

American Bar Association
Standing Committee on Ethics and Professional Responsibility
Working Discussion Draft – Revisions to Model Rule 8.4
Language Choice Narrative

July 16, 2015

Introduction

In May 2014, the American Bar Association's Goal III¹ Entities -- the Commission on Disability Rights, the Commission Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession -- wrote to the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") urging it to draft amendments to the ABA Model Rules of Professional Conduct that would directly address lawyer bias, prejudice, and harassment in the black letter of the Rules. This issue is currently addressed only in Comment [3] to ABA Model Rule of Professional Conduct 8.4(d). The Goal III Entities wrote that this indirect reference in a Comment to a Rule was not sufficient for this purpose.²

Currently, Rule 8.4(d) prohibits conduct prejudicial to the administration of justice. Comment [3] to Rule 8.4 provides one example of such conduct. That Comment reads:

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.

As noted in the Goal III Entities' letter to the Ethics Committee, the ABA Model Rules of Professional Conduct do not facially address bias, discrimination, or harassing behavior by a lawyer. By contrast, twenty-four jurisdictions in the United States have adopted in the black letter of their Rules of Professional Conduct some form of anti-bias, anti-prejudice, and/or anti-harassment rule prohibiting lawyers from engaging in such conduct. These 24 jurisdictions prohibit such behavior in a number of different ways – sometimes very broadly, sometimes more narrowly. In addition, fifteen jurisdictions in the United States have adopted an official Comment to their Rules of Professional Conduct to address bias, discrimination and prejudicial behavior by lawyers. These Comments either mirror Comment [3] to ABA Model Rule 8.4 or contain substantially similar restrictions and exceptions. The remaining fourteen jurisdictions do not address lawyer bias or prejudice in their Rules of Professional Conduct. Appendix B is a chart detailing all of the state rules.

¹ ABA's Goal III is: Eliminate Bias and Enhance Diversity.

² The letter from the Goal III entities is provided in Appendix A.

In response to the Goal III Entities' letter, Ethics Committee Chair Myles Lynk appointed an ad hoc Working Group to consider this issue and solicited representatives from the Ethics Committee, the Goal III Entities, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers to participate in the research and drafting of a proposed rule. Paula Frederick, former member of the Board of Governors, immediate past chair of the Ethics Committee and former chair of the Center for Racial and Ethnic Diversity, graciously agreed to serve as chair of the Working Group. The Working Group met, researched the issue and provided valuable input and recommendations to the Ethics Committee.

Based on this input and the recommendation of the Working Group, the Ethics Committee crafted the following working draft amendment to ABA Model Rule of Professional Conduct 8.4.

Rule 8.4, Misconduct

It is professional misconduct for a lawyer to:

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

The new language in Comment [3] to Rule 8.4 would read:

~~[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.~~

The Ethics Committee has concluded that a black letter Rule in the ABA Model Rules of Professional Conduct prohibiting lawyers from knowingly discriminating against or harassing

others because of their race or other specific factor set forth in the proposal, is appropriate. While the current Model Rules do address this conduct through Comment [3] to Rule 8.4, “[C]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.” See ABA Model Rules of Professional Conduct Preamble and Scope, paragraph [14]. Lawyers are licensed officers of the court. Discrimination and harassment represent unacceptable behavior. They undermine confidence in the legal profession and our legal system and such conduct is contrary to the fundamental principle that all people deserve to be treated with equal dignity and respect.

Drafting Choices

Drafting rules requires writers to consider the meaning and possible effect of every word. When precisely crafted, every word choice reflects the intent of the drafter. The following is an in-depth discussion of the language choices made by the Ethics Committee for this proposal.

1. *Mens rea* requirement

Under the current Model Rules, a violation of Rule 8.4(d) for bias and prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status requires a *mens rea* of knowledge. Knowledge is a defined term and “denotes actual knowledge of the fact in questions. A person’s knowledge may be inferred from circumstances.”

By contrast, both the ABA’s Model Judicial Code and the ABA Criminal Justice Standards prohibit biased and prejudiced conduct, but neither the Code nor the Standards contain a knowledge requirement in these provisions.³ Most states that have written their own anti-bias rule do not include a knowledge requirement. These states include: Colorado, Florida, Indiana, Iowa, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, Ohio, Rhode Island, Washington, Wisconsin.

Nonetheless, the Ethics Committee was concerned that a model rule that did not include a *mens rea* would in effect impose a strict liability standard on the profession. The Ethics Committee was not convinced that this was necessary, or that prohibiting “knowing” conduct would not adequately prevent the conduct this Rule is intended to address. Therefore, the Ethics Committee decided to retain the knowledge requirement that currently exists in Comment [3] to Model Rule of Professional Conduct 8.4.

The Ethics Committee does, however, seek comments on this issue: Should the Rule include a *mens rea*?

2. Prohibited Conduct

The draft proposal would prohibit a lawyer from knowingly harassing or discriminating against another person. The Ethics Committee chose to not use the phrase “manifest bias or prejudice” for a number of reasons. First, because the Model Rules of Professional Conduct are rules of

³ See ABA Model Code of Judicial Conduct, Rule 2.3; ABA Criminal Justice Standards for the Prosecution Function 3-1.6; ABA Criminal Justice Standards for the Defense Function 4-1.6.

conduct and not rules enacted to regulate thoughts or feelings of lawyers. The word “discrimination” more accurately reflects conduct or action, while bias and prejudice are deemed to be opinions or feelings.

However, based on the recommendation of the ad hoc Working Group, the Ethics Committee recommends expanding the prohibited conduct in current Comment [3] to include harassing conduct. The ABA Model Code of Judicial Conduct, Rule 2.3(C) already requires judges to ensure lawyers refrain from harassment in proceedings before the court, and harassment based on gender is also prohibited by statute. The Ethics Committee notes that lawyers are licensed officers of the court. When lawyers engage in harassment their conduct demonstrates a lack of respect for the law and undermines the integrity and impartiality of the judicial system.

The Ethics Committee seeks comments on this issue: should the prohibition apply to discrimination or should the phrase “manifest bias or prejudice” remain? Also, should the prohibited conduct be expanded to include harassment?

3. Expanding the Categories of Persons Protected by the Rule

The categories of persons identified in Comment [3] to Rule 8.4 include those discriminated against because of their “race, sex, religion national origin, disability, age, sexual orientation or socioeconomic status.”

There is ongoing discussion about continued inclusion of “socioeconomic status” as a protected class. Research failed to reveal either a definition for the term or its application in any disciplinary context. To address a concern raised about including socioeconomic status in the list of protected groups, the suggested Comment includes the statement: “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.” This language recognizes that this provision could affect lawyers and legal service organizations that represent other defined groups as well. However, there was discussion of how the Committee would define “underserved.” For example, if a lawyer represents only wives in family law matters, that is not an “underserved” population. Would this practice violate the Rule? Similarly there are a variety of lawyers who limit their practices on the basis of particular economic factors, e.g. high-asset divorce cases, white collar criminal defense, or corporate mergers and acquisitions. Would such limited practices violate the Rule?

The Goal III Entities recommended the addition of “gender identity.” In subsequent meetings, the Working Group also recommended the addition of “ethnicity” and “marital status” as protected classes. The prohibition against discrimination of persons based on their marital status and ethnicity already exists in the ABA Model Judicial Code, Rule 2.3(C), but it does not appear in Comment [3] to ABA Model Rule 8.4.

The Ethics Committee seeks comments on whether expanding the list of classes to include gender identity, ethnicity, and marital status is appropriate.

The Ethics Committee also seeks comments on whether socioeconomic status should be included in this Rule.

4. Reach of the Rule

The proposed draft reframes the scope of the prohibition from conduct “in the course of representing a client” to either “engaged in conduct related to the practice of law” or “engaged in the practice of law.”

The Ethics Committee believes that jurisdictions should have the option of establishing a narrow or expansive rule to fit the needs of their jurisdiction. At the same time, the Committee rejected retaining the scope of current Comment [3], “in the course of representing a client,” because too many jurisdictions have read this provision to mean that the lawyer’s biased or prejudiced act must be specifically connected to court proceedings. In fact, many transactional lawyers are not engaged in trial work, and trial lawyers necessarily engage in a variety of practice-related matters that are not related to specific court proceedings.

At the same time, the Ethics Committee is also cognizant of lawyers’ First Amendment rights to express their personal views on any subject. Therefore, the Ethics Committee seeks input on whether the Rule’s Comment should address the issue of a lawyer engaged in, for example, a political campaign or other advocacy that is unrelated to the practice of law.

5. Exclusions

The proposed draft retains the “legitimate advocacy” exception in current Comment [3] to Model Rule 8.4. However, the exclusion for legitimate advocacy would be tempered by the phrase “when they are at issue in a representation,” so as to provide balance to the exception.

The proposal also retains the caution in Comment [3] that a trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

The Ethics Committee seeks comments on whether these exceptions should continue.

6. Providing Guidance to Disciplinary Counsel

The proposed language for revised Comment [3] includes the statement, “Paragraph (g) incorporates by reference relevant holdings by appropriate courts and administrative agencies.” This statement is included to explain that relevant holdings from courts and agencies enforcing civil rights laws may be used to provide context and standards for disciplinary counsel seeking to enforce the Rule.

The Ethics Committee seeks comment on whether this language provides sufficient guidance to disciplinary counsel.

7. Location of the Rule

Finally, the Committee decided to place the amended Rule into Rule 8.4, Misconduct. There was, however, some discussion about placing this provision in a separate free-standing Rule, for example, a new Model Rule 8.6, Harassment and Discrimination. Because the current Comment is in Rule 8.4 and the majority of states with similar rules have located their comparable rules in Rule 8.4, the Ethics Committee decided to follow that practice, but has left open the possibility of an alternative placement. Therefore, the Ethics Committee seeks comment on this issue.

Appendix A



AMERICAN BAR ASSOCIATION

Paula Frederick
American Bar Association
Chair
Standing Committee on Ethics & Professional Responsibility
321 North Clark Street
Chicago, IL 60654

Dear Ms. Frederick:

As you know, the mission of the American Bar Association is “to serve equally our members, our profession, and the public by defending liberty and delivering justice as the national representative of the legal profession.” To advance that mission, the ABA adopted four goals, including Goal III, which seeks “to eliminate bias and to enhance diversity.” Goal III includes the specific objectives to:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons
2. Eliminate bias in the legal profession and the justice system.

Also in furtherance of that mission, the ABA created four commissions that have the mandate to advance the aspirations of Goal III. As the chairs of those Goal III commissions, we believe that if the ABA truly wishes to deliver justice and to eliminate bias, it is incumbent upon the Association to ensure that its own rules of professional conduct reflect these values.

Accordingly, we ask that the Standing Committee on Ethics & Professional Responsibility (“SCEPR”) work to amend ABA Model Rule of Professional Conduct 8.4 to expressly address bias, prejudice, and harassment.

The ABA Model Code of Judicial Conduct Rule 2.3 expressly addresses bias, prejudice, and harassment within the court system, but it does not extend to the conduct of lawyers in other professional settings.¹ No ABA Model Rule of Professional Conduct expressly addresses such conduct and Rule 8.4 does so only through a comment.² We believe that lawyers should be held to the same standard of conduct whether they are in the courtroom or not.

We do not believe that the current Rule 8.4(d) is sufficient. It does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system. Indeed, the use of “prejudicial” in the Rule seems to relate to prejudice not in the context of nondiscrimination but rather in the context of general fairness by the tribunal.

We also do not believe that the comment to Rule 8.4(d) provides sufficient breadth or clarity. It addresses bias or prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

It is also important to include the language in the rule itself and not just a comment, because not all states that adopt the ABA Model Rules of Professional Conduct also adopt the comments to those rules. We have attached a summary of all relevant state bar rules which shows that fourteen (14) states have adopted ABA Model Rule 8.4(d) without the comment while only ten (10) states have included some version of the comment. Meanwhile, twenty (20) states and the District of Columbia have recognized the need to expressly address bias in the profession and/or the justice system by adopting an explicit rule against it. Some of these states have added such a rule to the existing Rule 8.4(d), thus demonstrating their belief that Rule 8.4(d) either does not address the issue or does not do so adequately. Also attached is a compilation of the relevant language from each of those 21 jurisdictions. We believe that the language in these rules, together with the existing ABA Comment to Model Rule 8.4, can serve as guidance for adopting a more explicit and comprehensive ABA rule.

In developing a new rule, we respectfully urge SCEPR to address harassment and intimidation as a form of bias, as Model Rule of Judicial Conduct 2.3 already does. Harassment and bullying of witnesses, employees, colleagues, and opposing counsel on the basis of sex, race, ethnicity, disability, sexual orientation, gender identity, and other protected categories should not be tolerated within the legal profession.

Finally, we request that the new rule include “gender identity” in addition to the categories already addressed by Model Rule of Judicial Conduct 2.3. This comports with the ABA’s commitment to nondiscrimination and its establishment of a Commission on Sexual Orientation and Gender Identity.

The ABA has made impressive strides in achieving greater diversity and providing leadership for eliminating bias, prejudice, and harassment in the legal profession and the legal system. We believe that it is time for its Model Rules of Professional Conduct to catch up with these achievements.

We appreciate your consideration of this request and look forward to working with SCEPR as you undertake this review. We are ready to provide any assistance you require during this process. Please do not hesitate to contact any one of us or SOGI commissioner Kristen Galles to discuss our request.

Thank you for your consideration. We look forward to working with you on this important issue.

Sincerely,



James J.S. Holmes, Chair,
ABA Commission on Sexual Orientation
and Gender Identity



Mark D. Agrast
ABA Commission on Disability Rights



Roberta D. Liebenberg
ABA Commission on Women in the Profession



Reginald M. Turner, Jr., Chair
ABA Commission on Racial and Ethnic
Diversity in the Profession

Appendix B

July 1, 2015 Anti-bias provisions in state rules of professional conduct

Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
ABA Model Rule 8.4(d) and Comment [3]	Comment [3]	Knowingly manifest by words or conduct bias or prejudice	race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status	In the course of representing a client Prejudicial to the administration of justice Legitimate advocacy not a violation. Trial judge's finding of discriminatory use of peremptory challenges cannot alone establish a violation
AL	Adopted 8.4(d); Did not adopt Comment [3].			
AK	Did not adopt Rule 8.4(d) or Comment [3]			
AZ	Adopted Rule 8.4(d) and most of Comment [3]. Limitation worded slightly differently.	knowingly manifests by words or conduct, bias or prejudice	race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph	in the course of representing a client when such actions are prejudicial to the administration of justice This does not preclude legitimate advocacy when race, sex,

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
AR	Adopted Rule 8.4(d). Comment [3] language differs.	discriminatory conduct	The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such discriminatory conduct, when directed towards litigants, jurors, witnesses, other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality.	religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. In connection with the practice of law 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. This subdivision does not prohibit a lawyer from representing a client accused of committing discriminatory conduct.

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
CA	Black letter 2-400 Unlawfully discriminate or knowingly permit	unlawfully discriminate or knowingly permit unlawful discrimination	on the basis of race , national origin, sex, sexual orientation, religion, age or disability in:	<p>In the management or operation of a law practice in</p> <p>(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or</p> <p>(2) accepting or terminating representation of any client</p> <p>(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have</p>

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Anti-bias provisions in state rules of professional conduct

Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
CO	Black letter Rule 8.4(g)	engage in conduct that exhibits or is intended to appeal to or engender bias against a person	race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status	In the representation of a client been dismissed.
CN	Adopted Rule 8.4(d). Comment [3] language differs.	Knowingly manifests by words or conduct bias or prejudice	race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status	In the course of representing a client Prejudicial to the administration of justice Legitimate advocacy not a violation. Does not adopt the language on a trial judge's finding of discriminatory use of peremptory challenges.
DE	Adopted ABA Model Rule 8.4(d) and Comment [3]			
FL	Black letter Rule 4-8.4(d)	Engage in conduct Knowing or callous indifference	on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age,	In connection with practice of law conduct that is prejudicial to the administration of justice, against litigants, jurors, witnesses,

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
GA	Did not adopt Rule 8.4(d) or Comment [3]	Disparage, humiliate, discriminate	socioeconomic status, employment, or physical characteristic;	court personnel, or other lawyers
HA	Did not adopt Rule 8.4(d) or Comment [3]			
ID	Adopted Rule 8.4(d) and Comment [3]			
IL	Black letter Rule 8.4 (j) Also adopts ABA Rule 8.4(d) and Comment [3]	(j) violate a federal, state or local statute or ordinance that prohibits discrimination	based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status	by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited

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Anti-bias provisions in state rules of professional conduct

Jurisdiction	Addressed in Rule or Comment?	Means rea and behavior prohibited	Protected classes	Limitations/defenses
				conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.
IN	Black letter Rule 8.4(g) No Comment	engage in conduct manifesting, by words or conduct, bias or prejudice	based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors.	in a professional capacity Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
IA	Black letter Adopted ABA Model Rule 8.4(d)	Engage in sexual harassment or other unlawful discrimination		In the practice of law

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
KS	and Comment [3] and adopted 8.4(g) on harassment	Knowingly permit staff or agents subject to lawyer's direction or control to		
KY	Kansas adopted ABA Model Rule 8.4(d) but did not adopt Comment [3]			
LA	Kentucky did not adopt ABA Model Rule 8.4(d) or Comment [3]			
ME	Louisiana adopted ABA Model Rule 8.4(d) but has no official Comments	knowingly manifests by words or conduct, bias or prejudice	upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status,	in the course of representing a client, Legitimate advocacy does not violate paragraph (d). when such actions are prejudicial to the administration of justice. Notwithstanding the foregoing, a trial judge's finding that

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
MY	Black letter Rule 8.4(e)	knowingly manifest by words or conduct bias or prejudice	based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status	peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. when acting in a professional capacity when such action is prejudicial to the administration of justice, legitimate advocacy is not a violation of this paragraph;
MA	Black letter R. 3.4 (i) Massachusetts has adopted ABA Model Rule 8.4(d) but not Comment [3]	engage in conduct manifesting bias or prejudice	based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person.	(i) in appearing in a professional capacity before a tribunal, This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.
MI	Black letter Rule 6.5	A lawyer shall treat with courtesy and respect all persons involved in the legal process.	race, gender, or other protected personal characteristic	Addresses supervision in the Comment
MN	Black letter	harass a person;	sex, race, age, creed, religion, color, national origin,	in connection with a lawyer's professional activities

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
	Rule 8.4(g)		disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status	Comment [4] - What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.
MN	Black letter Rule 8.4 (h)	commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer	Comment [5] - Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status may violate either paragraph (g) or paragraph (h).	(h) Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: (1) the seriousness of the act, (2) whether the lawyer knew that the act was prohibited by statute or ordinance, (3) whether the act was part of a pattern of prohibited conduct, and (4) whether the act was committed in connection with the lawyer's professional activities; Comment [6] - a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the

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Anti-bias provisions in state rules of professional conduct

Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
MS	Mississippi adopted ABA Model Rule 8.4(d) but did not adopt Comment [3]			<p>lawyer's professional activities.</p> <p>Comment [7] [7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).</p>
MO	Black letter	manifest by words or conduct	race, sex, religion, national	in representing a client

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
	Rule 4-8.4 (g) substantially similar to Comment [3]	<p>bias or prejudice</p> <p>Comment [4] Whether a lawyer's conduct constitutes professional misconduct in violation of Rule 4-8.4(g) can be determined only by a review of all of the circumstances; e.g., the gravity of the acts and whether the acts are part of a pattern of prohibited conduct. For the purpose of Rule 4-8.4(g), "manifest ... bias or prejudice" is defined as words or conduct that the lawyer knew or should have known discriminate against, threaten, harass, intimidate, or denigrate any individual or group. Prohibited conduct includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:</p> <p>(a) submission to that conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;</p> <p>(b) submission to or rejection of such conduct by an individual is used as a factor in</p>	origin, disability, age, or sexual orientation	Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues.

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
MT	Montana adopted ABA Model Rule 8.4(d) but adopted no comments.			
NE	Black letter Adopts an amended Rule 8.4(d); Adopts Comment [3]	shall not engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel knowingly manifests by words or conduct, bias or prejudice – from adoption of Comment [3]	race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status.	Once a lawyer is employed in a professional capacity in the course of such employment, This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
NV				

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
NH	Nevada adopted ABA Model Rule 8.4(d) but did not adopt Comments			
NH	New Hampshire did not adopt ABA Model Rule 8.4(d) or Comment [3]			
NJ	Black letter Rule 8.4(g)	conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) where the conduct is intended or likely to cause harm Supreme Court Comment – the drafters intended “not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive.”	race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap Supreme Court Comment - “Discrimination” is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.	in a professional capacity Supreme Court Comment: section covers “activities in the court house, such as a lawyer’s treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer’s office and firm. purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical

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Jurisdiction	Addressed in Rule or Comment?	Mens rea and behavior prohibited	Protected classes	Limitations/defenses
NM	16-300 Black letter and Adopted ABA Model Rule 8.4(d) and Comment [3]	In the course of any judicial or quasi-judicial proceeding before a tribunal lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice	race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others	legitimate advocacy when race, gender, religion, national origin, disability, age or sexual orientation is material to the issues in the proceeding
NY	Black letter Rule 8.4(g)	unlawfully discriminate	age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.	in the practice of law, including in hiring, promoting or otherwise determining conditions of employment Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted,

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NC	North Carolina adopted ABA Model Rule 8.4(d) and a revised Comment.	Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice.		finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding
ND	Black letter Rule 8.4(f)	engage in conduct that is prejudicial to the administration of justice including knowingly manifests through words or conduct bias or prejudice	race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others	In the course of representing a client Conduct that is prejudicial to the administration of justice except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding

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				a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
OH	Black letter Rule 8.4(g)	Conduct involving discrimination prohibited by law	race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;	In a professional capacity does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.
OK	Oklahoma adopted ABA Model Rule 8.4(d), but did not adopt Comment [3].			
OR	Black letter Rule 8.4(a)(7) Oregon has not adopted Comments.	Knowingly intimidate or harass	Race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability	Rule 8.4(c) a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein

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PA	Pennsylvania adopted ABA Model Rule 8.4(d), but did not adopt Comment [3].			
RI	Black letter Rule 8.4(d)	engage in conduct that is prejudicial to the administration of justice, including but not limited to, harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others	based on race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status	Conduct prejudicial to the administration of justice Legitimate advocacy respecting the foregoing factors does not violate paragraph. A judicial finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
SC	South Carolina adopted ABA Model Rule 8.4(d) and Comment [3] .			
SD	South Dakota adopted ABA Model Rule 8.4(d) and Comment [3] .			

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TN	Tennessee adopted ABA Model Rule 8.4(d) and Comment [3] except as noted.			Does not adopt the exception for a trial judge's finding of discriminatory use of preemptory challenges.
TX	Black Letter Texas has adopted Rule 5.08 on prohibited discriminatory activities	willfully	race, color, national origin, religion, disability, age, sex, or sexual orientation	In connection with an adjudicatory proceeding, toward anyone involved in the proceeding. does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as confidential information under these Rules does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy: (i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

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UT	Utah adopted ABA Model Rule 8.4(d) and Comment [3] .			
VT	Black letter Rule 8.4(g) And adoption of ABA Model Rule Comment [3]	discriminate against any individual	because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual	in hiring, promoting or otherwise determining the conditions of employment of that individual.
VA	Virginia has not adopted ABA Model Rule 8.4(d) or Comment [3]			
WA	Black letter Rule 8.4(g)	commit a discriminatory act prohibited by state law	sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status.	in connection with the lawyer's professional activities. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;

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W/A	Black letter Rule 8.4(h)	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	sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status.	In representing a client Prejudicial to the administration of justice This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.
Washington DC	Adopted a version of Rule 8.4(d) and Comment [3]	offensive, abusive, or harassing conduct that seriously interferes with the administration of justice	race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status	Conduct that seriously interferes with the administration of justice
Washington DC	Black letter Rule 9.1	Such conduct may include words or actions that manifest bias or prejudice A lawyer shall not discriminate against any individual	race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical	Conditions of employment The Rule is not intended to create ethical obligations that exceed

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			handicap	those imposed on a lawyer by applicable law. If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Bar Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Bar Counsel and material allegations involved in such other proceedings.
WV	West Virginia has adopted ABA Model Rule 8.4(d) and Comment [3]			
WI	Black letter Rule 8.4(i)	Harass a person	sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities.	In connection with a lawyer's professional activities What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Legitimate advocacy respecting the foregoing factors does not

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WY	Wyoming has adopted ABA Model Rule 8.4(d) and Comment [3]			violate par. (i).

24 jurisdictions address these issues in the black letter – CA, CO, FL, IL, IN, IA, MY, MA, MI, MN, MO, NE, NJ, NY, ND, NM, OH, OR, RI, TX, VT, WA, WI, and Washington DC.

15 jurisdictions address these issues in an official Comment – AZ, AR, CN, DE, ID, ME, NM, NC, SC, SD, TN, UT, WV, WY and Washington DC.

14 jurisdictions did not adopt Comment [3] or address this issue in any other way – AL, AK, GA, HA, KS, KY, LA, MS, MT, NH, NV, OK, PA, VA.