reasonably should know" language would in effect create a get-out-of-jail-free card for any lawyer pleading ignorance that certain words or actions are discriminatory or harassing.

4. Lack of Justification for the Rule

Many commenters argue the Bar has not justified the need for Rule 8.4(h). Others argue that current federal and state anti-harassment and anti-discrimination laws are sufficient and such issues should be left up to courts and expert administrative agencies, rather than the disciplinary process. The ABA faced this same objection in its consideration of Model Rule 8.4(g),[111] and the Committee finds the SCEPR's response particularly persuasive:

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[111] *See* ABA Report, *supra* note 2, at 11 ("Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.")

Although objections to the Committee's previous report did not suggest that a complainant of discrimination or harassment should be required to prevail in a civil proceeding before pursuing a disciplinary remedy, the difference is immaterial; the point is, as the ABA observes, civil proceedings and disciplinary proceeding proceed on separate tracks, and the Court of Appeals' regulation of the legal profession is independent of the government's general authority to regulate conduct.

> SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rule. . . . Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that 'the legal profession is largely self-governing.' As such, 'a lawyer's failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,' not the civil legal system. The two systems run on separate tracks.[112]

In addition, the Committee would point out that it is too late in the day to suggest that the D.C. Rules should not address discrimination and harassment in our profession: Rule 9.1 already prohibits discrimination in the employment context, and Rule 8.4(d) bars harassment when such conduct seriously interferes with the administration of justice. In the Committee's view, the reasons laid out in the SCEPR report supporting the adoption of the Model Rule 8.4(g), together with the additional evidence discussed in Section II of this report, demonstrate irrefutably the reasons for expanding the existing prohibitions. As Dennis Rendleman, former ethics counsel at the ABA's Center for Professional Responsibility, observed during debate over Model Rule 8.4(g), "[t]ime after time, the ABA was told of illegal and inappropriate harassment taking place at firm outings, dinners and bar association events."[113] Just as consideration of these circumstances led the ABA to include "conduct related to the practice of law" in Model Rule 8.4(g), they equally support the Committee's decision to recommend that existing prohibitions be similarly expanded in proposed Rule 8.4(h).

5. Practical Impediments to Adopting and Enforcing the Rule

In addition to the constitutional issues described above, a small number of commenters raised what might better be described as "practical" concerns with the proposed rule. For example, one commenter noted that this rule creates an extreme burden for the falsely accused, in part due to the slow adjudicative process for disciplinary cases in the District

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[112] *Id*. (footnotes omitted). The ABA further points out that "legal remedies are available for conduct such as fraud, deceit or misrepresentation, which also are prohibited by paragraph(c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and one a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted of a crime." (Footnotes omitted)

[113] Rendleman expanded on this point in his article, *The Crusade against Model Rule 8.4(g)*, *supra* note 75, recounting that the drafters of Model Rule 8.4(g) heard from lawyers who represent women lawyers in harassment and discrimination complaints against their employers.

of Columbia and also because malpractice insurance does not cover discrimination claims. Similarly, the Office of Disciplinary Counsel (ODC)[114] in the District has expressed concern that the rule will encourage frivolous complaints which will burden the ODC and that such cases are particularly challenging because there is so rarely concrete evidence.

The Committee acknowledges the unfortunate burden that a false accusation under any law or regulation can create for the accused, but the Committee does not regard that possibility as a justification for failing to adopt a rule addressed at harassment and discrimination. Moreover, the rule does not limit in any way due process and anybody accused of such conduct will be afforded their constitutional rights and will not be subject to the arbitrary exercise of government power. Finally, with regard to actual disciplinary cases in D.C. based on current Rules 9.1 and 8.4, there is no empirical evidence to show that this is an issue for actual concern.

One commenter suggested that the Committee's recommendation usurps the D.C. Council's role as the appropriate entity to define appropriate conduct within the District. However, members of the D.C. Bar have been granted the privilege and the responsibility of self-regulation. This proposed rule is consistent with that responsibility.

One commenter objected to the rule because it could disrupt the settlement of civil claims of harassment or discrimination. Again, that concern does not outweigh the need to enact a rule that protects individuals from harassing and discriminatory conduct. Moreover, the decision to promulgate a rule of professional conduct should not be determined by the litigation strategy of parties to civil litigation in extraneous matters.

Another commenter suggested that the breadth of the proposed rule is unclear, wondering, for example, if conduct occurs in a jurisdiction in which such conduct is legal, a lawyer could nonetheless be disciplined by the ODC. Although it is difficult to address hypothetical violations of such a fact-specific rule, the Committee notes that the choice of law provision of D.C. Rule 8.5 provides guidance for lawyers as to which rules the ODC would apply to the lawyer's conduct.

6. Response to the Board on Professional Responsibility Comments

The Board on Professional Responsibility (BPR) has also provided several comments.[115]

[114] Appendix E contains comments submitted by BPR, including ODC's perspective on the proposal.
[115] *Id.*

First, the BPR suggests using the ABA's formulation, "bar association, business or social activities in connection with the practice of law," in Model Rule Comment [2] to describe (in part) the situations in which the Model Rule applies. The Committee has elected to clarify the comment by using the language "participating in bar association events and work-related social functions."

Second, the BPR suggests offering a more thorough explanation for how external law defines the concepts of harassment and discrimination. The Committee believes that the newly proposed language of comment [4] clarifies any confusion over the meaning of the terms "harassment" and "discrimination."

Third, the BPR suggests comments be added making clear that the rule (1) does not limit a lawyer's duty of zealous advocacy and (2) does not infringe on an attorney's First Amendment right to free speech. However, the Committee does not believe such comments are necessary because the rule is not intended, and will not in practice, infringe on an attorney's First Amendment right to free speech or limit a lawyer's duty of zealous advocacy. Moreover, a lawyer's duty of zealous advocacy does not supersede Title VII and the D.C. Human Rights Act nor does it preclude the application of its protections in the workplace.[116]

Finally, the BPR also suggested clarifying that a lawyer's use of peremptory challenges is addressed exclusively by Rule 3.4(g). The Committee agreed with this suggestion and has added the suggested language to comment [6].

IV. Final Recommendation

A redlined and a clean version of the new proposed rule may be found in Appendices C and D, respectively.

In summary, the proposal expands the scope of existing anti-harassment and anti-discrimination provisions in D.C. Rule 8.4, which currently focus only on discrimination and harassment in the context of the administration of justice. Proposed Rule 8.4(h) specifically targets abusive behavior by a lawyer directed at another person in connection with the lawyer's practice of law, as opposed to statements that might be made when debating political or other issues.

[116] *Cf., In re Williams*, 414 N.W.2d 394 (Minn, 1987) (lawyer unsuccessfully argued that he should not be disciplined for making anti-Semitic remarks to opposing counsel in a deposition because he had a right to represent his clients vigorously, aggressively, and zealously).

The proposed Rule and corresponding Comments are broad enough to prohibit invidious harassment and discrimination but narrow enough to avoid exposing a lawyer to discipline unless the lawyer knows or reasonably should know that the conduct constitutes harassment or discrimination directed to one or more persons in a protected category.

These recommended changes would:

- expand the existing prohibitions beyond the employment sector, so that discrimination and harassment would be forbidden in any activity "with respect to the practice of law." As noted below, there are exceptions for choice of clients and legitimate advocacy.

- cover situations beyond those addressed by federal and state discrimination laws, though only where the conduct in question relates to the practice of law.

Importantly, the amendment would—

- protect a lawyer's right to accept, decline, or withdraw from a matter;

- protect a lawyer's right to provide legitimate advice or engage in legitimate advocacy;

- leave unchanged the existing D.C. Rule (Rule 3.4(g)) regarding peremptory challenges to jurors.

The Bar has a responsibility to lead the profession in promoting equal justice under law. This should include working to eliminate discrimination, harassment and bias—not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. Lawyers who demonstrate bias and engage in discrimination or harassment in connection with the practice of law undermine and damage the profession, both by limiting opportunities for certain individuals to participate in the practice of law and by damaging the public's perception of the profession. By adopting the proposed Rule, the District will make a significant and long overdue statement on harassment and discrimination in the legal profession.

Appendix A

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

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

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

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

(d) Engage in conduct that seriously interferes with the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official;

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

(g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Comment

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

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under

paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

[3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

Rule 9.1: Discrimination in Employment

A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

Comment

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

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

[3] If proceedings are pending before other organizations, such as the D.C. Office of

Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. *See* §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

Appendix B

Appendix B contains relevant excerpts of the February 2019 Report of the Rules of Professional Conduct Review Committee focused on proposed revisions to Rule 8.4 and Rule 9.1. Sections of the Report related to Rule 3.8 and the ABA Ethics 20/20 amendments are not included.

DISTRICT OF COLUMBIA BAR
RULES OF PROFESSIONAL
CONDUCT REVIEW COMMITTEE

PROPOSED AMENDMENTS
TO SELECTED RULES
OF THE
D.C. RULES OF PROFESSIONAL CONDUCT

The views expressed herein are those of the Committee
and not those of the D.C. Bar or its Board of Governors.

FEBRUARY 2019 (REPORT FOR PUBLIC COMMENT)

Members*
of the District of Columbia Bar
Rules of Professional Conduct Review Committee

Marina S. Barannik, Chair

Thomas B. Mason, Vice Chair

Kathleen Clark

Rachel Cotton

Yaida O. Ford

German A. Gomez

Laura E. Hankins

Eric L. Hirschhorn

Stacy M. Ludwig

Victoria S. Nugent

Steven C. Tabackman

Charles "Rick" Talisman

Steuart Thomsen

*Ellen Efros served as a member of the Committee at some point during the consideration of issues and/or recommendations presented in this report.

PROPOSED REVISIONS TO D.C. RULE 9.1 AND RULE 8.4, COMMENT [3] (NONDISCRIMINATION AND ANTIHARASSMENT)

The Committee recommends amendments to D.C. Rule 9.1 based on ABA Model Rule 8.4(g), with some minor differences. The Committee also recommends an amendment to Comment [3] to D.C. Rule 8.4 that would cross reference D.C. Rule 9.1.

A. Background

In August 2016, the ABA House of Delegates adopted Model Rule 8.4(g) to prohibit discrimination and harassment in conduct related to the practice of law. Twenty-five jurisdictions, including the District, already had legal ethics rules dealing with discrimination and/or harassment in some form at the time of the Model Rule's adoption. D.C. Rule 9.1, which became effective in 1991, prohibits discrimination by lawyers in conditions of employment based on a list of enumerated classes. Additionally, D.C. Rule 8.4, Comment [3] also contains a variation of the former Comment [3] to Model Rule 8.4 and prohibits certain conduct that manifests bias or prejudice.

Following the ABA's adoption of Model Rule 8.4(g), the Rules Review Committee appointed a subcommittee which met over a period of several months to study the Model Rule and develop recommendations. The Committee ultimately approved a recommendation to amend D.C. Rule 9.1 based on Model Rule 8.4(g), with some minor differences; and Comment [3] to Rule 8.4 to include a cross reference to Rule 9.1.

B. Comparison of Existing D.C. Rule 9.1 and Model Rule 8.4(g)

Existing D.C. Rule 9.1 is an antidiscrimination provision that prohibits D.C. lawyers from discriminating against individuals on the basis of certain characteristics in conditions of employment only. Specifically, Rule 9.1 states:

> A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

By contrast, ABA Model Rule 8.4(g) is broader in scope and also contains strong antiharassment provisions. Specifically, 8.4(g) provides that is it 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.

Currently, only harassment that interferes with the administration of justice is prohibited under the D.C. Rules by Rule 8.4(d) and Comment [3].[1] In recommending that D.C. Rule 9.1 be amended to closely align with ABA Model Rule 8.4(g), the Bar expands the scope of prohibited behavior under the D.C. Rule without losing any of the limitations on lawyer conduct already imposed by the current Rules.

In addition to the report that accompanied the adoption of Model Rule 8.4(g), the Committee considered the significant public debate over the constitutionality of the Model Rule preceding and following its adoption by the ABA. Further, the Committee considered the actions taken by other jurisdictions, D.C.'s existing rules on harassment and discrimination, and the legislative history of D.C. Rule 9.1.

1. Committee Analysis

In making a recommendation to significantly amend Rule 9.1, members of the Rules Review Committee considered the possibility that lawyers might object to the proposed amended Rule on grounds that it infringes on their First Amendment rights to free speech, which was the principal argument raised by commenters against the adoption of ABA Model Rule 8.4(g). The Committee concluded that all of the ethics Rules are necessarily subject to the truism that in circumstances in which a lawyer is exercising a constitutionally protected right, he or she cannot be disciplined under the ethics rules. Further, the Committee determined that it was neither appropriate nor possible to resolve the questions of whether and in what circumstances a particular lawyer's conduct would be in fact constitutionally protected. Indeed, there are numerous court decisions, not all of which are consistent, which address whether and in what circumstances a lawyer's otherwise protected constitutional rights may be properly limited under the ethics rules.

[1] [3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

Also debated within the Committee were the various categories of bias that were prohibited under existing Rule 9.1, Comment [3] to D.C. Rule 8.4, and Model Rule 8.4(g). The Committee's proposed rule forbids harassment and discrimination on the basis of "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status." In comparison to the existing Rule 9.1, the proposed rule eliminates the categories of color and physical handicap and adds the categories of ethnicity, disability, gender identity, and socioeconomic status. The list differs from the Model Rule only in that it includes the category of family responsibility as a vestige of D.C.'s original rule. The Committee debated the inclusion of the category of "socioeconomic status," ultimately including it after determining that it is meant to address situations where, for example, a lawyer improperly refers to a witness's socioeconomic status in a derogatory manner, but not to compel a lawyer to accept a *pro bono* matter.

C. Proposed Revision to D.C. Rule 8.4, Comment [3]

With respect to the new language proposed for Comment [3] to Rule 8.4, the Committee noted that the Comment as currently written was redundant with the Rule itself, as a lawyer's harassing behavior that interferes with the administration of justice inevitably violates a rule that prohibits lawyers from interfering with the administration of justice. The proposed revised Comment [3] serves as a helpful cross-reference for those lawyers who reasonably search for the District's prohibition on harassment and discrimination in Rule 8.4, based on the location of the provision in the Model Rules, and also flags for lawyers the possibility that a perpetrator of harassment and discrimination may, in certain circumstances, be at risk for a violation of Rule 8.4(d) in addition to Rule 9.1.

Proposed Revised Comment [3] to Rule 8.4

> [3] See Rule 9.1 for guidance on prohibited harassment and discrimination. Conduct that violates Rule 9.1 and seriously interferes with the administration of justice also violates paragraph (d) of this Rule. ~~A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.~~

D. Proposed Amendments to D.C. Rule 9.1

Based on the forgoing, the Rules Review Committee voted unanimously to recommend the adoption of an amended Rule 9.1 to replace the existing Rule. The proposed text of Rule 9.1 follows:

RULE 9.1 (NONDISCRIMINATION AND ANTIHARASSMENT)

It is professional misconduct for a lawyer, with respect to the practice of law, 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, family responsibility, or socioeconomic status. This Rule does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules.

Comment

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

[2] Conduct with respect 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 or business activities (for example, social functions sponsored by the firm or employer as well as travel for the firm or employer) 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.

[3] A lawyer's use of peremptory challenges is addressed by Rule 3.4(g). A lawyer does not violate Rule 9.1 by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b),

and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[4] The D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), and federal law also contain certain prohibitions on discrimination in employment.

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

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

[7] The prior version of Rule 9.1 included "physical handicap" among the disallowed bases for harassment and discrimination. That basis now is subsumed within the new category of "disability."

District of Columbia Rules of Professional Conduct
Rule 8.4 (Misconduct): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored;** proposed deletions: strike-through, as in ~~deleted~~]

D.C. Rule 8.4 (Misconduct)

It is professional misconduct for a lawyer to:

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

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

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

(d) Engage in conduct that seriously interferes with the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official;

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

(g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Comment

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

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

[3] ~~A lawyer violates paragraph (d) by offensive, abusive, or harassing~~ **~~conduct~~See Rule 9.1 for guidance on prohibited harassment and discrimination. Conduct** that

violates Rule 9.1 and seriously interferes with the administration of justice **also violates paragraph (d) of this Rule.** ~~Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.~~

District of Columbia Rules of Professional Conduct
Rule 8.4 (Misconduct): Clean Version

D.C. Rule 8.4 (Misconduct)

It is professional misconduct for a lawyer to:

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

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

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

(d) Engage in conduct that seriously interferes with the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official;

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

(g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Comment

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

with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

[3] See Rule 9.1 for guidance on prohibited harassment and discrimination. Conduct that violates Rule 9.1 and seriously interferes with the administration of justice also violates paragraph (d) of this Rule.

Appendix C

Appendix C

Redline showing Rule 8.4 with proposed paragraph (h) and comments.

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
(d) Engage in conduct that seriously interferes with the administration of justice;
(e) State or imply an ability to influence improperly a government agency or official;
(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.
(h) engage in conduct directed at another person, with respect to the practice of law, that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status. This Rule does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules.

Comment

[1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those

characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

~~[3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.~~

[3] Paragraph (h) reflects the premise that the concept of human equality and respect for all individuals lies at the very heart of our legal system. A lawyer whose conduct demonstrates hostility or indifference toward the principle of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Discrimination and harassment by lawyers in violation of the Rule undermine confidence in the legal profession and the legal system.

[4] Discrimination includes conduct that manifests an intention to treat a person as inferior, to deny a person an opportunity, or to take adverse action against a person, because of one or more of the characteristics enumerated in the Rule. Harassment includes derogatory or demeaning verbal or physical conduct based on the characteristics enumerated in the Rule. In addition, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. Anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (h).

[5] Conduct with respect 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 events and work-related social functions.

[6] A lawyer's use of peremptory challenges is exclusively addressed by Rule 3.4(g). A lawyer does not violate Rule 8.4(h) 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).

[7] Rule 9.1 addresses discriminatory and harassing behavior in the context of employment that would violate applicable law. Misconduct that occurs in the context of employment could potentially violate both Rule 9.1 and Rule 8.4(h).

Appendix D

Appendix D

Clean version of proposed Rule 8.4

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
(d) Engage in conduct that seriously interferes with the administration of justice;
(e) State or imply an ability to influence improperly a government agency or official;
(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.
(h) engage in conduct directed at another person, with respect to the practice of law, that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status. This Rule does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules.

Comment

[1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those

characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

[3] Paragraph (h) reflects the premise that the concept of human equality and respect for all individuals lies at the very heart of our legal system. A lawyer whose conduct demonstrates hostility or indifference toward the principle of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Discrimination and harassment by lawyers in violation of the Rule undermine confidence in the legal profession and the legal system.

[4] Discrimination includes conduct that manifests an intention to treat a person as inferior, to deny a person an opportunity, or to take adverse action against a person, because of one or more of the characteristics enumerated in the Rule. Harassment includes derogatory or demeaning verbal or physical conduct based on the characteristics enumerated in the Rule. In addition, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. Anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (h).

[5] Conduct with respect 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 events and work-related social functions.

[6] A lawyer's use of peremptory challenges is exclusively addressed by Rule 3.4(g). A lawyer does not violate Rule 8.4(h) 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).

[7] Rule 9.1 addresses discriminatory and harassing behavior in the context of employment that would violate applicable law. Misconduct that occurs in the context of employment could potentially violate both Rule 9.1 and Rule 8.4(h).

Appendix E

April 19, 2019

District of Columbia Bar
Rules of Professional Conduct Review Committee
c/o Hope C. Todd, Esquire
District of Columbia Bar
901 4th Street NW
Washington, D.C. 20001

Re: Comments on Proposed Amendments to Certain D.C. Rules of Professional Conduct

Dear Ms. Todd:

In response to the D.C. Bar's solicitation of public comment on its Proposed Amendments to Certain D.C. Rules of Professional Conduct, I submit the following comments on behalf of the Board on Professional Responsibility and the Office of Disciplinary Counsel. Our comments are limited to areas where we have questions or concerns about the proposed Rule and Comment changes.

1. Technology and Confidentiality

The Rules Review Committee explains that the proposed change to Rule 4.4(b) is intended to be a clarification, but we are concerned that it will instead be interpreted as a *narrowing* of an attorney's duty to disregard and return inadvertently delivered writings. As we read the current Rule, it broadly covers any writings received by any lawyer relating to the representation of any lawyer's client. The proposed amendment appears to narrow the applicable category of covered writings to include only those relating to the receiving lawyer's representation of his or her own clients. But there is no explanation provided as to why attorneys' obligations under the Rule should not extend beyond documents relating only to their own clients.

If the purpose of the proposed change is to narrow this provision, we raise a question as to why this change should be made. If the purpose of the proposed change is not to narrow the current practice, we urge the Committee to reconsider the amendment since we do not find it to be a helpful clarification and are concerned that other attorneys will be similarly confused. The Rules Review Committee may want to consider providing an explanation to clarify the scope and purpose of any amendment.

2. Outsourcing

We have several concerns about the changes proposed to be added as Comments [6] and [7] to Rule 1.1.

First, there are different categories of contract lawyers, including – for example – those who provide substantive and independent advice to the client, those who may advise the primary lawyer rather than the client, and those who perform document review. The proposed language in Comment [6] appears to require advance notification of the use of all of these, including temporary contract lawyers performing document review or translation. We believe that advance notification would be unnecessarily burdensome both to the lawyer and the client (with no discernable benefit to the client), especially considering that such lawyers are often hired quickly due to pressing deadlines.

If the "available to provide legal services generally" exception was intended to distinguish between the categories of contract lawyers, we are concerned that this is not clear. D.C. Bar Legal Ethics Opinion 284 (1998) may be instructive, as it provides that the temporary status of an outside lawyer whose work "does not require the substantial exercise of judgment" and is closely supervised by the client's lawyer need not be disclosed to the client, whereas employment of one with "important responsibilities" who will not be closely supervised and whose temporary status may be material to the representation should be disclosed.

Second, we are concerned that the proposed language is inconsistent with Rule 1.5(e)(2), which *requires* that the client provide informed consent to the hiring of and fees for outside lawyers where there will be a division of fees, whereas the proposed language of the proposed Comment [6] merely encourages it. We are concerned that if there is an inconsistency – or even a perceived one – it will create problems for attorneys seeking to comply with the Rules.

Third, we believe any proposed changes should be moved to the Comments following Rule 5.1, because they have more to do with attorneys' supervisory responsibilities than with their competence.

In sum, we suggest that these concepts and definitions be integrated into the proposed Comments to clarify the situations in which advance notice of contract lawyers' identities would be required and to avoid any inconsistency with the stricter obligations of Rule 1.5(e).

3. Nondiscrimination and Antiharassment

The Board supports the D.C. Bar's efforts to prevent discrimination and harassment and agrees that such conduct by attorneys can "undermine[] confidence in the legal profession and the legal system." In addition, we support the more up-to-date categories in the proposed Rule, to include ethnicity, disability, gender identity, and socioeconomic status. Not only does this proposed revision largely follow the ABA's Model Rule, but it is also similar to the broader categories in the D.C. Human Rights Act. (D.C. Code § 2-1401.01). However, we have a few

concerns about the scope and the definitions of discrimination and harassment in the proposed Rule.

First, Rule 9.1 is currently limited to discrimination in the employment context, and Rule 8.4 is limited to harassing conduct that interferes with the administration of justice. Rule 9.1, as proposed, generally would be expanded to include attorneys' conduct "with respect to the practice of law."[1] The proposed Comment [2] explains that the Rule's scope would include interacting with court personnel, witnesses, lawyers, and others and would include participating in bar association and business activities, including social functions. Similar language is contained in the ABA Model Rule, but the Committee's proposed Comment [2] includes additional language, noting that the Rule is intended to include conduct at "business activities (for example, social functions sponsored by the firm or employer as well as travel for the firm or employer) in connection with the practice of law." Because the two examples given could be subject to myriad interpretations, it may be advisable to omit the parenthetical, and use the ABA's formulation: "business or social activities in connection with the practice of law." Further, we also suggest that additional clarity would be useful so attorneys can determine what would be subject to discipline in these broader contexts that include interacting with people who are not employees and conduct at social events that may have marginal relation to the attorney's practice.[2]

Second, we are concerned whether the Rule and the Comments are clear as to how discrimination and harassment are to be defined for the purpose of determining whether a lawyer's conduct violates Rule 9.1. Comment [4] makes clear that, in the employment context, federal and D.C. law applies, and Comment [1] notes that anti-discrimination and anti-harassment laws may guide application of this Rule. However, the laws cited generally apply in the employment, housing, public accommodations, education, and public services contexts and it is not clear how they provide guidance in determining whether an attorney engaged in discrimination or harassment of court personnel, witnesses, and others who are not employees or clients.[3] As such, it may be

[1] We recognize that although the proposed Rule mostly expands its coverage, there is one circumstance that is covered currently but which would not be covered in the future. Currently, a lawyer would violate Rule 9.1 if he or she discriminates in any employment – whether related to the practice of law or not. For example, the current Rule covers the conduct of a lawyer running a business not involving the practice of law or employing household help. Under the proposed Rule, the lawyer could not be disciplined for engaging in discrimination in these contexts.

[2] By way of example, it would be useful for attorneys to know whether a birthday party for a co-worker is considered a "social event" covered by the proposed Rule. Further, if a lawyer is out of town on a month-long trial, is her conduct throughout the entire month subject to Rule 9.1, including on weekends and "down time," whereas it would not be if she lived in the District of Columbia, her trial was here, and she engaged in similar conduct on weekends and her down time?

[3] For example, in the employment context, a stray offensive comment is usually not viewed as discrimination or harassment. Further, liability usually requires that an adverse personnel action have been taken because of one of the protected categories or that a severe and pervasive environment of harassment is found. It is unclear whether Rule 9.1 requires the covered harassment to be severe or pervasive, and it is hard to envision that "adverse actions" could be found in many instances. Thus, for example, if an attorney

helpful to explain how anti-discrimination and anti-harassment laws will guide application of this Rule, or develop more comprehensive definitions of discrimination and harassment.

Third, we appreciate that the amended Rule excludes conduct that is "legitimate advice" or "legitimate advocacy" and is intended to prevent only conduct that "manifests bias or prejudice toward others," or is "derogatory and demeaning." However, we believe an additional comment may be helpful to fully flesh out this exception and make clear that the Rule does not limit a lawyer's obligation of zealous advocacy, which may sometimes require insistent, aggressive, or uncomfortable questioning of a witness that might be seen as harassment rather than legitimate advocacy.[4] There is a concern that without some additional clarity on the meaning of "legitimate advice" or "legitimate advocacy," there may be a chilling effect on zealous advocacy, particularly since the proposed Rule could be used as a threat by dissatisfied clients, opposing counsel, or parties that they will make Bar complaints if the attorney continues her zealous advocacy.

Fourth, we note that the proposed Comment [3] states that a lawyers' use of peremptory challenges is addressed by Rule 3.4(g). This implies that Rule 3.4(g) applies exclusively to a lawyers' use of peremptory challenges. If so, the Comment could make that clear. If both Rules are intended to apply to peremptory challenges, it is not clear whether an attorney's selection of jurors she believes will be most advantageous to her case, based on gender, age, race, appearance, or any other factor – but which do not violate *Batson v. Kentucky*, 476 U.S. 79 (1986) – is intended to also be covered by proposed Rule 9.1. This Comment is not part of the ABA Model Rule, so there is no guidance there as to the intent of this insertion.

Fifth, we are aware that one of the primary objections to the ABA Model Rule was that it infringes on an attorney's First Amendment rights to free speech. The Committee notes an attorney cannot be disciplined for violating the Rules if the conduct at issue is protected by the Constitution. We suggest that explicitly noting this limitation in a Comment will ensure that there is no misunderstanding about the scope of the rule.

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setting up a trust account asks the bank employee to dinner and such invitation is "unwelcome," it is not clear whether this conduct was intended to be considered to be a violation of this Rule at all, or whether it would only rise to that level if the bank employee has previously declined the invitation and the attorney continued to ask.

[4] This concern is heightened by the example the Committee provided in its analysis, *i.e.*, that the Committee intends that it should be a violation of the Rule if "a lawyer improperly refers to a witness's socioeconomic status in a derogatory manner." We note that there are legitimate reasons that an attorney may need to be aggressive in questioning a witness and in arguing about a person's financial status, such as in a domestic relations matter where a parent's financial ability to provide for a child is a factor in custody decisions, that nevertheless might be seen as "improper" by some.

In such litigation contexts where the proceedings are recorded and a judge is available (either by phone in a deposition or in person in court) the Committee may want to consider whether that conduct is better judged under Rule 8.4(d), with its requirement that the conduct interfere with the administration of justice, or under Rule 4.4(a), which prohibits conduct that serves "no substantial purpose other than to embarrass, delay, or burden a third person."

Finally, Disciplinary Counsel Fox is also concerned about the implications of the rule change on his office's prosecutorial function. He notes that only one case has been brought under Rule 9.1 since it was originally adopted, in part because the Comments allow Disciplinary Counsel to defer to government agencies tasked with addressing and remedying discrimination. As explained above, we believe the Rule and Comments need clarity, and without that clarity on the scope and definition, he is concerned that the broader rule will encourage frivolous complaints from clients who were merely unsatisfied with the results of their cases but allege discrimination, from opposing counsel who seek an advantage, and from other third-parties who are personally offended by an aggressive lawyer. In such situations, where concrete evidence supporting discrimination would be rare, Disciplinary Counsel could routinely dismiss those complaints, making the Rule changes seem cosmetic only. Alternatively, because these cases usually lack concrete evidence, Disciplinary Counsel may feel it must open cases that would force attorneys to provide statements or evidence to overcome the allegations, which would put a strain on the disciplinary system and a burden on many innocent attorneys. For these reasons, Disciplinary Counsel opposes the proposed amendments to Rule 9.1.

We would be pleased to discuss this in more detail with the Committee or respond to any questions concerning these comments.

Best regards,

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D.C. Board on Professional Responsibility

cc:

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