

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 493

July 15, 2020

Model Rule 8.4(g): Purpose, Scope, and Application

This opinion offers guidance on the purpose, scope, and application of Model Rule 8.4(g). The Rule prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of various categories, including race, sex, religion, national origin, and sexual orientation. Whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is found harmful will be grounds for discipline.¹

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

The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit a lawyer's speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation. The Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.

Besides being advocates and counselors, lawyers also serve a broader public role. Lawyers "should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."² Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. Enforcement of Rule 8.4(g) is therefore critical to maintaining the public's confidence in the impartiality of the legal system and its trust in the legal profession as a whole.³

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² MODEL RULES OF PROF'L CONDUCT Scope [14] (2019) [hereinafter MODEL RULES].

³ As explained in this opinion, events in the legal profession and in the broader community influenced the development of Rule 8.4(g) and demonstrated the necessity for its adoption. The police-involved killing of George Floyd and the unprecedented social awareness generated by it and other similar tragedies have brought the subject of racial justice to the forefront, further underscoring the importance of Rule 8.4(g) and this opinion.

I. Introduction

In August 2016, the ABA House of Delegates adopted Model Rule 8.4(g).⁴ The Rule prohibits a lawyer from “engag[ing] 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.”⁵ Adoption of paragraph (g) followed years of study and debate within the ABA. This opinion offers guidance on the Rule’s purpose, scope, and application.

The conduct addressed by Rule 8.4(g) harms the legal system and the administration of justice. As one court emphasized in sanctioning a male lawyer for disparagingly referring to his female adversary as “babe” and making other derogatory, sexual comments during a deposition,

[The lawyer’s] behavior . . . was a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of “sexual [deposition] tactics.” . . . “These actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors.”⁶

⁴ See *Annual Meeting 2016: ABA Amends Model Rules to Add Anti-Discrimination, Anti-Harassment Provision* (Aug. 8, 2016), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/ (summarizing events at the House of Delegates meeting). The provision was adopted by voice vote, with no one speaking in opposition. See Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 197 (2017).

⁵ MODEL RULES R. 8.4(g).

⁶ *Mullaney v. Aude*, 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999) (quoting trial judge in the case); see also *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 185 (Sup. Ct. 1992) (“[D]iscriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession. . . . ‘The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual. . . . Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. . . .’ While the conduct here falls under the heading of sexist, the same principle applies to any professional discriminatory conduct involving any of the variations to which human beings are subject, whether it be religion, sexual orientation, physical condition, race, nationality or any other difference.”) (quoting Preamble to the Code of Professional Responsibility)); *Cruz-Aponte v. Caribbean Petroleum Corp.*, 123 F. Supp. 3d 276, 280 (D.P.R. 2015) (“When an attorney engages in discriminatory behavior, it reflects not only on the attorney’s lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.”); *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005) (“Interjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole.”); *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563, 568 (Minn. 1999) (maintaining that “it is especially troubling” when a lawyer engages in “race-based misconduct” and, if not addressed, “undermines confidence in our system of justice”).

On June 4, 2020, the Washington Supreme Court issued an open letter regarding the issues raised by the George Floyd situation, forcefully embracing the cause of racial justice: “We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism. . . . We go by the title of “Justice” and we reaffirm our deepest level of commitment to achieving justice by ending racism. We urge you to join us in these efforts. This is our moral imperative.” Supreme Court of Washington, *Open Letter to the Judiciary and the Legal Community* (June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

Comment [3] to the prior version of Rule 8.4 explained that some of the same behavior subjected a lawyer to discipline when the behavior was prejudicial to the administration of justice.⁷ Other rules prohibit similar conduct in contexts related to the representation of a client.⁸ Rule 8.4(g) is

⁷ MODEL RULES R. 8.4(d) cmt. [3] (1998). In particular, the Comment stated:

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

Id. (emphasis added).

⁸ See, e.g., MODEL RULES R. 3.5(d) (prohibits "conduct intended to disrupt a tribunal"); MODEL RULES R. 4.4(a) (prohibits using "means that have no substantial purpose other than to embarrass, delay, or burden a third person" when "representing a client").

The Model Code of Judicial Conduct has long contained a provision prohibiting judges from engaging in this sort of discriminatory and harassing conduct and requiring that judges ensure that lawyers appearing before them adhere to the same restrictions. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2011). The pertinent portion of the Rule provides:

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

MODEL RULES R. 2.3(B) & (C); see also Gillers, *supra* note 4, at 209-11 (discussing adoption of CJC Rule 2.3 and its relationship to Model Rule 8.4(g)). In addition, in 2015, the ABA revised its *Standards for Criminal Justice: Prosecutorial Function and Defense Function* to add anti-bias provisions for both prosecutors and defense counsel. For example, the Defense Function standard provides:

(a) Defense counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Defense counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel's authority.

(b) Defense counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in *all of counsel's work*. A public defense office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the defense office's jurisdiction, and eliminate those impacts that cannot be properly justified.

more expansive, also forbidding harassment and discrimination in practice-related settings beyond the courtroom and in contexts that may not be connected to a specific client representation.⁹ Such breadth was necessitated by evidence that sexual harassment, in particular, occurs outside of court-related and representational situations—for example, in non-litigation matters or at law firm social events or bar association functions.¹⁰

Furthermore, Rule 8.4(g) prohibits conduct that is not covered by other law, such as federal proscriptions on discrimination and harassment in the workplace.¹¹ Although conduct that violates Title VII of the Civil Rights Act of 1964 would necessarily violate paragraph (g),¹² the reverse may not be true. For example, a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g).¹³ The isolated nature of the conduct, however, could be a mitigating factor in the disciplinary process.¹⁴

CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Std. 4-1.6 (4th ed. 2017) (emphasis added). *See also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Std. 3-1.6 (4th ed. 2017) (setting forth the same standard for prosecutors).

⁹ Some jurisdictions have limited their antidiscrimination and anti-harassment rules to conduct related to the representation of a client. *See, e.g.*, COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2020) (conduct "in the representation of a client"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2020) (conduct "in appearing in a professional capacity before a tribunal"); MO. RULES OF PROF'L CONDUCT R. 4-8.4(g) (2020) (conduct "in representing a client"); NEB. RULES OF PROF'L CONDUCT § 3-508.4(d) (2020) (conduct when "a lawyer is employed in a professional capacity").

¹⁰ *See generally* Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women from Harassment*, 96 U. DET. MERCY L. REV. 579 (2019). *See also* STANDING COMMITTEE ON ETHICS & PROF'L RESPONSIBILITY, ET AL., REPORT TO THE HOUSE OF DELEGATES ON REVISED RESOLUTION 109, at 10 (Aug. 2016); *infra* note 31 and accompanying text; *Standing Committee on Ethics and Professional Responsibility Hearing on Model Rule 8.4(g)*, at 39, 61-62 (Feb. 2016) (Wendy Lazar testifying that "so much sexual harassment and bullying against women actually takes place on the way home from an event or in a limo traveling on the way back from a long day of litigation"; former ABA president Laura Bellows testifying about anecdotal evidence of sexual harassment, such as, at a "Christmas party"), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf.

¹¹ *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (2019). *See also* *Bostock v. Clayton County*, 590 U.S. ____ (2020) (recognizing that discrimination and harassment based on sexual orientation and gender identity are prohibited by Title VII as components of "sex," one of the protected categories listed in the statute). Sexual orientation and gender identity are expressly included among Model Rule 8.4(g)'s categories.

¹² *See* MODEL RULES R. 8.4(g) cmt. [3] (noting that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)").

¹³ *See* *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533 (7th Cir. 1993) (observing that "'relatively isolated' instances of non-severe misconduct will not support a hostile environment claim") (quoting *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993); *Martinelli v. Bancroft Chophouse, LLC*, 357 F. Supp. 3d 95, 102 (D. Mass. 2019) (finding that "[a] single, isolated incident of harassment . . . is ordinarily insufficient to establish a claim for hostile work environment unless the incident was particularly egregious and the employee must demonstrate how his or her ability to work was negatively affected").

¹⁴ Whether discipline is imposed for any particular violation of Rule 8.4(g) will depend on a variety of factors, including, for example: (1) severity of the violation; (2) prior record of discipline or lack thereof; (3) level of cooperation with disciplinary counsel; (4) character or reputation; and (5) whether or not remorse is expressed. For a full discussion of factors that influence the imposition of discipline imposed, see ANNOTATED ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2d ed. 2019).

Rule 8.4(g) does not regulate conduct unconnected to the practice of law, as do some other rules of professional conduct.¹⁵ Nevertheless, it does impose a higher standard on lawyers than that expected of the general public.¹⁶ As the Preamble to the Model Rules states, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”¹⁷ Harassment and discrimination damage the public’s confidence in the legal system and its trust in the profession.

Section II of this opinion elaborates further on the scope of Rule 8.4(g) and explains in more detail how it safeguards the integrity of the legal system and the profession. Section III contains hypotheticals that illustrate the Rule’s application.

II. Analysis

Rule 8.4(g) provides:

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. 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.¹⁸

Comment [3] to Rule 8.4(g) addresses the meaning of “discrimination” and “harassment” and emphasizes that such conduct “undermine[s] confidence in the legal profession and the legal

¹⁵ The most noteworthy example is Rule 8.4(c). Indeed, the misconduct addressed in that rule—dishonesty, fraud, deceit, and misrepresentation—has traditionally been viewed as unacceptable by the legal profession, whether it occurs in the courtroom or on the street. Other Model Rules that subject lawyers to discipline for conduct not necessarily connected with the practice of law include Model Rules 8.2.(a) (prohibiting statements by lawyers about judges or other legal officials known to be false or in reckless disregard as to their truth), and 8.4(b) (misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness). *See also* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 67 (2018) (noting that “the bar readily considers conduct completely unconnected to the practice of law when such conduct is either deceptive or otherwise reflective on fitness, with some jurisdictions requiring and others omitting the element that the conduct in question be criminal”).

¹⁶ *See, e.g.*, MODEL RULES R. 3.6(a) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”); MODEL RULES R. 4.1(a) (“In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person . . .”); MODEL RULES R. 8.4(c) (“It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .”). *See also* Hess, *supra* note 10, at 596 (“Rather than having lawyers escape accountability for their sexually harassing conduct that might not meet Title VII’s high bar, the legal profession can instead take the opportunity to hold itself to a higher standard of professionalism.”).

¹⁷ MODEL RULES Preamble [1].

¹⁸ MODEL RULES R. 8.4(g).

system.”¹⁹ It defines “discrimination” to include “harmful verbal or physical conduct that manifests bias or prejudice towards others.”²⁰ Harassment includes “derogatory or demeaning verbal or physical conduct.”²¹ “Sexual harassment” is more specifically described as “unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”²² The Comment also indicates that “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”²³

The existence of the requisite harm is assessed using a standard of objective reasonableness. In addition, a lawyer need only know or reasonably should know that the conduct in question constitutes discrimination or harassment.²⁴ Even so, the most common violations will likely involve conduct that is intentionally discriminatory or harassing.

Comment [4] identifies the scope of “conduct related to the practice of law,” listing such activities as: “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.”²⁵

Comment [5] describes specific circumstances that do not violate paragraph (g). For example, a judge’s determination that a lawyer has utilized peremptory challenges in a discriminatory manner, alone, will not subject the lawyer to discipline.²⁶ Furthermore, limiting one’s practice to providing representation to underserved populations, consistent with the rules of professional conduct and other law, will not constitute a violation.²⁷

Finally, Rule 8.4(g) specifically excludes from its scope “[l]egitimate advice or advocacy consistent with these Rules.” Thus, the Rule covers only conduct for which there is no reasonable justification. Common usage and Rule 8.4(g)’s Comments reinforce this point by elucidating the type of harassing or discriminatory conduct that is disciplinable.

¹⁹ *Id.* cmt. [3].

²⁰ *Id.*

²¹ *Id.*

²² *Id.* See also MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. [4] (noting that “[s]exual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome”).

²³ MODEL RULES R. 8.4(g) cmt. [3].

²⁴ “Knows” and “reasonably should know” are defined terms in the Model Rules. See MODEL RULES R. 1.0(f) & (j).

²⁵ MODEL RULES R. 8.4 cmt. [4].

²⁶ See *id.* cmt. [5].

²⁷ See *id.* The balance of the Comment notes some additional actions that will not violate Rule 8.4(g):

A lawyer may charge and collect reasonable fees and expenses for a representation. . . . 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. . . . A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities.

Id. (citations omitted).

A. “Harassment”

Harassment is a term of common meaning and usage under the Model Rules.²⁸ It refers to conduct that is aggressively invasive, pressuring, or intimidating.²⁹ Rule 8.4(g) addresses harassment in relation to the practice of law that targets others on the basis of their membership in one or more of the identified categories.³⁰

Preventing sexual harassment is a particular objective of Rule 8.4(g).³¹ As Comment [3] makes clear, sexual harassment encompasses “unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”³² This type of behavior falls squarely within the broader, plain meaning of harassment and is consistent with the term’s application throughout the Model Rules.

Model Rule 3.5(c)(3), for example, prohibits lawyers from communicating with jurors or prospective jurors following their discharge if “the communication involves misrepresentation, coercion, duress or *harassment*.”³³ Here, the term “harassment,” as in Rule 8.4(g), refers to conduct that is aggressively invasive, pressuring, or intimidating, including that which is reasonably perceived to be demeaning or derogatory, as demonstrated in *In re Panetta*.³⁴ In *Panetta*, the respondent was disciplined for sending an email to another lawyer who had served as the jury foreperson in a trial the respondent had lost several years earlier. The message was insulting, badgering, and threatening. Its subject line read, “ALL THESE YEARS LATER I WILL NEVER FORGET ... THE LIAR” and went on to state, among other things: “After numerous multi-million dollar verdicts and success beyond anything you will attain in your lifetime, I will never forget you: the bloated Jury [Foreperson] that I couldn’t get rid of and that misled and hijacked my jury.” He ended the message with “Well you should get attacked you A-hole. Good Luck in Hell.”³⁵ The

²⁸ See, e.g., MODEL RULES R. 3.5(c)(3) & 7.3(c)(2) (both discussed in the text). See also MODEL RULES Preamble [5] (“A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”).

²⁹ See, e.g., NEW OXFORD AMERICAN DICTIONARY 790 (3d ed. 2010) (defining “harassment” as “aggressive pressure or intimidation”); MERRIAM-WEBSTER DICTIONARY (defining “harass” as meaning “to annoy persistently”; “to create an unpleasant or hostile situation for, especially by uninvited and unwelcome verbal or physical conduct”), <https://www.merriam-webster.com/dictionary/harass> (last visited June 23, 2020).

³⁰ Consistent with the guiding principle that the Model Rules are rules of reason and “should be interpreted with reference to the purposes of legal representation and of the law itself,” the term “harassment” in Rule 8.4(g) must be construed and applied in a reasonable manner. See MODEL RULES Scope [14].

³¹ See Gillers, *supra* note 4, at 200 (noting that decisions and surveys cited overwhelmingly “disclose that the targets [of bias and harassment] are predominantly women”); Hess, *supra* note 10, at 582 (noting conservatively that an estimated “25% of women in the legal workplace have reported unwanted sexual harassment”); Chuck Lundberg, *#MeToo in the Law Firm*, BENCH & BAR MINN., Vol. 75, No. 3, at 16, 17 (Mar. 2018) (noting that in speaking to many male and female “bar leaders, judges, present and former ethics partners and managing partners at large law firms,” the author learned from the men that they had observed or heard about a “broad spectrum of workplace conduct” of a sexual nature, including “some pretty egregious sexual misconduct”; as for the women with whom the author spoke, “[t]o a person, they were able to relate multiple instances of such behaviors—in law firms, law schools, court chambers, and other legal workplaces”).

³² MODEL RULES R. 8.4(g) cmt. [3].

³³ MODEL RULES R. 3.5(c)(3) (emphasis added).

³⁴ 127 A.D.3d 99 (N.Y. 2d Dept. 2015).

³⁵ *Id.* at 101.

court easily found that this conduct was intended to harass the former jury foreperson and adversely reflected on the respondent's fitness as a lawyer.³⁶

Model Rule 7.3(c)(2) also prohibits "harassment." It forbids "solicitation that involves coercion, duress or *harassment*."³⁷ As with other uses of "harassment" in the Model Rules, a rational reading of the term includes badgering or invasive behavior, as well as conduct that is demeaning or derogatory. Similarly, Model Rule 4.4(a) subjects lawyers to discipline for using "means that have no substantial purpose other than to embarrass, delay, or burden a third person."³⁸ While it does not expressly use the word "harassment," the conduct prohibited is clearly of the same sort that comes within that word's definition.

B. "Discrimination"

Discrimination "includes harmful verbal or physical conduct that manifests bias or prejudice towards others."³⁹ Bias or prejudice can be exhibited in any number of ways, some overlapping with conduct that also constitutes harassment. Use of a racist or sexist epithet with the intent to disparage an individual or group of individuals demonstrates bias or prejudice.

For example, in *In re McCarthy*,⁴⁰ a lawyer was suspended for a minimum of thirty days for sending an email message that was deeply offensive and undoubtedly evinced racial bias. In connection with a real estate title dispute, the secretary of the seller's agent sent a message to the lawyer demanding that he take certain action. The lawyer responded, by stating, among other things, that "I am here to tell you that I am neither you [sic] or [your boss's] n****r."⁴¹ The Indiana Supreme Court found that such remarks "serve only to fester wounds caused by past discrimination and encourage future intolerance."⁴² Similarly, the same court found that a lawyer engaged in conduct manifesting bias or prejudice in relation to a personal bankruptcy proceeding by distributing flyers that referred to other counsel in the matter as "'bloodsucking shylocks' who were part of a 'heavily Jewish [sic] . . . reorganization cartel.'"⁴³

³⁶ *Id.* at 102. *See also* Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Advisory Op. 91-52 (1991) (finding that it was permissible for a lawyer's paralegal to conduct post-trial interviews of jurors, provided that no intimidation or pressure was used).

³⁷ MODEL RULES R. 7.3(c)(2) (emphasis added).

³⁸ MODEL RULES R. 4.4(a).

³⁹ MODEL RULES R. 8.4(g), cmt. [3] (emphasis added). In addition, "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law" may serve as a guide in applying paragraph (g). *Id.*

⁴⁰ 938 N.E.2d 698 (Ind. 2010).

⁴¹ *Id.*

⁴² *Id.* (quoting *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005)).

⁴³ *In re Dempsey*, 986 N.E.2d 816 (Ind. 2013). *See also In re Thomsen*, 837 N.E.2d 1011 (Ind. 2005) (publicly reprimanding lawyer for filing a petition in a divorce action arguing that couple's children were put in "harm's way" by wife's association with an African-American man); *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563 (Minn. 1999) (prosecutor disciplined for filing motion seeking to prohibit defendant's counsel from including a lawyer of color as part of the defense team "for the sole purpose of playing upon the emotions of the jury"); *People v. Sharpe*, 781 P.2d 659, 660, 661 (1989) (prosecutor disciplined for exhibiting racial prejudice against Latinos by stating, in reference to two Latino defendants, that he did not "believe either one of those chili-eating bastards").

As many courts have emphasized, such behavior is unacceptable generally but especially when engaged in by members of the bar. In *In re Charges of Unprofessional Conduct*,⁴⁴ for instance, the Minnesota Supreme Court expressed this general judicial perspective: “When any individual engages in race-based misconduct it undermines the ideals of society founded on the belief that all people are created equal. When the person who engages in this misconduct is an officer of the court, the misconduct is especially troubling.”⁴⁵ Rule 8.4(g) embodies this principle.

C. Rule 8.4(g) and the First Amendment

The Committee does not address constitutional issues, but analysis of Rule 8.4(g), as with our analysis of other rules, is aided by constitutional context.⁴⁶ For Rule 8.4(g), two important constitutional principles guide and constrain its application. First, an ethical duty that can result in discipline must be sufficiently clear to give notice of the conduct that is required or forbidden. Second, the rule must not be overbroad such that it sweeps within its prohibition conduct that the law protects. Identifying the proper balance between freedom of speech or religion and laws against discrimination or harassment is not a new problem, however. The scope of Rule 8.4(g) is no more or less reducible to a precise verbal formula than any number of regulations of lawyer speech or workplace speech that have been upheld and applied by courts.⁴⁷

Courts have consistently upheld professional conduct rules similar to Rule 8.4(g) against First Amendment challenge. For example, in addressing the constitutional authority of a court of appeals to discipline a lawyer for “conduct unbecoming a member of the bar of the court,” the Supreme Court observed that a lawyer’s court-granted license “requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.”⁴⁸ More recently, the Kentucky Supreme Court echoed this message in an opinion concerning Rule 8.2(a), which generally prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judicial or other legal official, stating that regulation of lawyer speech “is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of ‘[t]he license granted by the court.’”⁴⁹

⁴⁴ 597 N.W.2d 563 (Minn. 1999).

⁴⁵ *Id.* at 567-68.

⁴⁶ *See, e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 490 (2020) (discussing ability-to-pay inquiries required by the due process and equal protection clauses, as interpreted in *Bearden v. Georgia*, 461 U.S. 669 (1983) and its progeny); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 486, at 9 (2019) (discussing Sixth Amendment Right to Counsel rooted “[i]n a series of cases beginning with *Argersinger v. Hamlin*,” 407 U.S. 25 (1972)); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009) (discussing obligations based on *Brady v. Maryland*, 373 U.S. 83 (1963)).

⁴⁷ For a discussion of workplace speech limitations upheld against a First Amendment challenge, see Aviel, *supra* note 15, at 48-50. For a discussion of lawyers’ speech and Rule 8.4(g), see Robert N. Weiner, “*Nothing to See Here*”: *Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUBLIC POLICY 125 (2018). *See also infra* note 49.

⁴⁸ *In re Snyder*, 472 U.S. 634, 644-45 (1985).

⁴⁹ *Ky. Bar Ass’n v. Blum*, 404 S.W.3d 841, 855 (Ky. 2013) (*quoting In re Snyder*) (observing that while a lawyer does not surrender First Amendment rights in exchange for a law license, once admitted, “he must temper his criticisms in accordance with professional standards of conduct”) (*quoting In re Sandlin*, 12 F.3d 861, 866 (9th Cir. 1993)). There are also other Model Rules that curtail attorney speech but are uniformly understood as proper regulatory measures, including, for example, the following: Rule 1.6 (generally prohibiting disclosure of “information relating to the representation of a client”); Rule 3.5(d) (prohibiting a lawyer from “engag[ing] in conduct intended to disrupt a tribunal”); Rule 3.6 (restricting a lawyer’s ability to comment publicly about an investigation or litigation matter in which the lawyer is participating or has participated when the lawyer knows or

Rule 8.4(d)'s prohibition of conduct that is prejudicial to the administration of justice has likewise withstood constitutional challenges based on vagueness and overbreadth arguments, with one court observing that: "The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen."⁵⁰ Similarly, in rejecting a vagueness challenge to the prohibition against conduct prejudicial to the administration of justice, the Fifth Circuit stated:

The traditional test for vagueness in regulatory prohibitions is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." . . . The particular context in which a regulation is promulgated therefore is all important. . . . *The regulation at issue herein only applies to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the "lore of the profession."*⁵¹

There is wide and longstanding acceptance of these principles, given lawyers' status as members of the bar. For example, in upholding the constitutionality of DR 1-102(A)(6), which prohibited a lawyer from engaging "in any other conduct that adversely reflects on [the lawyer's] fitness to practice law," the New York Court of Appeals noted: "As far back as 1856, the Supreme Court acknowledged that 'it is difficult if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed'. . . . Broad standards governing professional conduct are permissible and indeed often necessary."⁵²

Furthermore, the fact that it is possible to construe a rule's language to reach conduct protected by the First Amendment is not fatal to its application to unprotected conduct. As observed by Justice Scalia in *Virginia v. Hicks*:

[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct". . . . For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally

reasonably should know that the comments "have a substantial likelihood of materially prejudicing an adjudicative proceeding"); Rule 4.1 (prohibiting a lawyer from "knowingly mak[ing] a false statement of material fact or law to a third person"); and Rule 7.1 (limiting communications about a lawyer or a lawyer's services to those that are truthful and not otherwise misleading).

⁵⁰ *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977), *overruled on other grounds*, by *In re Hutchinson*, 534 A.2d 919 (D.C. 1987) (upholding against a vagueness challenge DR 1-102(A)(5), Rule 8.4(d)'s predecessor).

⁵¹ *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (emphasis added); *see also* Attorney Grievance Comm'n of Maryland v. Korotki, 569 A.2d 1224, 1235 (1990) (observing that a professional conduct rule for lawyers need not "meet the standards of clarity that might be required for rules governing the conduct of laypersons") (citations omitted).

⁵² *In re Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991) (quoting *Ex Parte Secombe*, 60 U.S. [19 How.] 9, 14 (1857) (citing *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 395 (Minn. 1985), appeal dismissed, 474 U.S. 976 (1985)); *see also In re Knutson*, 405 N.W.2d 234, 238 (Minn. 1987).

unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law “overbroad,” we have insisted that a law’s application to protected speech be “substantial,” not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications . . . before applying the “strong medicine” of overbreadth invalidation.⁵³

Rule 8.4(g) promotes a well-established state interest by prohibiting conduct that reflects adversely on the profession and diminishes the public’s confidence in the legal system and its trust in lawyers.⁵⁴

Numerous judicial opinions confirm the significance and legitimacy of a state’s regulatory interest in this area. For instance, the Minnesota Supreme Court has noted that “racially-biased actions” engaged in by lawyers “not only undermine confidence in our system of justice, but also erode the very foundation upon which justice is based.”⁵⁵ Similarly, in affirming the public reprimand of a lawyer who made racially disparaging accusations in a court filing, the Indiana Supreme Court stressed that “[i]nterjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole.”⁵⁶ The New Jersey Supreme Court expressed the same opinion in *Matter of Vincenti*, observing that:

Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, be it based on race or color, . . . or . . . on gender, or ethnic or national background or handicap, is especially offensive. In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.⁵⁷

Rule 8.4(g) protects specific categories of victims from identified harm, and a violation can only take place when the offending conduct engaged in is “related to the practice of law” and the lawyer knows or reasonably should know that it constitutes harassment or discrimination.

Using these various interpretative principles and applying them in an objectively reasonable manner, a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law. For example, in a case referenced earlier, under Indiana’s version of Rule 8.4(g), a lawyer received a three-year suspension for distributing flyers in relation to personal litigation depicting his

⁵³ 539 U.S. 113, 119-20 (2003) (emphasis in original) (citations omitted); *see also* *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (“Assuming for the argument that [the rule prohibiting conduct prejudicial to the administration of justice] might be considered vague in some hypothetical, peripheral application, this does not, as this Court [has] observed, . . . warrant throwing the baby out with the bathwater. To invalidate the regulation in toto, . . . we would have to hold that it is impermissibly vague in all of its applications.”) (citations omitted).

⁵⁴ *See supra* note 6 and accompanying text.

⁵⁵ *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563, 568 (Minn. 1999).

⁵⁶ *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005).

⁵⁷ 554 A.2d 470, 474 (N.J. 1989).

adversaries as “slumlords,” calling their counsel “bloodsucking shylocks,” and making various derogatory remarks about Jews generally.⁵⁸ Another Indiana lawyer representing a husband in a custody dispute violated that state’s version of Rule 8.4(g) by filing a petition in which he alleged that the wife associated herself “in the presence of a black male, and such association [caused] and [placed] the children in harm’s way.”⁵⁹ Similarly, a Colorado lawyer was disciplined for disparagingly referring to a female judge as a “c**t” in the course of negotiating a plea deal with prosecutors.⁶⁰

Each of these examples would likewise violate Model Rule 8.4(g), even if the conduct occurred outside of a court-related setting. It need only take place in a context related to the practice of law, as Comment [4] explains.

III. Application of Rule 8.4(g) to Hypotheticals

To further illustrate the scope and application of Rule 8.4(g), this section discusses several representative situations.

- (1) A religious organization challenges on First Amendment grounds a local ordinance that requires all schools to provide gender-neutral restroom and locker room facilities.⁶¹ Would a lawyer who accepted representation of the organization violate Rule 8.4(g)?

No. This situation does not involve the type of conduct covered by Rule 8.4(g). The blackletter text underscores this by explaining that the “paragraph does not limit the ability of a lawyer to *accept, decline or withdraw* from a representation in accordance with Rule 1.16.”⁶² In addition, the provision’s next sentence further emphasizes that it “does not preclude legitimate advice or advocacy consistent with these Rules.” Though individuals may disagree with the position the lawyer in the hypothetical would be defending, that would not affect the legitimacy of the representation.

- (2) A lawyer participating as a speaker at a CLE program on affirmative action in higher education expresses the view that rather than using a race-conscious process in admitting African-American students to highly-ranked colleges and universities, those students would be better off attending lower-ranked schools where they would be more likely to excel. Would the lawyer’s remarks violate Rule 8.4(g)?

No. While a CLE program would fall within Comment [3]’s description of what constitutes “conduct related to the practice of law,” the viewpoint expressed by the lawyer would not violate Rule 8.4(g). Specifically, the lawyer’s remarks, without more, would not constitute “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . race.” A general point of

⁵⁸ *In re Dempsey*, 986 N.E.2d 816, 817 (Ind. 2013) (court specifically found that “none of these violations are based on any communication that falls within Respondent’s broad constitutional right to freedom of speech and expression”).

⁵⁹ *Thomsen*, 837 N.E.2d at 1012.

⁶⁰ *People v. Gilbert*, 2011 WL 10PDJ067, *10-11 (Colo. O.P.D.J. Jan. 14, 2011).

⁶¹ *Cf. Texas Att’y Gen. Op. KP-0123* (Dec. 20, 2016).

⁶² MODEL RULES R. 8.4(g) (emphasis added).

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

- (3) A lawyer is a member of a religious legal organization, which advocates, on religious grounds, for the ability of private employers to terminate or refuse to employ individuals based on their sexual orientation or gender identity.⁶³ Will the lawyer's membership in this legal organization constitute a violation of Rule 8.4(g)?

No. As with the prior hypothetical, Rule 8.4(g) does not forbid a lawyer's expression of his or her political or social views, whether through membership in an organization or through oral or written commentary. Furthermore, to the extent that such conduct takes the form of pure advocacy it would not qualify as sufficiently "harmful" or targeted. Moreover, even though the Supreme Court has now recognized that discrimination based on sexual orientation and gender identity violates Title VII,⁶⁴ it is not a violation of Rule 8.4(g) to express the view that the decision is wrong.

- (4) A lawyer serving as an adjunct professor supervising a law student in a law school clinic made repeated comments about the student's appearance and also made unwelcome, nonconsensual physical contact of a sexual nature with the student. Would this conduct violate Rule 8.4(g)?

Yes. This is an obvious violation and demonstrates the importance of making the scope of the provision broad enough to encompass conduct that may not necessarily fall directly within the context of the representation of a client.⁶⁵

- (5) A partner and a senior associate in a law firm have been tasked with organizing an orientation program for newly-hired associates to familiarize them with firm policies and procedures. During a planning session, the partner remarked that: "Rule #1 should be never trust a Muslim lawyer. Rule #2 should be never represent a Muslim client. But, of course, we are not allowed to speak the truth around here." Do the partner's remarks violate Rule 8.4(g)?

Yes. Even if one assumes that the associate was not Muslim, the comments violate Rule 8.4(g).⁶⁶ The partner's remarks are discriminatory in so far as they are harmful and manifest bias and prejudice against Muslims. Furthermore, the partner surely knew or reasonably should have known this. In addition, the fact that the comments may not have been directed at a specific individual would not insulate the lawyer from discipline; though, in many instances, the offending conduct will be targeted towards

⁶³ See *Cf.* Texas Att'y Gen. Op. KP-0123 (Dec. 20, 2016).

⁶⁴ See *Bostock v. Clayton County*, 590 U.S. ___ (2020); see also *supra* note 11.

⁶⁵ See *In re Griffith*, 838 N.W.2d 792 (Minn. 2013) (lawyer suspended for ninety days and required to petition for reinstatement for engaging in unwelcome verbal and physical sexual advances towards a student the lawyer was supervising in a law school clinic); see also *id.* at 793-96 (Lillenhaug, J., dissenting) (maintaining that more severe discipline was warranted in light of the egregious nature of the misconduct).

⁶⁶ *Cf. In re McCarthy*, 938 N.E.2d 698 (Ind. 2010); see also *supra* text accompanying notes 40-42.

someone who falls within a protected category. Because the remarks were made within the law firm setting, they were “related to the practice of law.” Moreover, given the supervisory-subordinate nature of the partner’s relationship to the associate, the remarks may influence how similarly-situated firm lawyers treat clients, opposing counsel, and others at the firm who are Muslim.

IV. Conclusion

Model Rule 8.4(g) prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassing or discriminatory. Whether conduct violates the Rule must be assessed using a standard of objective reasonableness, and only conduct that is found harmful will be grounds for discipline.

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

The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit in any way a lawyer’s speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer’s expression does not establish a violation. The Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.

Besides being advocates and counselors, lawyers also serve a broader public role. Lawyers “should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”⁶⁷ Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. Enforcement of Rule 8.4(g) is therefore critical to maintaining the public’s confidence in the impartiality of the legal system and its trust in the legal profession as a whole.

Abstaining: Hon. Goodwin Liu.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Barbara S. Gillers, New York, NY ■ Lonnie T. Brown, Athens, GA ■ Robert Hirshon, Ann Arbor, MI
■ Hon. Goodwin Liu, San Francisco, CA ■ Thomas B. Mason, Washington, D.C. ■ Michael H. Rubin, Baton Rouge, LA ■ Lynda Shely, Scottsdale, AZ ■ Norman W. Spaulding, Stanford, CA ■ Elizabeth Clark Tarbert, Tallahassee, FL ■ Lisa D. Taylor, Parsippany, NJ

CENTER FOR PROFESSIONAL RESPONSIBILITY

©2020 by the American Bar Association. All rights reserved.

⁶⁷ MODEL RULES Preamble [6].