

# PROFESSIONALISM FOR THE ETHICAL LAWYER

## Hypotheticals and Analyses\*

**Thomas E. Spahn  
McGuireWoods LLP**

\* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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## Avoiding Discrimination and Bigotry

### Hypothetical 4

One of your senior partners has the habit of telling racial jokes.

What should you do?

**REMIND THE SENIOR PARTNER THAT SUCH JOKES ARE INAPPROPRIATE IN TODAY'S WORLD AND MAY VIOLATE THE ETHICS RULES**

### Analysis

On August 9, 2016, the ABA House of Delegates overwhelmingly approved changes to ABA Model Rule 8.4, intended to prohibit certain discrimination. It will be interesting to see how any states adopting this new rule implement its crystal-clear per se prohibition.<sup>1</sup>

### Previous ABA Model Rule Comment

Before this change, the ABA Model Rules dealt with specified misconduct in an ABA Model Rule 8.4 Comment.

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates 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.

Former ABA Model Rule 8.4 cmt. [3] (emphasis added).

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<sup>1</sup> Many states are now analyzing the new ABA Model Rule and whether they should adopt it or a similar rule. Some states have explicitly prohibited only illegal or unlawful practices. That presumably is narrower than the ABA's flat prohibition, and incorporates outside statutory, regulatory and common law concepts into the ethics analysis.

This former ABA Model Rule Comment was fairly limited. First, it applied only to a lawyers' conduct "in the course of representing a client." Other ABA Model Rule prohibitions begin with the same or similar phrase, such as the prohibition on false statements of material fact (ABA Model Rule 4.1), or the prohibition on ex parte communications with represented persons (ABA Model Rule 4.2). This limiting language contrasts with the introductory phrase of ABA Model Rule 8.4: "It is professional misconduct for a lawyer to . . . ." Those prohibitions apply whenever the lawyer acts in any context, professionally or personally. Second, the former ABA Model Rule Comment prohibited only "knowing" misconduct. Third, the former ABA Model Rule Comment did not prohibit discrimination. It prohibited "bias or prejudice," if such conduct was "based upon" the stated attributes. The ABA Model Rules did not define those two terms, but presumably, they describe improper (and perhaps even unlawful) conduct that is a subset of discrimination. If the terms were meant to describe the more generic conduct of "discrimination," the ABA could have used that one word rather than the two words. Fourth, the former ABA Model Rule Comment prohibited the misconduct only when it was "prejudicial to the administration of justice." That vague standard paralleled the black letter ABA Model Rule 8.4(d)'s prohibition on any "conduct that is prejudicial to the administration of justice." In fact, the general language of ABA Model Rule 8.4(d) thus already prohibited the specific conduct described in former ABA Model Rule 8.4 cmt. [3].

### **ABA Model Rule 8.4(g)**

The new ABA Model Rule 8.4 provision appears in the black letter rule.

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.

ABA Model Rule 8.4(g) (emphasis added).

The new black letter rule provision expands the scope of the previous Comment. First, the rule applies to lawyers' conduct "related to the practice of law." This is far broader than conduct lawyers undertake "in the course of representing a client." But it is still narrower than other ABA Model Rule 8.4 provisions, which apply to all of lawyers' professional and private conduct. Second, the rule applies when a lawyer "knows or reasonably should know" that she is engaged in the articulated misconduct. This contrast with the previous Comment's "knowing" standard. Third, the rule prohibits "discrimination" -- in contrast to the old Comment's "bias or prejudice." As explained below, inclusion of this prohibition on any and all "discrimination" is the most interesting new addition. Fourth, the rule prohibits the described conduct whether or not it is "prejudicial to the administration of justice."

Immediately following its prohibitory language, the new black rule includes two exceptions.

This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.6. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Id. As explained below, the ABA's inclusion of these exceptions in the black letter rule itself sheds light on the Comments accompanying the new black letter rule.

ABA Model Rule 8.4(g) is also notable for a word that is missing from the black letter rule. The language could have the word "unlawfully" in describing the prohibited

conduct. New York's and California's ethics rules both prohibit lawyers from "unlawfully" discriminating in practicing law. New York Rule 8.4(g); California Rule 2-400(B); proposed California Rule 8.4.1(b). Adding that word presumably would have imported into the ABA Model Rule prohibition constitutional and other case law drawing the line between permissible and impermissible consideration of race, sex, etc. Instead, ABA Model Rule 8.4(g) contains a per se prohibition of any such consideration.

The new ABA Model Rule is supplemented by two comments.

One explains the ill effects of discrimination and harassment, and then provides examples.

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).

ABA Model Rule 8.4 cmt. [3] (emphasis added). Notably, this Comment's description of improper "discrimination" does not purport to define discrimination, or limit its definitional reach -- but merely provides several examples.

The second Comment explains the broader reach of the new black letter rule's discrimination ban, which now extends beyond lawyers' dealings with clients.

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.

ABA Model Rule 8.4 cmt. [4] (emphases added).

### **ABA Model Rule 8.4 Comment [4]**

ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes.

It is worth exploring the last sentence of Comment [4] to assess its possible impact on the per se prohibition in ABA Model Rule 8.4(g).

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.

ABA Model Rule 8.4 cmt. [4].

This sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment's reflection it does not – and could not -- do that.

First, as the ABA Model Rules themselves explain,

[t]he Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

ABA Model Rules Scope [21]. In fact, that apparently is why the ABA moved its anti-discrimination provision into the black letter rules. An [ABA Journal](#) article describing the new ABA Model Rule 8.4(g) language quoted Professor Myles Lynk, then chair of the ABA Standing Committee on Ethics and Professional Responsibility. In describing why that Committee recommended a change to the black letter rule instead of relying on a Comment, Professor Lynk explained "[c]omments are only guidance or examples . . . [t]hey are not themselves binding." ABA J., Oct. 2016, at 60. So the last sentence of Comment [4] is not binding -- the black letter rule's per se discrimination ban is binding.

Perhaps that sentence was meant to equate "diversity" with discrimination on the basis of race, sex, etc. But that would be futile -- because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.

Second, the ABA clearly knew how to include exceptions to the binding black letter anti-discrimination rule. ABA Model Rule 8.4(g) itself contains two exceptions. If the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.

Third, Comment [4]'s last sentence says nothing about discrimination. It describes efforts to promote diversity and inclusion. Even if that language could overrule the black letter rule, the sentence does not describe activities permitting discrimination on the basis of the listed attributes. There are numerous types of diversity and inclusion that have nothing to do with ABA Model Rule 8.4(g)'s listed attributes. Some examples include political viewpoint diversity, geographic diversity, and law school diversity. Comment [4] allows such diversity and inclusion efforts. Those types of diversity and inclusion efforts would not involve discrimination prohibited in the black letter rule.

### **Reach of ABA Model Rule 8.4(g)**

ABA Model Rule 8.4(g) prohibits any and all "discrimination on the basis of" the listed attributes. The prohibition extends to any lawyer conduct "related to the practice of law," including "operating or managing a law firm or law practice; and participating in bar association" activities. ABA Model Rule 8.4 cmt. [4].

The black letter rule thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc. Law firms will no longer be able to schedule social events or conferences limited to their LGBT lawyers.

In addition to the easily recognizable and now flatly prohibited discrimination listed above, lawyers will also have to comply with the new per se discrimination ban in their personal hiring decisions. Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes -- but it is nevertheless discrimination. In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation. Of course, it may be hard to detect, but so was lawyers' improper treatment of race, sex, or another listed attribute as a "minus" when making their hiring decisions. Lawyers will have to rely on their own conscience to assure their compliance with this new standard.

#### **Impact of ABA Model Rule 8.4(g)**

Ironically, at the same meeting that the ABA House of Delegates adopted the ABA Model Rule 8.4 changes, it adopted a Resolution urging (among other things) "the use of diverse merit selection panels" in connection with federal judge magistrate selection. ABA House of Delegates Resolution 102, Aug. 8-9, 2016. The Resolution also indicated that "[s]itting federal judges can assist the cause of diversity by ensuring that their interns and law clerks represent diverse backgrounds." Id. In its Conclusion,

the Resolution lauds what it called "[p]ipeline recruitment," which includes "targeting minority students" to encourage them to consider judicial careers. However, the Resolution concluded that "[i]t is also essential to have a diverse merit selection panel."  
Id.

These court practices probably do not fall into the definition of "[c]onduct related to the practice of law," but let's assume for a minute that they do. If the "minority students" mentioned in the Resolution's conclusion describe racial minorities, "targeting" them would violate ABA Model Rule 8.4(g). Determining whether the "diversity" references would likewise violate ABA Model Rule 8.4(g) is more subtle. If the word "diverse" in those examples and elsewhere in that Resolution means the type of diversity described above (political viewpoint, geography, educational background, etc.), the Resolution would not run afoul of new ABA Model Rule 8.4(g). But if the Resolution "urges" the court system to make hiring decisions based on the attributes listed in ABA Model Rule 8.4(g), that would be an ethics violation (if it were undertaken in "conduct related to the practice of law.").

The ABA's bizarre approach to ABA Model Rule 8.4(g) was on full display in the October 2017 ABA Journal. In that ABA Journal, noted Stanford Law School Professor Deborah Rhode essentially acknowledged that new ABA Model Rule 8.4(g) cannot (or at least will not) be used for disciplinary purposes.

"The rule provides a useful symbolic statement and educational function," says Rhode, who is Stanford's director of the Center on the Legal Profession. "I understand the First Amendment concerns, but I don't think they present a realistic threat in this context. I don't think these cases are going to end up in bar disciplinary proceedings. They are going to end up in informal mediation and occasionally in

lawsuits if the conduct is egregious and the damages are substantial.

David L. Hudson, Jr., Constitutional Conflict: States split on Model Rule limiting harassing conduct, 103 A.B.A.J. 25, 26, Oct. 2017 (emphases added).<sup>2</sup> So even one of the country's leading ethics authorities concluded that ABA Model Rule 8.4(g) merely "provides a useful symbolic statement and educational function." That is not the ABA Model Rules' purpose, and adopting disciplinary rules merely for symbolic or educational purposes carries frightening implications.

That same article indicated, among other things, that "[s]upporters say that the rule is necessary to enforce anti-discrimination principles." But seven pages later, that ABA Journal ran a story entitled "Mandating Diversity: Law firms borrow from the NFL to address the makeup of their leadership ranks." The article described what is known as the "Mansfield rule," which "mandates that at least 30 percent of a firm's candidates for leadership positions . . . be women, attorneys of color or both." Apparently several large law firms have already adopted or are considering adopting the "Mansfield rule."

Of course, complying with that rule requires discrimination on the basis of gender or race -- which is flatly unethical under the black letter ABA Model Rule 8.4(g), as explained seven pages earlier in the same Journal. The Journal's editors seem not to have noticed the irony of this juxtaposition.

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<sup>2</sup> In a way, this is similar to the ABA's unavoidable concession about its overbroad and unenforceable ABA Model Rule 1.6 confidentiality standard. That confidentiality rule covers all "information relating to the representation." On its face, ABA Model Rule 1.6 would prohibit (absent the client's consent or some other exception) a litigator from congratulating the adversary's lawyer for doing a good job in an oral argument, or prevent a lawyer from telling her husband that she will be in Denver next week taking a deposition in the widely publicized Jones case.

It is also worth examining another example of discrimination that would violate ABA Model Rule 8.4(g) if it were "related to the practice of law." In Grutter v. Bollinger, 539 U.S. 306 (2003), the United States Supreme Court indicated that a university or a law school (as in that case) may "consider race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." Id. at \*334 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)). In their brief supporting respondents in more recent litigation over the University of Texas's race-conscious admissions, the Yale Law School and Harvard Law School deans acknowledged using race as a factor in admitting students to those law schools. Brief of *Amici Curiae* Post & Minow at 2, Fisher v. Univ. of Tex., U.S. (Aug. 13, 2012 (No. 11-345), 2012 WL 3418596, at \*1 ("In both schools' admissions programs, 'race or ethnic background may be deemed a "plus" in a particular applicant's files.")). The United States Supreme Court ultimately upheld the University of Texas's race conscious admissions process – emphasizing the unique educational benefits of a diverse student body. Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013).

As with the awkwardly timed ABA Resolution urging courts to use race as a factor in selecting magistrate judges, and hiring law clerks, the law school admissions process presumably does not involve "conduct related to the practice of law." But if it did, would Yale's and Harvard's deans run afoul of ABA Model Rule 8.4(g)? Of course they would. In both Grutter and Fisher, the United States Supreme Court did not deny that those admissions processes involved race discrimination. To the contrary, the United States Supreme Court acknowledged that the processes involved race discrimination -- but found it constitutional in those specific contexts. So Yale's and

Harvard's use of race as a "plus" might be "lawful" discrimination – but ABA Model Rule 8.4(g) prohibits all discrimination.

### **Conclusion**

More than any other profession, lawyers choose their words deliberately, intending to give them meaning. By consciously adopting language prohibiting all "discrimination on the basis of race, sex" and other listed attributes, ABA Model Rule 8.4(g) clearly forbids lawyers from considering any of the attributes in managing their law firms, recruiting or hiring lawyers, participating in bar associations, etc. Race, sex, and the other attributes may no longer play any role in lawyers' "conduct related to the practice of law." It will be fascinating to see how lawyers practicing in states adopting ABA Model Rule 8.4(g) conduct themselves in light of these carefully chosen words.

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