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

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I. INTRODUCTION

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

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

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

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

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

Any jurisdiction considering adopting the new model rule should be aware of its legislative history,⁴ which Part II of this article recounts. As that history shows, the new model rule’s afflictions derive in part from indifference on the part of rule change proponents,⁵ and in part from the hasty manner in which the rule change proposal was pushed through to passage.⁶ Indeed, though the proposal evolved through three separate versions in the two weeks before passage, none of these was subjected to review and comment by the ABA’s broader membership, the bar at large, or the public.⁷ In this last-minute pother, the model rule change process differed from past substantial ABA model rule change efforts such as Ethics 2000 and Ethics 20/20.⁸

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

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

3. *Id.*

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

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

6. *See infra* Part II.D.

7. *See infra* Part II.D.

8. *Id.*

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

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

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

A. Overview

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

As recounted in more detail below, the new model rule and its corresponding comments were adopted only after substantial modifications to an original July 2015, rule change proposal ("Version 1") the ABA Standing Committee on Ethics and Professional Responsibility (the "Standing Committee") had advanced.¹⁰ The ensuing December 2015 version of the proposal ("Version 2")¹¹—the only one presented to the ABA's broader membership, the bar at large, and the public for input—generated many dozens of comments, the vast majority of which expressed opposition.¹² Led by the Standing Committee, the rule change proponents responded with an April/May 2016 modified proposal embodied in "Resolution 109" ("Version 3")¹³ which, due to continuing opposition by substantial constituencies within the ABA, was again modified, with the resulting proposal ("Version 4") circulated on July 25, 2016.¹⁴ Further horse-trading occurred in the ensuing days, resulting in the circulation on

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

10. *See infra* Part II.D.1.

11. *See infra* Part II.D.2.

12. *See infra* Part II.D.3.

13. *See infra* Part II.D.4.

14. *See infra* Part II.D.5.

August 3, 2016, of a further modified proposal, “Revised 109” (“Version 5”), which the House ultimately adopted on August 8, 2016.¹⁵

B. Model Rule 8.4 Comment [3].

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

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.¹⁶

This comment accompanied Rule 8.4, which provided:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]¹⁷

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

15. See *infra* Part II.D.6-7.

16. MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 3 (2015).

17. MODEL RULES OF PROF’L CONDUCT R. 8.4 (2015).

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

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

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

It is professional misconduct for a lawyer to:

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

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

It is professional misconduct for a lawyer to:

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

Comment

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

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

20. *Id.*

21. *Id.* at 813-14.

22. *Id.* at 813.

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

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

(g) It is professional misconduct for a lawyer to:

(1) commit, in the course of representing a client, any verbal or physical discriminatory act, on account of race, ethnicity or gender, if intended to abuse litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage;
or

(2) engage, in the course of representing a client, in any continuing course of verbal or physical discriminatory conduct, on account of race, ethnicity, or gender, in dealings with litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, if such conduct constitutes harassment.²⁵

Comment

[5] Paragraph (g) of this Rule identifies the special importance of lawyers' verbal or physical discriminatory acts, based on race, ethnicity, or gender, in the course of client representation, where those acts either : (a) intentionally seek to abuse litigants, jurors, witnesses, court personnel, opposing counsel, or other lawyers, or to gain a tactical advantage, or (b) involve a continuing course of

23. *Id.* at 813.

24. A LEGISLATIVE HISTORY, *supra* note 19, at 816.

25. *Id.* at 814.

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

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

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

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

directed to a protected individual in the course of representing a client. These limitations protect lawyers' and clients' freedom to speak their views, limiting regulation to those circumstances most likely to interfere with the fair and efficient workings of the justice system. Judicial findings made during the course of litigation or matters arguable covered by this rule would not automatically subject a lawyer to discipline. For example, a trial peremptory challenge during jury selection, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1989), and its progeny would not necessarily violate this rule. That determination would be made by the appropriate state disciplinary authority acting de novo, after full and fair procedures, in which the *Batson* findings of the trial court would be irrelevant.

[9] Attorneys are further cautioned not to view discriminatory conduct outside the limits of this rule as acceptable. Much conduct not within the precise scope of the disciplinary rules is nevertheless inconsistent with what it means to be an officer of the court. In particular, reference is made to the ABA's Resolution Against Bias and Prejudice, adopted August 1995, as setting forth a range of disfavored discriminatory conduct that is not within the ambit of Rule 8.4(g).²⁶

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

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

26. *Id.* at 815-16.

27. *Id.* at 814-16.

28. *Id.*

29. A LEGISLATIVE HISTORY, *supra* note 19, at 813.

30. *Id.* at 814.

31. *Id.* at 816.

32. *Id.*

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

Comment

[2] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).³⁵

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

[2] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.³⁶

As summarized in the ABA’s official “legislative history” of the Model Rules,

33. *Id.* at 817 (quoting Standing Committee Report 117).

34. A LEGISLATIVE HISTORY, *supra* note 19, at 817.

35. *Id.* at 816.

36. *Id.* at 817.

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

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

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

1. Version 1.

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

Goal I: Serve Our Members⁴⁰

Goal II: Improve Our Profession⁴¹

Goal III: Eliminate Bias and Enhance Diversity,⁴² and

Goal IV: Advance the Rule of Law.⁴³

37. *Id.* at 818.

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

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

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

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

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

In May 2014, the ABA’s Goal III Commissions—the Commission on Women in the Profession (“CWP”), the Commission on Racial and Ethnic Diversity in the Profession (“CREDP”), the Commission on Disability Rights (“CDR”), and the Commission on Sexual Orientation and Gender Identity (“CSOGI”)—asked the Standing Committee “to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III.”⁴⁴ The Goal III Commissions complained that current Model Rule 8.4(d) “d[id] not facially address bias, discrimination, or harassment and d[id] not thoroughly address the scope of the issue in the legal profession or legal system.”⁴⁵

The Standing Committee formed a Working Group, which included representatives from the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and each of the Goal III Commissions.⁴⁶ From the fall of 2014 to May 2015, the Working Group developed a memorandum to the Standing Committee, which advocated elevating anti-discrimination content from the comment to a rule.⁴⁷ After reviewing the Working Group’s memorandum, the Standing Committee prepared a draft proposal to amend Model Rule of Professional Conduct 8.4.⁴⁸

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

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

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

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

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

46. *Id.*

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

48. *Id.* at 3.

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

The Comment language would be modified as follows:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies.⁵⁰

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

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

50. *Id.*

51. *Id.*

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

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

2. *Version 2.*

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

It is professional misconduct for a lawyer to:
(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.⁵⁸

52. *Id.*

53. *Id.*

54. July 8, 2015 Working Discussion Draft, *supra* note 49.

55. *Id.*

56. *Id.*

57. *Id.*

58. Memorandum from Standing Comm. on Ethics & Prof’l Resp., Am. Bar Ass’n, Draft Proposal to Amend Model Rule 8.4, at 2 (December 22, 2015) [hereinafter “Memo re: Dec. 22, 2015 Draft”], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf.

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

[3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation. ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~⁵⁹

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

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

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

60. *Id.*

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

3. *Reactions to Version 2.*

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

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

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

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

The proponents’ testimony dominated the hearing. It focused upon examples and perceptions of biased statements and conduct,⁶⁹ “implicit

61. *Id.*

62. *Id.*

63. *Id.*

64. See Notice of Pub. Hearing, Standing Comm. on Ethics & Prof’l Resp., Am. Bar. Ass’n, at 2-3 (December 22, 2015), https://americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf

65. Am. Bar. Ass’n Public Hearing Transcript, at 3, 78 (Feb. 7, 2016) [hereinafter “Transcript”], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf (last reviewed Oct. 16, 2016).

66. *Id.*

67. *Id.*

68. *Id.*

bias” and the proponents’ corresponding desire that any knowledge qualifier be removed from the proposed model rule,⁷⁰ and the desire that the ambit of covered lawyer conduct be broad.⁷¹

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

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

69. *Id.* at 19-21, 31-32, 51-53, 69-70, 76-77.

70. Transcript, *supra* note 65, at 7-8 (Brown); *id.* at 22 (Ramey); *id.* at 32-34 (Weiner); *id.* at 38-39 (Lazar), 59-61 (Bellows), 67 (Finerty).

71. *Id.* at 41-43, 62.

72. *Id.* at 17.

73. *Id.* at 20.

74. *Id.* at 33.

75. Transcript, *supra* note 65, at 47.

76. *Id.* at 75.

77. *Id.* at 72.

78. *Id.*

79. *Id.* at 74.

80. Transcript, *supra* note 65, at 74.

b. Written Comments from ABA Entities.

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

i. Goal III Commissions

Version 2 of the proposal drew supportive but mixed reactions from the Goal III Commissions—CWP, CDR, CSOGI, and CREDP.⁸¹ CREDP and CDR supported adoption of Version 2, albeit with additional modification suggestions;⁸² CWP and CSOGI were more critical.⁸³ Each continued to urge that any knowledge qualifier be deleted,⁸⁴ and that the ambit of covered lawyer conduct be broad.⁸⁵ The ABA Center for Professional Responsibility Diversity Committee, the ABA Standing Committee on Legal Aid and Indigent Defense, the ABA Section on Civil Rights and Social Justice,⁸⁶ and the Law Student Division⁸⁷ also expressed support.

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

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

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

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

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

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

ii. *Other ABA Entities*

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

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

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

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

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

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

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

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

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

90. Letter from Keith R. Fisher & Nathan M. Crystal to Myles V. Lynk, at 3 (Mar. 10, 2016) [hereinafter "BLSEC Comment 1"], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_business_law_ethics_committee_comments.authcheckdam.pdf.

91. *Id.*

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

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

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

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

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

93. *Id.*

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

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

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

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

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

c. Other Written Comments

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

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

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

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

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

98. *Id.*

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

100. *Id.*

101. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Whether the proposed model rule suffered from First Amendment freedom of expression,¹¹⁴ freedom of religion,¹¹⁵ freedom of association, or freedom of assembly infirmities¹¹⁶—particularly given its arguable reach to activities such as board service, membership in religious organizations, and speech on “political, social, religious, and cultural issues.”¹¹⁷
3. Whether state constitutional protections analogous to those of the First Amendment might be implicated.¹¹⁸
4. Whether adding “Specially Protected Classes to Discrimination Provisions” is desirable as a policy matter, as well the potential impact of inconsistent enumeration of such classes as between “Legal Conduct Codes.”¹¹⁹
5. Whether Model Code of Judicial Conduct Rule 2.3 supplies a workable analog for an anti-bias lawyer rule.¹²⁰
6. Whether an exception for workplace rules regarding “grooming and garb, or the reservation of restrooms or locker rooms, based on biological sex,” should be included.¹²¹
7. “The wisdom of imposing a ‘cultural shift’ on all attorneys.”¹²²

4. *Version 3.*

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

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

114. *Id.* at 13-14.

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

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

117. *Id.* at 7-8.

118. *Id.* at 13.

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

120. *Id.* at 27.

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

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

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

The proposed addition to Model Rule 8.4 read:

It is professional misconduct for a lawyer to:

. . . (g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.¹²⁴

The new proposed comment read:

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

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

[3] ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race,~~

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

124. *Id.*

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

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

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

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

[4]-[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The

provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

~~{5}~~ [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.¹²⁵

Version 3 reflected significant changes from Version 2.

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

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

Version 3's comment attempted for the first time to expound—though not define—the meaning of the terms "discrimination" and "harassment." "Discrimination" would "include[] harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in" the proposed rule.¹²⁸ "Harassment" would "include[] sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups," with "[s]exual harassment includ[ing] unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."¹²⁹

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

125. *Id.*

126. *Id.*

127. *Id.*

128. April 2016 Draft Proposal, *supra* note 123.

129. *Id.*

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

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

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

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

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

5. *Version 4.*

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

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

130. *Id.*

131. *Id.*

132. *Id.*

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

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

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

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

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

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.¹³⁷

The proposed comment read, in pertinent part,

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

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

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

136. *Id.*

137. *Id.*

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

[5] Paragraph (g) does not prohibit legitimate advice or advocacy, including in jury selection as allowed by law, which is material and relevant to factual or legal issues or arguments in a representation. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).¹³⁸

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

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

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

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

138. *Id.*

139. *Id.*

140. Current Working Re-Draft, *supra* note 135.

141. *Id.*

exercised on a discriminatory basis does not alone establish a violation of this rule,” which had been dropped from Version 3.¹⁴²

6. Version 5.

Furious lobbying by proponents of the proposal¹⁴³ led to bargaining over terms on which, at a minimum, the Standing Committee on Professional Discipline and the Litigation Section would support it.¹⁴⁴ The bargaining process yielded still another version, framed as a “Revised Resolution,” on August 3, 2016. As then proposed, and ultimately adopted following further lobbying by rule change proponents,¹⁴⁵ the rule provided:

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual

142. *Id.*

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

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

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

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

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

146. As redlined, the Version 5 comment read:

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

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

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

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

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

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

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

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

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

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

[4]-[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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

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

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

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

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

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

A. Overview

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

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

By comparison, the ABA Ethics 20/20 Commission took two years before it rolled out initial proposals throughout the second half of 2011.¹⁵⁴ The Ethics 20/20 Commission had seven working groups, held thirteen open meetings, conducted public hearings and roundtables, and received and reviewed over 400 comments on its proposals.¹⁵⁵ The proposals went through multiple drafts before they were finalized and filed with the House of Delegates for consideration at the August 2012 Annual Meeting.¹⁵⁶

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

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

152. *Id.*

153. *Id.*

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

155. *Id.*

156. *Id.*

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

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

157. Litigation Section Comment, *supra* note 92, at 2 (pointing out the dearth of data presented to support a need for this rule change); MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (“Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving ‘moral turpitude.’ That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”).

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

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

- Does the advice or advocacy exclusion of the model rule—such as it is¹⁶⁰—include other lawyer functions, such as speaking for a client in a negotiation setting, or advocating for changes in the law?¹⁶¹
- Assuming *arguendo* the existence of some groups or statuses that deserve the protection of an anti-bias ethics rule, why were some but not other such “factors”¹⁶² (such as height, weight, or veteran status) excluded?¹⁶³
- Does such a rule’s potential weaponization against lawyers¹⁶⁴ call for a change to the general rule that bar complainants are insulated from liability for making a charge¹⁶⁵ (or, for that matter, that a bar complainant needs no standing, as that term is understood in civil litigation terms,¹⁶⁶ in order to make out a bar complaint¹⁶⁷)?
- Does it matter that the model rule can be read to proscribe mandatory retirement policies at law firms and corporations,¹⁶⁸ as well as law practices focusing on populations identified by one or more of the model rule’s “factors,” unless “underserved”?¹⁶⁹

The proponents of the ABA model rule change thought public comment important when distinguishing Version 3 from Version 2.¹⁷⁰ Yet,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

171. *Id.*

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

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

“socioeconomic status,”¹⁷⁴ “conduct related to the practice of law,” and “legitimate” advice or advocacy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But even were it possible for a comment to contradict the plain meaning of the ethics rule it accompanies—and it is not¹⁹³—the terms “diversity” and “inclusion” themselves were left undefined. Attempting to define them now demonstrates the quandary that the proponents of the model rule change left for those who might be asked to implement and enforce it in a real world lawyer discipline setting.

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

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

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

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

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

The new model rule, then, casts a pall over law firm practices such as a Women's Initiative ("sex"), pipeline initiatives in law firms and corporate legal departments designed to promote the entry of poverty-stricken youth into the educational and commercial mainstream ("socioeconomic status"), and perhaps even recognition programs such as Hispanic Heritage Month ("race" or "ethnicity"¹⁹⁷). This would be true for both jurisdictions that do not adopt the Model Rules' comments¹⁹⁸ and because comments cannot contradict rules, jurisdictions that do. It is no answer that a disciplinary agency might readily dismiss a complaint brought on these grounds. Prosecutorial whim is not the rule of law.

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

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

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

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

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

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

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

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

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

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

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

202. See MODEL RULES PROF’L CONDUCT R. 1.4:

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

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

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

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

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

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

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

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

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

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

208. *Id.*

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

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

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

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

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

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

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

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

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

215. *Id.*

216. See text accompanying note 141.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

228. See *id.* § 3.0.

229. See *supra* Section III.B.

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

231. ABA STANDARDS § 6.0.

232. *Id.*

233. *Id.* § 6.1.

234. *Id.*

235. *Id.* § 6.2.

236. ABA STANDARDS § 6.2.

237. *Id.* § 6.3.

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

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

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

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

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

238. *Id.* § 7.0.

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

240. *Id.* § 5.0.

241. *Id.* § 5.1.

242. *Id.*

243. *Id.* § 3.0.

244. ABA STANDARDS §§ 9.2 and 9.3.

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

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

E. Constitutional Issues

1. Due Process

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

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

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

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

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

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

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

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

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

2. First Amendment Free Expression

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

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

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

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

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

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

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

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

Does the Proposed Rule Violate the Frist [sic] Amendment Rights of Lawyers? No, It Does Not.

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

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

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

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

Later, on July 29, 2016, the Chair circulated a treatment titled, "Response to First Amendment Concerns Raised in Certain Comments to the Proposed Amendment to Model Rule 8.4."²⁶⁰ But that treatment did not address any particular version of the proposal, let alone the most recent, and contained no reference to important Supreme Court jurisprudence governing content-based speech regulation—which regulatory limitations on the content of lawyer speech surely are²⁶¹—such as *R.A.V. v. City of St. Paul*²⁶² or, more recently, *Reed v. Town of Gilbert*.²⁶³ The treatment also invoked diversity, though it did not explicate the connection between that interest and First Amendment free speech rights.²⁶⁴ This too: the proponents of the new model rule evidently thought they needed to rescue diversity initiatives from the new model rule, rather than that the new model rule would advance them.

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

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

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

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

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

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

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

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

A rich body of scholarship addresses the various ways in which lawyer rules of professional conduct have been allowed to restrict lawyer speech where, otherwise, such restrictions would be held invalid under the First Amendment's free speech guarantee.²⁶⁵ These include, among others, restrictions on advertising,²⁶⁶ solicitation²⁶⁷ and trial publicity,²⁶⁸ as well as rules governing decorum in courtroom and ancillary judicial proceedings.²⁶⁹ Sometimes reviewing courts justify these restrictions by considering the lawyers' words as conduct rather than as content-laden speech deserving of First Amendment protection.²⁷⁰ Sometimes the restrictions draw gentler First Amendment treatment because they are deemed "functional necessities in the administration of justice."²⁷¹

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

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

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

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

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

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

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

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

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

to the administration of justice,” or even words spoken or written in courtroom or ancillary environs, but all the way to any and all conduct “related to the practice of law,” the new rule left the safe harbor that, at least arguably, marks positively the First Amendment jurisprudence governing limitations on lawyer speech.²⁷³ For example, the “officer of the court” rationale sometimes advanced to justify lawyer speech restrictions²⁷⁴ would seem misplaced to justify the new model rule, where the lawyer may be subject to discipline for conduct that took place nowhere near a courtroom.

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

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

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

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

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

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

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

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

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

petition by arguing that wearing these garments is inherently demeaning²⁷⁷—an argument consistent with the interest in combatting gender bias—or simply as a matter of courtroom decorum.²⁷⁸ Yet, had our hypothetical jurisdiction adopted the new model rule as its own, the lawyer might well wonder whether she is subject to a charge of discriminating on the basis of religion or ethnicity or, for that matter, a charge that she “reasonably should have known” as much. Notwithstanding indifferent treatment by some of the new rule’s proponents—who variously treated questions of what is or is not discrimination as self-evident,²⁷⁹ or acknowledged but didn’t credit the plight of the lawyer who might incur “significant financial, reputational, and other harm” by dint of such a charge, regardless of its merits²⁸⁰—these questions are neither simple nor trivial.

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

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

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

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

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

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

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

and that if there is any aspect of our system of government that cannot afford to subject participants to fear of retribution over the content of their speech as such, it is the judicial system.²⁸³ In making law, applying law, and administering justice, hard questions must first be asked in order to be answered, and the system cannot afford for those who might ask hard questions to be chilled from doing so by threats to their livelihood.²⁸⁴ This chill on the expression of ideas—a chill which ultimately threatens our society’s ability even to generate ideas²⁸⁵—elevates First Amendment concerns into transcendence over the due process interest of the individual lawyer.²⁸⁶

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

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

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

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

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

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

shed light,²⁸⁷ but because the new model rule's formulation is just that—new—and because the new model rule was not subjected to deep First Amendment free speech scrutiny, that analysis is needed now.²⁸⁸ Analogies may be drawn to the multiverse of lawyer speech regulation categories to which the First Amendment has been applied—or, in contrast, one or more of these categories may be argued as inapposite.²⁸⁹ These analogies may (or may not) shed light the level of scrutiny to be applied, as well as the competing interests at stake, and the “fit” between (or in contravention of) those interests, within those frameworks. Similarly, analogies may be drawn—or not—to other kinds of speech regulation drawn from outside the professional advice²⁹⁰ and lawyer spheres.²⁹¹

IV. CONCLUSION

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

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

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

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

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

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

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

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

