

WHAT IS ABA MODEL RULE 8.4(G), WHY IS IT SO CONTROVERSIAL AND HOW DID ILLINOIS RESPOND?

Allison L. Wood

I. INTRODUCTION¹

The legal profession is a self-regulated profession, in that rules that govern lawyer conduct are written by lawyers.² In 1983, the House of Delegates³ of the American Bar Association (“ABA”) promulgated the ABA Model Rules of Professional Conduct (“MRPC”) for lawyers and the Model Code of Judicial Conduct for judges in 2007.⁴ The MRPC specifically provides the baseline for the standards of the legal profession’s conduct. All states, except California, have adopted the MRPC in some form or variation.⁵ The ABA Standing Committee on Ethics and Professional Responsibility

¹ Allison L. Wood is Principal of Legal Ethics Consulting, P.C. located in Chicago, Illinois, where she primarily focuses on all phases of disciplinary defense before the Illinois Attorney Registration and Disciplinary Commission (ARDC). She also handles Character & Fitness matters and provides ethics expert testimony in legal malpractice cases. Prior to starting her firm in 2011, Ms. Wood was Litigation Counsel with the ARDC where she investigated and prosecuted attorney misconduct cases. She also previously served as a Hearing Board Chair with the ARDC where she presided over these cases. Ms. Wood was a member of the American Bar Association’s Standing Committee of Professional Responsibility where she worked on the adoption of Model Rule 8.4(g). She is currently a member of the Illinois Supreme Court Standing Committee on Professional Responsibility. All the views expressed herein are her own.

² The Preamble of the ABA Model Rules speaks to why the legal profession is self-regulating: The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts. MODEL RULES OF PRO. CONDUCT PREAMBLE AND SCOPE, cmt. 10 (AM. BAR. ASS’N. 1983).

³ See generally, *ABA Leadership*, AM. BAR ASS’N., <http://www.americanbar.org/groups/leadership> (last visited March 11, 2021). The ABA House of Delegates is the policy-making body of the association where resolutions are presented for consideration and adopted. *Id.*

⁴ *Model Rules of Professional Conduct*, AM. BAR ASS’N., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited March 1, 2021); *Model Code of Judicial Conduct*, AM. BAR ASS’N., https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/ (last visited March 1, 2021).

⁵ *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alphabetical_list_state_adopting_model_rules/ (last visited March 1, 2021).

(“SCEPR”) issues ethics opinions to help interpret the MRPC.⁶ Since the MRPC are recommendations, states are not bound by them. When any changes to the MRPC are made, states may, but need not, adopt the changes.⁷

The ABA Model Rule that defines professional misconduct is Rule 8.4. This rule holds that it is professional misconduct for a lawyer to violate the Rules of Professional Conduct, to commit a criminal act, to engage in conduct involving dishonesty or fraud, to engage in conduct that is prejudicial to the administration of justice, to state or imply an ability to influence a governmental agency, or to knowingly assist a judge in conduct that violates the judicial rules of conduct.⁸ One of the Comments to Rule 8.4, Comment 3, states that a lawyer also engages in professional misconduct if they engage in discriminatory conduct that prejudices the administration of justice.⁹ Specifically, Comment 3 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.¹⁰

On August 8, 2016, the SCEPR presented Resolution 109 to the ABA House of Delegates at the ABA Annual Meeting in San Francisco.¹¹ Resolution 109 proposed to eliminate Comment 3 to ABA Model Rule 8.4 and to create a new paragraph (g) to Rule 8.4, to place an anti-discrimination and anti-harassment provision in the black letter of the MRPC.¹² The ABA House of Delegates unanimously and without opposition adopted Resolution 109, which is now ABA Model Rule 8.4(g).¹³ Notably, the adoption of Rule

⁶ See generally *Model Rules of Professional Conduct*, AM. BAR ASS'N., https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/ (last visited March 1, 2021).

⁷ MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR. ASS'N 2016); and see also *ABA website* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (describing the Model Rules as “models for the ethics rules of most jurisdictions.”).

⁸ MODEL RULES OF PRO. CONDUCT r. 8.4 (a)-(f) (AM. BAR. ASS'N 2020).

⁹ MODEL RULES OF PRO. CONDUCT r.8.4(g) cmt. 3 (AM. BAR ASS'N 2016).

¹⁰ AM. BAR ASS'N HOUSE OF DELEGATES REVISED RESOLUTION 109, 2 (Aug. 2016).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

8.4(g) was supported by the Association of Professional Responsibility Lawyers (APRL).¹⁴

This article is intended to be a primer for those who want to have a better understanding as to how Rule 8.4(g) came to be adopted by the ABA, why it was met with such strong opposition and the nature of the “crusade”¹⁵ to persuade states to reject its adoption.¹⁶ The first section will discuss the process that led to the creation and adoption of Rule 8.4(g) by the ABA. The second section will discuss why it was believed that an anti-discrimination and anti-harassment provision was needed in the black letter of the ethics rules. The third section will discuss the nature of the opposition against the rule. The fourth section will discuss the Illinois anti-discrimination rule; how it compares to Rule 8.4(g); and how Illinois has responded to Rule 8.4(g) as of this date. The primer will conclude with final thoughts.

II. HOW DID RULE 8.4(G) COME TO BE?

As part of its mission, one of the ABA’s goals is to “eliminate bias and enhance diversity.”¹⁷ This goal is referred to as “Goal III” and the stated objectives of this goal are to “(1) promote full and equal participation in the association, the profession, and the justice system by all persons; and (2) eliminate bias in the legal profession and the justice system.”¹⁸ On May 13, 2014, the SCEPR received a joint letter¹⁹ from the chairs of what has been referred to as the Goal III Commissions, which includes the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identity.²⁰ The letter opined that Comment 3 to Rule

¹⁴ The Association of Professional Responsibility Lawyers (“APRL” pronounced April) is comprised of more than 450 lawyers, law professors and judges holding an interest in lawyers’ professional responsibility, legal ethics, legal malpractice, and the evolving law of lawyering, primarily through the application of the rules of lawyer ethics to the practice of law. See *About APRL*, ASS’N PRO. RESP. LAWS. 1, <https://aprl.net/about-aprl/> (last visited Mar. 11, 2021).

¹⁵ The reference is to the ABA article by Dennis Rendlemen aptly titled, *The Crusade Against Model Rule 8.4(g)* (2018) <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g>.

¹⁶ See David L. Hudson, Jr., *States split on New ABA Model Rule Limiting Harassment or Discriminatory Conduct* (October 1, 2017) ABA JOURNAL, https://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct.

¹⁷ *ABA Diversity and Inclusion Center*, AM. BAR ASS’N. <https://www.americanbar.org/groups/diversity/> (last visited March 11, 2021).

¹⁸ See *ABA Mission and Goals*, AM. BAR ASS’N., https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Feb. 28, 2020). The ABA has four stated goals: (1) serve its members; (2) improve the profession; (3) eliminate bias; and (4) advance the law. *Id.*

¹⁹ Letter from Goal III Commissions’ Chairs to Paula J. Frederick, Chair, ABA Standing Comm. on Ethics & Prof. Resp. (May 13, 2014).

²⁰ AM. BAR ASS’N HOUSE OF DELEGATES REVISED RESOLUTION 109, 2 (Aug. 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

8.4 was not, standing alone, sufficient to address issues of discrimination and harassment in the profession.²¹ The respective chairs were requesting that the Model Rules be amended to address these issues. Specifically, the letter states in pertinent part:

It [the current provision] addresses bias and 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.²²

The Goal III Commissions noted that Comments to the MRPC are not binding;²³ and they raised a question as to why judges would be held to certain standards that were not imposed on lawyers. In 2007, the House of Delegates had adopted revisions to ABA Model Rules of Judicial Conduct to include Rule 2.3, entitled “Bias, Prejudice and Harassment.”²⁴

Rule 2.3 (C) of the ABA Model Rules of Judicial Conduct reads:

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.²⁵

In response to this letter, a working group was formed in fall of 2014 with the support of the SCEPR and chaired by the immediate past chair of the SCEPR.²⁶ The working group consisted of one member from each of the following organizations: SCEPR, the Association of Professional

²¹ Letter from Goal III Commissions' Chairs to Paula J. Frederick, Chair, ABA Standing Comm. on Ethics & Prof. Resp. (May 13, 2014).

²² *Id.*; see also Steven Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide to State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017) (discussing the sources used for Rule 8.4(g) and potential issues for states to address).

²³ AM. BAR ASS'N HOUSE OF DELEGATES REVISED RESOLUTION 109, 2 (Aug. 2016); MODEL RULES OF PRO CONDUCT PREAMBLE AND SCOPE, cmt. 21 (The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.).

²⁴ AM. BAR ASS'N HOUSE OF DELEGATES REVISED RESOLUTION 109, 1 (Aug. 2016).

²⁵ MODEL RULES OF JUDICIAL CONDUCT r. 2.3(C) (AM. BAR ASS'N 2020).

²⁶ AM. BAR ASS'N HOUSE OF DELEGATES REVISED RESOLUTION 109, 3 (Aug. 2016).

Responsibility Lawyers (“APRL”), the National Organization of Bar Counsel (NOBC) and each of the Goal III Commissions. On July 8, 2015, SCEPR posted a “Working Discussion Draft” on the website proposing to amend Rule 8.4. Comments were invited and reviewed throughout this process.²⁷

On July 31, 2015, SCEPR “hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting.”²⁸ In December 2015, SCEPR published a revised draft recommending an amendment to Rule 8.4.²⁹ A public hearing was held at the ABA Mid-Year meeting in San Diego in February 2016 where more comments were received and reviewed.³⁰ Members of the SCERP met with many bar leaders within the ABA as well as outside of the ABA.³¹ Many of the comments received informed and guided the group in making certain drafting decisions.³² The final amendment deleted Comment 3 and added the following paragraph (g) to Rule 8.4:

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination³³ 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.³⁴ 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

²⁷ *Id.* at 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 3-4.

³¹ *Id.* at 3

³² *Id.*

³³ Comment 3 to Model Rule 8.4(g) provides:

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

MODEL RULES OF PRO. CONDUCT r.8.4(g) cmt. 3 (AM. BAR ASS’N 2016).

³⁴ Comment 4 to Model Rule 8.4(g) as revised provides:

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

MODEL RULES OF PRO. CONDUCT r.8.4(g) cmt. 4 (AM. BAR ASS’N 2016).

paragraph does not preclude legitimate advice or advocacy consistent with these Rules.³⁵

In addition to Comments 3 and 4 referenced herein, an additional comment identified as Comment 5 was added. Comment 5 advises lawyers, in part, that a judge's finding that peremptory challenges were exercised on a discriminatory basis will not, standing alone, establish a violation of paragraph (g); that a lawyer can limit the scope of their practice to members of underserved populations; and that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.³⁶

III. WHY WAS AN AMENDMENT TO MRPC 8.4 DEEMED NECESSARY?

It was believed that an amendment to Rule 8.4 would further advance the ABA's Goal III objectives, as well as promote diversity in the legal profession.³⁷ As compared to other professions, the legal profession is the least diverse of any profession.³⁸ According to a report by the Institute for Inclusion in the Legal Profession, "minority representation among lawyers was 16.5%, compared to 24.9% among financial managers, 29.6% among accountants and auditors, 44.6% among software developers, 34.8% among physicians and surgeons, and 27.8% within management and the professional labor force."

The legal profession has been and remains a profession dominated by white men.³⁹ "According to the ABA Lawyer Demographics for 2016, the

³⁵ AM. BAR ASS'N HOUSE OF DELEGATES REVISED RESOLUTION 109, 1 (Aug. 2016).

³⁶ Comment 5 to Model Rule 8.4(g) as revised provides:

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

MODEL RULES OF PRO. CONDUCT r.8.4 cmt 5 (AM. BAR ASS'N 2016).

³⁷ AM. BAR ASS'N HOUSE OF DELEGATES REVISED RESOLUTION 109, 13 (Aug. 2016).

³⁸ *The State of Diversity and Inclusion in the Legal Profession 2019-2020*, INST. FOR INCLUSION IN THE LEGAL PROFESSION, http://www.theiilp.com/resources/Documents/IILP_2019_FINAL_web.pdf (last visited Feb. 28, 2021).

³⁹ AM. BAR ASS'N HOUSE OF DELEGATES REVISED RESOLUTION 109, 13 (Aug. 2016). The ABA Lawyer Demographics for 2016 (the year Rule 8.4(g) was adopted) were taken from a 2010 census.

legal profession was 64% male and 36% female.”⁴⁰ Figures for racial demographics showed that the profession was 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.⁴¹

In 2020, the legal profession was 86% White, 5% Black, 5% Hispanic, and 2% Asian.⁴² These statistics matter because they do not represent the cultural diversity of the U.S. population. For example, 5% of all lawyers are African-American, but African-Americans make up 13.4% of the U.S. population; 5% of all lawyers are Hispanics, but Hispanics make up 18.5% of the U.S. population.⁴³ These statistics also matter because minorities and women continue to be underrepresented in legal employment.⁴⁴

The comments received by SCERP from the Goal III Commissions highlighted the reasons why they believed an amendment to Rule 8.4 was necessary.⁴⁵ The Commission on Racial and Ethnic Diversity in the Profession stated that, “[a]mending the black letter of the Rule 8.4 is an important step towards the elimination of bias in the legal profession.”⁴⁶ The Commission on Women in the Profession shared a comment made by a law student at a public hearing who stated, “[w]e, the future members of this profession, were frankly surprised to discover that an antidiscrimination provision was not already in the black letter of our rules.”⁴⁷ The Commission on Sexual Orientation and Gender Identity stated, “[e]ven though not all individual lawyers are covered by these laws, it is shocking and embarrassing

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See the *ABA National Lawyer Population Survey – 10 Year Trend Demographics*, AM. BAR ASS’N https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf (last visited Mar. 2, 2021). Notably, there is a footnote in the survey that 2020 was the first year they added questions about LGBTQ and persons with disabilities, but the response was limited.

⁴³ See *ABA Profiles of the Legal Profession 2020*, AM. BAR ASS’N 1, 33 [Americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf](https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf) (last visited Mar. 7, 2021).

⁴⁴ *2020 Report on Diversity in U.S. Law Firms*, NAT’L ASS’N FOR L. PLACEMENT, INC., https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf (last visited Mar. 12, 2021). (“During the 28 years that NALP has been compiling this information, law firms have made steady incremental — though excruciatingly slow — progress in increasing the presence of women and people of color in the partner ranks. In 2020, that slight upward trend continued, with people of color accounting for 10.23% of all partners in major U.S. firms and women accounting for 25.05% of the partners in these firms, up from 9.55% and 24.17%, respectively, in 2019. See Table 1. Despite these increases, less than four percent of all partners are women of color — a figure that remains abysmally low due to the significant underrepresentation of both women and people of color at the partnership level and a pattern that holds true across all firm sizes and most jurisdictions.”).

⁴⁵ All the written comments received by the SCERP can be found at https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments/.

⁴⁶ See Letter dated March 11, 2016 from the ABA Commission on Racial and Ethnic Diversity in the Profession.

⁴⁷ See Letter dated March 10, 2016 from the ABA Commission on Women in the Profession.

to the profession that lawyer discrimination persists despite clear public policy against it.”⁴⁸ Finally, the Commission on Disability stated, “[c]ertainly, the vast majority of lawyers would never engage in harassment or discrimination, any more than they would commit other ethical violations. But such behavior is all too common, and it damages the professional lives of many persons with disabilities (as well as the lives of women, members of racial and ethnic minorities, and LGBT individuals.)”⁴⁹

IV. WHY HAS THE ADOPTION OF RULE 8.4(G) BEEN SO CONTROVERSIAL?

When the ABA adopted the amendment to Rule 8.4 in 2016, twenty-five states already had anti-discrimination and/or anti-harassment prohibitions in the black letter of their ethics rules.⁵⁰ As of this writing, Vermont is the only state to adopt MRPC 8.4(g), and Maine adopted a variation of the amendment.⁵¹ Notably; Arizona, Tennessee, South Carolina, and Montana either rejected the amendment or declined to consider it.⁵²

The rule has many critics.⁵³ Some have questioned the need for the amendment, some have argued that the definitions of discrimination and harassment in Comment 3 of the rule are too vague;⁵⁴ they argue that the

⁴⁸ See Letter dated February 7, 2016 from the ABA Commission on Sexual Orientation and Gender Identity.

⁴⁹ See Letter dated March 14, 2016 from the ABA Commission on Disability Rights.

⁵⁰ AM. BAR ASS’N HOUSE OF DELEGATES REVISED RESOLUTION 109, 5 (Aug. 2016). Footnote 11 identifies those jurisdictions as follows:

California Rule of Prof’l Conduct 2-400; Colorado Rule of Prof’l Conduct 8.4(g); Florida Rule of Prof’l Conduct 4-8.4(d); Idaho Rule of Prof’l Conduct 4.4 (a); Illinois Rule of Prof’l Conduct 8.4(j); Indiana Rule of Prof’l Conduct 8.4(g); Iowa Rule of Prof’l Conduct 8.4(g); Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e); Massachusetts Rule of Prof’l Conduct 3.4(i); Michigan Rule of Prof’l Conduct 6.5; Minnesota Rule of Prof’l Conduct 8.4(h); Missouri Rule of Prof’l Conduct 4-8.4(g); Nebraska Rule of Prof’l Conduct 8.4(d); New Jersey Rule of Prof’l Conduct 8.4(g); New Mexico Rule of Prof’l Conduct 16-300; New York Rule of Prof’l Conduct 8.4(g); North Dakota Rule of Prof’l Conduct 8.4(f); Ohio Rule of Prof’l Conduct 8.4(g); Oregon Rule of Prof’l Conduct 8.4(a)(7); Rhode Island Rule of Prof’l Conduct 8.4(d); Texas Rule of Prof’l Conduct 5.08; Vermont Rule of Prof’l Conduct 8.4(g); Washington Rule of Prof’l Conduct 8.4(g); Wisconsin Rule of Prof’l Conduct 8.4(i); D.C. Rule of Prof’l Conduct 9.1.

⁵¹ See generally Debra Cassens Weiss, *Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, AM. BAR ASS’N. J. (June 13, 2019, 11:39 AM), <https://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers>.

⁵² See generally Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. UNIV. L. REV. 629, 639-42 (2019) (providing an overview of how the States have responded to Model Rule 8.4(g)). <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3518&context=lawreview>.

⁵³ See generally, Bradley Abramson, *The ABA Was Dead Wrong About Model Rule 8.4(g)* LAW360 (Oct. 12, 2018, 2:53PM), <https://www.law360.com/articles/1091613/the-aba-was-dead-wrong-about-model-rule-8-4-g>.

⁵⁴ AM. BAR ASS’N HOUSE OF DELEGATES REVISED RESOLUTION 109, 6-9 (Aug. 2016).

mens rea should be “knowing” instead of “knows or reasonably should know;”⁵⁵ and they argue that the rule violates a lawyer’s First Amendment rights.⁵⁶

Two state attorney generals issued formal opinions urging the rejection of Rule 8.4(g). The Texas Attorney General argued that the rule restricts speech and conduct beyond the practice of law because it broadly defines

The definition of discrimination in Comment 3 (*see* MODEL RULES OF PRO. CONDUCT r.8.4(g) cmt. 3 (AM. BAR ASS’N 2016)) as “harmful verbal or physical conduct that manifests bias or prejudice towards others” is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes “verbal or physical conduct” and in the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients. *See* MODEL RULES OF JUDICIAL CONDUCT r. 2.3(C) (AM. BAR ASS’N 2020).

Comment 3 defines “harassment” including “sexual harassment and derogatory or demeaning verbal or physical conduct . . . of a sexual nature.” MODEL RULES OF PRO. CONDUCT r.8.4(g) cmt. 3 (AM. BAR ASS’N 2016). This definition is also based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court. MODEL RULES OF JUDICIAL CONDUCT r. 2.3 cmt. 4.

The Comment also states that “the substantive law of anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g).” *Id.*

⁵⁵ AM. BAR ASS’N. HOUSE OF DELEGATES REVISED RESOLUTION 109, 7-8 (Aug. 2016). In considering the comments that supported a mens rea requirement as well as the comments that opposed it, the SCEPR made a drafting decision to include both the “knowing” and “reasonably should know” standards. *Id.* This standard has been a part of the MRPC since its adoption and is currently found in several rules such as MRPC Rule 1.13(f), Rule 2.4(b), Rule 3.6(a), and Rule 4.3. *Id.* The SCEPR concluded that having the two standards would reduce the risk of overzealous disciplinary prosecutions for conduct a lawyer could not have known was harassment or discrimination; and it would not allow a defense of “I didn’t know” advance unchallenged. *Id.*

The Goal III Commissions urged the SCEPR to eliminate the mens rea of the amendment. The Commission on Disability Rights explained in its letter (*see supra* note 49):

We join our fellow Goal III commissions in urging the Standing Committee to eliminate the knowledge requirement. Like other civil rights laws, Title III of the Americans with Disabilities Act (ADA) does not include a mens rea requirement for a finding of discrimination. It provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). We are concerned that imposing such a high intent standard would result in a rule that is effectively unenforceable.

The Commission on Women in the Profession explained in their letter (*see supra* note 47):

If you can escape accountability for reprehensible conduct simply by claiming that you did not know you were discriminating or harassing someone, then the rule has scant credibility and will have little to no effect on professional conduct. By allowing a modifier such as “knowingly”, or “known”, or even “should have known” to be a barrier to culpability, we essentially excuse the behavior. And, if our learned profession has failed at educating lawyers on knowing what discriminatory and harassing behavior is, then we have sadly failed our greater mission to uphold the rule of law.

⁵⁶ Gillers, *supra* note 22, at 214-30; *see also* AM. BAR ASS’N HOUSE OF DELEGATES REVISED RESOLUTION 109, 8 (Aug. 2016) (discussing conduct the Rule applies to, including First Amendment rights, even though these rights are not specifically enumerated). Gillers provides a comprehensive analysis for all these objections at 214-30. Gillers, *supra* note 22, at 214-30. As a primer, this article is attempting to provide an overview of the objections to MRPC 8.4(g) and will only focus on two of the strongest arguments made by critics of the rule.

practice of law to include “participating in bar association, business or social activities.”⁵⁷ The Texas Attorney General expressed his concern that, “Given the broad nature of this rule, a court could apply it to an attorney’s participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.”⁵⁸

The Tennessee Attorney General also argued that the amendment was an infringement of free speech, but went further to opine that there was no evidence presented to explain how “*discriminatory or harassing speech by attorneys harms the legal profession or the administration of justice.*”⁵⁹

Courts in Arizona, Idaho, South Carolina, and Tennessee issued opinions rejecting Rule 8.4(g),⁶⁰ and the Montana Legislature passed a joint resolution condemning Rule 8.4(g) as an unconstitutional attempt to restrict the First Amendment rights of attorneys.⁶¹ This resolution made the same arguments as the Texas Attorney General, but also notably included the following argument:

WHEREAS Proposed Rule 8.4(g) would unlawfully attempt to prohibit attorneys from engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system, therefore the scope of Proposed Rule 8.4(g) exceeds the Supreme Court's constitutional authority to regulate the conduct of attorneys;⁶²

While the aforementioned jurisdictions issued opinions and resolutions, the United States District Court for the Eastern Division of Pennsylvania expressly held that the Amendment to Rule 8.4(g) and the Comments as adopted by the Pennsylvania Supreme Court, constituted “unconstitutional viewpoint discrimination in violation of the First Amendment.”⁶³ Plaintiff

⁵⁷ See 2016 TEX. ATT’Y. GEN. OP. NO. KP-0123 at 3, <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2016/kp0123.pdf>; see also 2018 TENN. ATT’Y. GEN. OP. NO. 18-11 at 7, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf>.

⁵⁸ 2016 TEX. ATT’Y. GEN. OP. NO. KP-0123 at 3, <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2016/kp0123.pdf>.

⁵⁹ 2018 TENN. ATT’Y. GEN. OP. NO. 18-11 at 7, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf>.

⁶⁰ Ariz. Sup. Ct. R. 17-00032, R. 8.4, R. 42; Idaho Sup. Ct. Off. Notice (Sept. 6, 2018); Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, S.C. Sup. Ct. App. Case No. 2017-000498; In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), No. ADM 2017-02244.

⁶¹ S.J. RES. 15, 65th Leg. (Mont. 2017), <https://leg.mt.gov/bills/2017/BillHtml/SJ0015.htm>.

⁶² *Id.*

⁶³ See *Zachary Greenberg v. James C. Haggerty*, in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania; et al, Case No.2:20-cv-03822. Attorney Plaintiff Filed a Verified Complaint for Declaratory and Injunctive Relief on August 6, 2020 in the United States District Court for the Eastern District of Pennsylvania. Plaintiff did not want to be subjected to the Supreme Court’s adoption of a version of the ABA Model Rule 8.4(g) that was to take effect on December 8, 2020. Plaintiff argued that since he gives CLE presentations on First

attorney who challenged the application of the Pennsylvania Rule 8.4(g) argued many of the same points made by a legal ethics scholar⁶⁴ and a First Amendment scholar⁶⁵ who wrote about their concerns that the rule violated a lawyer's right to free speech.⁶⁶

A strong and committed critic of Rule 8.4(g) is The Christian Legal Society. On its website there is a section entitled, "Take Action on Issues Impacting Religious Freedom" under which the article "ABA Model Rule 8.4(g) and the States" is listed.⁶⁷ Its members wrote letters to nearly every jurisdiction urging them to reject the rule. The Christian Legal Society makes many of the same arguments about the rule that have been made by the attorney generals and the courts who rejected Rule 8.4(g), but they also argue that the rule violates their freedom of religion in that it would have "*a stifling and chilling effect on lawyer's free speech and free exercise of religion when serving religious congregations and institutions.*"⁶⁸ The Christian Legal

Amendment issues that some people might find biased, prejudiced, or hateful, he was at risk of becoming the subject of a disciplinary complaint by someone in the audience who might be offended. He argued the amendments did not provide him with sufficient guidelines as to how to exercise his right to free speech and still be in compliance with the rule. Interestingly, the Pennsylvania Bar filed a notice of appeal and then withdrew it on March 16, 2021, deciding instead to go back to the drawing board.

⁶⁴ Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, THE HERITAGE FOUND. (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.

⁶⁵ See The Federalist Society, *Eugene Volokh: A Nationwide Speech Code for Lawyers*, YOUTUBE (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA&list=PLWwcngsYgoUX-6992vkQbyRrgLhCNPs7T&index=5>. But see, Robert N. Weiner, "*Nothing to See Here*" *Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J. & PUB. POL'Y 125 (2018) http://www.harvard-jlpp.com/wp-content/uploads/sites/21/2018/01/Weiner_FINAL.pdf (last visited Mar. 3, 2021).

⁶⁶ It should be noted, however, that Illinois attorneys have been disciplined for their speech in violation of Rule 4.4 (a) which prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay or burden a third person. For example, *In re Craddock*, 2017PR0115 (attorney suspended for three months for using vulgar and disparaging language when addressing female opposing counsel); *In re Guadagno*, 2010PR0065, *petition for discipline on consent allowed*, No. M.R. 24962 (Jan. 13, 2012) (five month suspension, stayed after thirty days by probation, for making homophobic slurs to opposing attorneys); *In re Hoffman*, 08 SH 65 (Review Bd., June 23, 2010), *recommendation adopted*, No. M.R. 24030 (Sept. 22, 2010) (suspension of six months and until further order for making improper statements to a lawyer about the lawyer's religion and in making statements about the integrity of two judges that were false; respondent had practiced for thirty five years without incident but failed to apologize for his remarks).

⁶⁷ CHRISTIAN LEGAL SOCIETY, <https://www.christianlegalsociety.org> (last visited Mar. 1, 2020) (stating the "Christian Legal Society (CLS) is a fellowship of Christians dedicated to serving Jesus Christ through the practice and study of law, the defense of religious freedom and life, and the provision of legal aid to the needy."). Copies of all the letters sent to CLS can be found on their website in a section entitled *CLS' Nationwide Efforts Fighting ABA Model Rule 8.4(g)*, <https://www.christianlegalsociety.org/resource/aba-model-rule-84g-and-states>.

⁶⁸ Kim Colby, *The Pitfalls in the New ABA Model Rule 8.4(g)*, CHRISTIAN LEGAL SOCIETY at 5, <https://www.clsnet.org/document.doc?id=996> (last visited Mar. 12, 2021).

Society also questioned how the rule would impinge upon their religious beliefs against same-sex marriage.⁶⁹ They wrote:

Would proposed Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage? . . . Proposed Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by the proposed rule's strictures.⁷⁰

Given the fact that there are over a million licensed attorneys in the United States⁷¹, the perspective of the opponents of Rule 8.4(g) is too narrow and self-serving. They collectively argue that they should not be held accountable for engaging in harmful verbal conduct at bar association meetings and/or programs for lawyers with certain political or religious leanings. The rights of lawyers who are members of the protected class to be treated with dignity, professionalism, and respect, would simply cease to exist when they stepped out of the courtroom and into the meeting room. Such a result is clearly untenable. While opponents argue the reach of Rule 8.4(g) is too broad, it is in fact more narrowly tailored than the reach of Rule 8.4(b) or (c), neither of which contain any qualifiers as to whether the conduct occurs inside or outside the courthouse.⁷² The hypotheticals they raised where they fear they will be disciplined for espousing their views or opinions is evidence of their lack of understanding as to how the disciplinary process works.⁷³ As they see it, the adoption of Rule 8.4(g) will either trigger

⁶⁹ Kimberlee Wood Colby & Michael P. Schutt, *ABA Model Rules of Professional Responsibility New Rule 8.4(g): Threat or Menace?*, CHRISTIAN LEGAL SOCIETY at 6-8, <https://www.clsnet.org/document.doc?id=1005> (last visited Mar. 12, 2021).

⁷⁰ *Id.*

⁷¹ The ABA reported that in 2020, there were 1,352,027 licensed attorneys in the United States <https://www.ilawyermarketing.com/lawyer-population-state/>.

⁷² Rule 8.4(b) states it is professional misconduct to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Rule 8.4(c) states it is professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Attorneys have been found to violate these rules even when the conduct did not involve the practice of law. *See e.g. In re Moore*, 99CH (Hearing Board Decision, approved and confirmed, No. MR. 17486 (May 25, 2001)(attorney was suspended for one year and until further order of court arising from four alcohol-related driving convictions); and *In Re Scheuneman*, 99 Ill. 2d 106, 457 N.E. 433 (1983)(attorney was censured after pleading guilty for his failure to file his federal income tax returns for 3 years).

⁷³ Notably, the success of the Plaintiff-lawyer to enjoin the application of Pennsylvania's modified version of Rule 8.4(g) is somewhat illusory, as it did not make him immune to someone filing a

disciplinary agencies to direct personnel and/or resources to attend bar association meetings seeking to catch a lawyer saying something offensive; or worse, the disciplinary agency will bring formal complaints against them for saying offensive things without undertaking any investigation or any analysis as to whether the grievance against them had any merit. All grievances submitted to the disciplinary agency are reviewed and a confidential investigation is undertaken. The lawyer is provided with an opportunity to provide a written response as part of that investigation. If the grievance is found to be without merit, it will be closed. If it is found to have merit and if a formal complaint is warranted, the disciplinary agency will decide what charges they believe support the evidence they have.⁷⁴ There is nothing to preclude the lawyer from asserting any number of defenses to the complaint, including where applicable, a free speech defense.⁷⁵ Put simply, the opponents of Rule 8.4(g) are too dismissive of the harassment and discrimination that plague the legal profession; and they have taken an alarmist view of disciplinary agencies that is just not warranted.

grievance against him if they are offended by something he says during one of his presentations. The agency will still investigate the claim and he would still have to submit a response. Like all other grievances, the agency would make an assessment as to whether the claim had any merit and if it did not, it would proceed no further.

⁷⁴ The author served as Litigation Counsel at the Illinois Attorney Registration and Disciplinary Agency (ARDC) for nearly 5 years and has been defending lawyers before the agency for the past decade. The agency routinely receives grievances from clients against attorneys who complain, for example, that they did not like the outcome of their case, or the fees were too high. Bar counsel investigates the grievance and makes an assessment as to whether an ethical violation has occurred and whether the filing of a formal complaint is warranted. There is simply no basis to believe that grievances received by disciplinary agencies in relation to Rule 8.4(g) will be handled any differently than any other grievance they receive. Further, the vast number of grievances do not result in formal complaints. By way of example, of the 3,936 grievances received by the ARDC in 2020, only 37 formal complaints were filed. See ARDC 2020 Annual Report <https://www.iardc.org/AnnualReports.html>.

⁷⁵ There are several cases where attorneys facing disciplinary complaints argued that the discipline was precluded because it would infringe upon their First Amendment rights. See e.g. *In re Jafree*, 93 Ill.2d 450, 457, 444 N.E.2d 143, 67 Ill.Dec. 104(1982) (rejecting attorney's First Amendment challenge to disciplinary action for filing frivolous lawsuits); *Statewide Grievance Committee v. Presnick*, 559 A.2d 220 (Conn. App. 1989)(loud and abusive remarks directed at agency personnel by attorney during course of ongoing case not protected by First Amendment); *Attorney Grievance Comm'n v. Alison*, 565 A.2d 660(Md. 1989)(disciplinary action for verbal abuse including the use of profanity inside and outside of courtroom not precluded by First Amendment); *In re Gershater*, 17 P.3d 929 (Kan. 2001)(disciplinary action based on letter to opposing counsel that was vicious, offensive, and extremely unprofessional did not violate attorney's First Amendment rights); and *In re Martin-Trigona*, 55 Ill.2d 301, 308, 302 N.E.2d 68 (1973)(rejecting bar applicant's First Amendment argument relative to letters containing untrue, scurrilous, and defamatory statements about members of Character and Fitness Committee and its counsel).

V. HOW DID ILLINOIS RESPOND TO MRPC 8.4(G)?

In Illinois, the Illinois Supreme Court is responsible for adopting and enforcing rules of conduct that govern lawyers.⁷⁶ Rules of conduct are drafted by lawyers and enforced by an agency created by the Court, the Illinois Attorney Registration and Disciplinary Commission (ARDC).⁷⁷ The rules of conduct that govern lawyers are codified in the Illinois Rules of Professional Conduct (IRPC).

Illinois is one of the states that already had a prohibition against discrimination in the black letter of the IRPC before the Model Rule was adopted.⁷⁸ IRPC Rule 8.4(j) reads in part, as follows:

It is professional misconduct for a lawyer to: 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.⁷⁹

The rule goes on to state that whether a discriminatory act reflects adversely on the lawyer's fitness is to be determined by a consideration of all the circumstances including: "the seriousness of the act; whether the lawyer knew that the act was prohibited by statute; whether the act was part of a pattern prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities."⁸⁰

It is significant that this is the only rule in the IRPC that contains an exhaustion requirement before any charges of misconduct can be brought pursuant to this rule.⁸¹ Specifically, charges cannot be brought by the ARDC until there is a finding by a court or administrative agency that the lawyer engaged in an unlawful discriminatory act.⁸² In the few cases found where charges were brought under this rule, the attorneys had either been disbarred

⁷⁶ Ill. Sup. Ct. R. 3, entitled "Rulemaking Procedures" sets forth the process in detail.

⁷⁷ Ill. Sup. Ct. R. 751(e).

⁷⁸ Ill. R. Pro. Conduct (2010) R. 8.4 cmt. 3 (eff. Jan. 1, 2010) (Illinois also has Comment 3 to Rule 8.4 which is identical to the Comment 3 in the ABA Model Rules before the adoption of Rule 8.4(g). It 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 preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.")).

⁷⁹ Ill. R. Pro. Conduct (2010) R. 8.4(j) (eff. Jan. 1, 2010).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

by another state where findings were made, or they had been criminally convicted of sexual misconduct.⁸³

Two of the cases are informative of the kinds of conduct that was charged under the Illinois rule. In *In re Jones*, the attorney was found to have engaged in conduct involving the sexual exploitation of four members of the office staff over whom he had supervisory authority.⁸⁴ The attorney “subjected his victims to sexual groping, embraces, kisses, touching of their private parts, and sexually explicit conversation and demands.”⁸⁵ His victims “feared that their jobs would be in jeopardy if they resisted him or told others in a position of authority about his conduct.”⁸⁶ There was a previous finding that he had “engaged in sex discrimination prohibited by the Washington Law Against Discrimination, RCW 49.60.180, by creating a hostile work environment through the sexual harassment of the female employees.”⁸⁷ He was disbarred in Washington and then given reciprocal discipline of disbarment in Illinois for the same conduct.⁸⁸ Similarly, in *In re Weiss*, the attorney was found to be sexually harassing employees at his law firm.⁸⁹ Specifically he was making improper remarks and engaging in sexually suggestive conduct.⁹⁰ With one victim, a legal assistant, he often followed her into the elevator or to the washroom and touched her in a sexual manner.⁹¹ She did not report this conduct because she was afraid to lose her job and did not think anything could be done, since the attorney was the owner of the firm.⁹²

MRPC 8.4(g) differs from IRPC Rule 8.4(j) significantly. IRPC Rule 8.4(j) makes no reference to harassment or sexual harassment. IRPC Rule 8.4(j) contains a requirement that there be a finding by a court or administrative agency before charges can be brought under this rule.⁹³ MRPC

⁸³ See e.g. *In re Jones*, 2014 IL M.R.26769 (Disciplinary Comm’n) (reciprocal discipline) (attorney was disbarred in Washington for engaging “in five instances of sexual misconduct with employees of the law firm in which he was a partner and he was convicted of four counts of assault in the fourth degree with sexual motivation.”); *In re Tyer*, M.R. 20266 04 CH 90 (September 26, 2005) (Disciplinary Comm’n) (September 26, 2005) (“disbarred attorney pled guilty to committing a sexual battery on a paralegal in his law firm in violation of 720 ILCS 5/12-3(a)(2). His company was then found civilly liable to the paralegal in federal court for sexual harassment and retaliatory discharge.”); *In re Rehberger*, M.R. 15508, 98 RC 1529 (Disciplinary Comm’n) (March 23, 1999) (reciprocal discipline) (attorney was disbarred in Georgia “after he was found guilty of felony false imprisonment, misdemeanor sexual battery and misdemeanor simple battery.”).

⁸⁴ *In re Jones*, 2014 IL M.R.26769 ¶ 4 (Disciplinary Comm’n).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* ¶¶ 10-11.

⁸⁹ *In re Weiss*, 2015 IL 08 CH 116, 13 (July 23 suspension entered for 30 months); *In re Weiss*, 2015 IL M.R. 27547, (Disciplinary Comm’n) (disbarred Nov. 17.).

⁹⁰ *Id.*

⁹¹ *In re Weiss*, 2014 IL 08 CH 116, 6 (Hearing Board Report).

⁹² *Id.* at 6, 10.

⁹³ Ill. R. Pro. Conduct (2010) R. 8.4(j) (eff. Jan. 1, 2010).

8.4(g) has no such requirement. While both rules list the same protected groups, MRPC 8.4(g) also includes “gender identity” and “marital status” as protected groups.⁹⁴ In terms of state of mind, IRPC 8.4(j) references consideration as to “whether the lawyer knew the act was prohibited by statute.”⁹⁵ In MRPC 8.4(g) the consideration is listed as, whether the lawyer knew or reasonably should have known that conduct constitutes discrimination or harassment.⁹⁶ IRPC Rule 8.4(j) makes no reference to a “verbal or physical” component as any part of any analysis as to whether the lawyer engaged in conduct that violated this rule.⁹⁷ In MRPC 8.4(g), discrimination, harassment, and sexual harassment, are all referenced as including harmful, derogatory, demeaning, or unwelcome verbal or physical conduct.⁹⁸ Finally, where IRPC Rule 8.4(j) considers “whether the act was committed in connection with the “lawyer’s professional activities;” MRPC 8.4(g) considers “conduct related to the practice of law.”⁹⁹

The Illinois Bar Association opposed the amendment since Illinois already has a rule that addresses discrimination in the black letter of the ethics rules.¹⁰⁰ To date, the Illinois Supreme Court has not made any changes to the Illinois ethics rules in relation to the amendment.¹⁰¹

VI. FINAL THOUGHTS

As stated herein, the legal profession is self-regulating.¹⁰² With self-regulation comes special responsibilities to “assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”¹⁰³ Since no rule is drafted perfectly, debate is

⁹⁴ MODEL RULES OF PRO. CONDUCT r.8.4(g) (AM. BAR ASS’N. 2016).

⁹⁵ Ill. R. Pro. Conduct (2010) R. 8.4(j) (eff. Jan. 1, 2010).

⁹⁶ MODEL RULES OF PRO. CONDUCT r.8.4(g) (AM. BAR ASS’N. 2016).

⁹⁷ Ill. R. Pro. Conduct (2010) R. 8.4(j) (eff. Jan. 1, 2010).

⁹⁸ MODEL RULES OF PRO. CONDUCT r.8.4(g) cmt. 3 (AM. BAR ASS’N. 2016).

⁹⁹ Ill. R. Pro. Conduct (2010) R. 8.4(j) (eff. Jan. 1, 2010); MODEL RULES OF PRO. CONDUCT r.8.4(g) cmt. 4 (AM. BAR ASS’N. 2016). Although IRPC 8.4(j) provides no definition for what would constitute a “lawyer’s professional activities,” all the cases cited herein where the rule was charged, involved lawyers committing unlawful acts against clients and employees. Arguably, a “lawyer’s professional activities,” would include all of the things listed as “conduct related to the practice of law” as defined in Comment 4 to MRPC 8.4(g).

¹⁰⁰ See, Erika Kubik, *ISBA Assembly Opposes Adoption of 8.4(g) in Illinois*, 2CIVILITY (January 1, 2017), <https://www.2civility.org/isba-assembly-opposes-adoption-8-4g-illinois/#:~:text=This%20August%2C%20the%20ABA%20House,discrimination%20in%20the%20legal%20profession.>

¹⁰¹ Since the author is a member of the Illinois Supreme Court Standing Committee on Professional Responsibility, she wants to make clear that she does not speak for the Committee. It is the author’s opinion that at a minimum, a prohibition against sexual harassment should be added to the Illinois rule; and the requirement that administrative remedies should first be exhausted should be eliminated as there is no such requirement in any other ethics rule.

¹⁰² MODEL RULES OF PRO. CONDUCT PREAMBLE AND SCOPE, cmt. 10 (AM. BAR. ASS’N. 1983).

¹⁰³ MODEL RULES OF PRO. CONDUCT PREAMBLE AND SCOPE, cmt. 12 (AM. BAR. ASS’N. 1983).

healthy and valuable in identifying ways rules can be improved.¹⁰⁴ In this respect, there was an expectation that the adoption of Rule 8.4(g) would be the subject of debate; and that it would spark much needed discussions about the lack of diversity, and the pervasiveness of discrimination¹⁰⁵ and sexual harassment¹⁰⁶ in the legal profession.¹⁰⁷

The purpose and intent of Rule 8.4(g) is to send a message to the profession and to the public that lawyers who engage in discriminatory conduct and/or sexual harassment will be held accountable.¹⁰⁸ Given the fact that various state and federal statutes have long prohibited discrimination and sexual harassment, the adoption of Rule 8.4(g) imposes no new restrictions

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

¹⁰⁴ See MODEL RULES OF PRO. CONDUCT PREFACE, *Chair's Introduction* (AM. BAR. ASS'N. 2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble/chair_introduction/.

¹⁰⁵ See e.g. SOCIETY OF AMERICAN LAW TEACHERS, RACIAL DISCRIMINATION IN THE LEGAL PROFESSION (June 30, 2014), <http://www.saltlaw.org/wp-content/uploads/2014/07/June-30-SALT-FINAL-to-CERD-2.pdf>; JOAN C. WILLIAMS, ET AL., YOU CAN'T CHANGE WHAT YOU CAN'T SEE – INTERRUPTING RACIAL AND GENDER BIAS IN THE LEGAL PROFESSION BY THE ABA'S COMMISSION ON WOMEN IN THE PROFESSION AND THE MINORITY CORPORATE COUNSEL ASSOCIATION (2018). <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf>.

¹⁰⁶ See e.g. Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make it Stop*, 225 N.Y. L. J. 42 (March 4, 2016); Savannah Files, *Breaking the Silence: Holding Texas Lawyers Accountable for Sexual Harassment*, 9 ST. MARY'S UNIVERSITY JOURNAL ON LEGAL MALPRACTICE & ETHICS 150 (2018); Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyer's Aren't Doing Enough to Change That*, THE WASHINGTON POST (May 27, 2015); Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, ABA COMMISSION ON WOMEN IN THE PROFESSION (2001). (The most recent surveys find that between about half to two-thirds of female lawyers, and a quarter to half of female court personnel, report experiencing or observing sexual harassment).

¹⁰⁷ See generally, Am. Bar Ass'n., *ABA Rule 8.4 Finding Few Followers, but sparking lots of discussions*, ABA NEWS (August 3, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/aba_rule_8_4_finding/ (the author was on a panel discussing Rule 8.4(g) and is quoted as saying the rule sparked a lot of discussions).

¹⁰⁸ On July 15, 2020, the SCERP issued Formal Ethics Opinion 493 to clarify the intent and the purpose of the rule. The first paragraph of the Ethics Opinion reads:

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.

ABA, Standing Comm. On Ethics and Pro. Resp. Formal Op. 493 (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf.

on lawyer speech or conduct.¹⁰⁹ Lawyers have always been expected to conduct themselves with professionalism and respect toward others in their professional and their personal lives.¹¹⁰ States have historically enacted and upheld ethical regulations of the legal profession's speech and conduct even when those regulations impose restrictions significantly beyond those imposed on other citizens.¹¹¹ Professional fields with regulatory bodies like the ABA have implemented non-discrimination policies as well.¹¹² There is no reason why lawyers should not be similarly regulated.

¹⁰⁹ See e.g. Illinois Human Rights Act 755 ILL. COMP. STAT. 5/1-102(A). (stating it is illegal to discriminate against someone due to their "race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy," as well as other job and financial related circumstances). Title IX Education Amendments Act of 1972. 20 U.S.C. §§1681-1688 (2018). (No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives ... Federal financial assistance.").

Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat 241 (1964). (prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance, including the Department of Education); and Title VII of the same Act (prohibits employment discrimination on the basis of race, sex, national origin and religion and is applicable to both public and private employers).

¹¹⁰ MODEL RULES OF PRO. CONDUCT PREAMBLE AND SCOPE, cmt. 5 (AM. BAR. ASS'N 1983).

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

¹¹¹ See generally, *Attorney Grievance Commission v. Alison*, 565 A.2d 660, 665-66 (MD. 1989) ("...attorneys are bound by Rules of Conduct significantly more demanding than the requirements of law applicable to other members of society); *In re Sarelas*, 50 Ill. 2d 87, 97, 277N.E. 2d 313 (1971) cert denied, 406 U.S. 968, 92 S.Ct. 2412, 32 L.Ed 666 (1972) ("As officers of the court, attorneys accept the imposition of standards of conduct, some of which impact upon First Amendment rights." By way of examples, ABA Model Rule 1.6 Confidentiality - restricts lawyers disclosure of confidential client information; ABA Model Rule 3.5 Impartiality and Decorum of the Tribunal - restricts ex parte communications; ABA Model Rule 3.6 Trial Publicity - restrict what lawyers can publicly say about their case; ABA Model Rule 7.2 (Advertising), 7.3 (Solicitation of Clients) 7.4 (Communication of Fields of Practice and Rule 7.5 (Firm Names and Letterheads) governs what lawyers can say about their services; and ABA Model Rule 8.2(a) restricts lawyers from making false statements about judges).

¹¹² See e.g. The National Association of Realtors have adopted new standards of practice, in which "REALTORS® must not use harassing speech, hate speech, epithets, or slurs based on race color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity." Matt Difanis, *Code of Ethics combats discriminatory speech*, ILLINOIS REALTORS (January 8, 2021), <https://www.illinoisrealtors.org/blog/code-of-ethics-combats-discriminatory-speech/#:~:text=New%20Standard%20of%20Practice%2010,orientation%2C%20or%20gender%20identity.%E2%80%9D>.

The American Medical Association adopted an Anti-Harassment Policy H-140.837 banning discrimination and harassment at all AMA events or activities, stating:

[a]ny type of harassment of any attendee of an AMA hosted meeting, event and other activity, including but not limited to dinners, receptions and social gatherings held in conjunction with an

Jurisdictions that either declined to consider the rule or who rejected the rule entirely, did a disservice to the diverse lawyers and women who practice in those jurisdictions. By relying primarily on personal opinions and/or the opinions of a select few, an opportunity to have genuine discussion about discrimination and sexual harassment in those legal communities was missed. In addition to soliciting comments on the rule, jurisdictions should solicit comments and/or surveys on race and gender issues among members of the bar. They should review disciplinary cases and federal cases in their jurisdiction and learn more about how discrimination and sexual harassment harms the victims, ruins promising careers, and prejudices the administration of justice.¹¹³ These jurisdictions do not have to adopt Rule 8.4(g) in its entirety, but if they do not have a prohibition against discrimination or sexual harassment in the black letter of the ethics rule, Rule 8.4(g) provides a model to work from.

As a lawyer who represents lawyers in disciplinary cases, I share some of the same thoughts about the rule as expressed by attorney Robert Weiner¹¹⁴ who wrote:

I am a defense lawyer—including the defense of lawyers in disciplinary proceedings. My first concern upon learning of this proposed change to the Model Rules was whether it weaponized the Rules of Professional Conduct for exploitation by particularly contentious litigants. But closer study persuaded me that abuse of the Rule, including its use as a speech code for lawyers, is very unlikely because of the barriers and safeguards described above. If transgressions against First Amendment rights occur, there are well-established pathways to deal with them. We can bring First Amendment challenges to unlawful applications of the Rule. We can defend lawyers against unwarranted disciplinary charges. And we can insist to

AMA hosted meeting, event or activity, is prohibited conduct and is not tolerated. The AMA is committed to a zero tolerance for harassing conduct at all locations where AMA business is conducted [. . .]

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes; and written, electronic, or graphic material that denigrates or shows hostility or aversion toward an individual or group and that is placed on walls or elsewhere on the AMA's premises or at the site of any AMA meeting or circulated in connection with any AMA meeting.

Anti-Harassment Policy H-140.837, AM. MED. ASS'N., <https://policysearch.ama-assn.org/policyfinder/detail/Anti-Harassment%20Policy%20H-140.837?uri=%2FAMADoc%2FHOD.xml-H-140.837.xml> (last visited April 2, 2021).

¹¹³ See e.g. Jana DiCosmo, *Racism in the Legal Profession: A Racist Lawyer is an Incompetent Lawyer*, 75 NAT'L LAW. GUILD REV 82 (2018). (This 2018 article seems to predate Rule 8.4(g) but it provides compelling examples of how for example, racist speech to clients, opposing counsels, or courts impacts the administration of justice). <https://www.nlg.org/nlg-review/article/racism-in-the-legal-profession-a-racist-lawyer-is-an-incompetent-lawyer/>.

¹¹⁴ See Robert N. Weiner, *'Nothing to See Here': Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 125, 136-37 (2018).

censors of every ilk that the First Amendment does not permit regulation based on disapproval of protected speech.¹¹⁵

But, without evidence that existing rules barring discrimination have chilled free speech, without a textual or historical basis to expect the new rule to mutate into a speech code, there is no justification for displacing this important weapon against discrimination in and by the legal profession.

The death of George Floyd left bare the racial disparities in this country and it presented a real opportunity to have discussions about discrimination.¹¹⁶ The legal profession responded with statements against racism and renewed commitments to diversity.¹¹⁷ At least one state, who had previously declined to consider Rule 8.4(g), decided to revisit it.¹¹⁸ There should be an ongoing interest in reviewing existing policies and/or procedures that can be implemented to ensure that law students¹¹⁹ and

¹¹⁵ On July 15, 2020, the SCERP issued Formal Ethics Opinion 493 directly addresses the free speech concerns and states:

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.

¹¹⁶ See e.g. Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Sign of Slowing Down*, CNN (Aug. 9, 2020). <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> (George Floyd was an African-American man killed on May 25, 2020 during an arrest after a store clerk alleged that he had passed a counterfeit \$20 bill in Minneapolis. One of the officers, Derek Chauvin, arrived on the scene and knelt on Mr. Floyd's neck until he died. On April 20, 2021, Chauvin was convicted on all counts for the death of Mr. Floyd).

¹¹⁷ See *Statements on George Floyd Death and Protests* (listing statements made by bar associations throughout the country) https://www.americanbar.org/groups/bar_services/resources/resource-pages/floydstatements/. See also, statement on racism by the ARDC, *Statement on Racism*, Att'y Reg. and Disciplinary Comm'n of the Sup. Ct. of Ill. (June 29, 2020). https://www.iardc.org/Statement_on_Racism.pdf.

¹¹⁸ See David Lee, *Texas State Bar Defies Attorney General on Anti-Bias Rule*, COURTHOUSE NEWS SERVICE (September 10, 2020). [https://www.courthousenews.com/texas-state-bar-defies-attorney-general-on-anti-bias-rule/#:~:text=AUSTIN%2C%20Texas%20\(CN\)%20%E2%80%94,free%20speech%20and%20religious%20rights.](https://www.courthousenews.com/texas-state-bar-defies-attorney-general-on-anti-bias-rule/#:~:text=AUSTIN%2C%20Texas%20(CN)%20%E2%80%94,free%20speech%20and%20religious%20rights.) (The Attorney General had issued opinions urging the Bar not to consider Rule 8.4(g)); See *supra* footnote 50. (To be fair, the reversal may have also been partly due to the fact that the Attorney General was charged with felony securities fraud and is awaiting trial).

¹¹⁹ There have been multiple incidents of law professors using the n-word in law class. This is clearly offensive with no regard to the impact on minority lawyers but also the impact it will have on all aspiring lawyers who may believe that such behavior is normal and to be expected when they join the legal profession. It should be noted that, "'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . .'" *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 140 (Mich. 2006) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–310 (1940)); See e.g. Kathryn Rubino, *Prominent Law School Professor Drops the N-Word After Specifically Being Asked Not To Do So*, ABOVE THE LAW (March 5, 2020), <https://abovethelaw.com/2020/03/prominent-law-school-professor-drops-the-n-word-after->

lawyers in the profession, as well as people who aspire to join the profession, are made to feel welcomed, seen, heard, and respected. Lawyers who are uncertain about what constitutes discriminatory or harassing speech or conduct should take affirmative steps to increase their cultural competency.¹²⁰ As stated in the ABA Opinion explaining the purpose, scope and application of Rule 8.4 (g), “Discrimination 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.”¹²¹

specifically-being-asked-not-to-do-so; Joe Patrice, *Why Can't Emory Law School Professors Stop Using the N-Word All the Time*, ABOVE THE LAW (Sept. 13, 2019).

<https://abovethelaw.com/2019/09/why-cant-emory-law-school-professors-stop-using-the-n-word-all-the-time/?rf=1>;

Kathryn Rubino, *T14 Law School Professor Who Made it a Habit to Drop the N-Word Has a Change of Heart*, ABOVE THE LAW (May 7, 2019). <https://abovethelaw.com/2019/03/t14-law-school-professor-who-made-it-a-habit-to-drop-the-n-word-has-a-change-of-heart/> and Elie Mystal, *N-Word Ipsa Loquitur* (May 7, 2021) <https://abovethelaw.com/2021/05/n-word-ipsa-loquitur/>.

¹²⁰ See Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 25 DUKE J. GENDER L. & POL'Y 1 (2017). Latonia Haney Keith provides a comprehensive overview about the adoption of Model Rule 8.4(g), discrimination and bias in the legal profession; and argues that states should “adopt Model Rule 8.4(g), revise, where applicable, its continuing legal education requirements to require a cultural competency education and hold lawyers accountable for violating the rule.”

¹²¹ The opinion further states in footnote 3, “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.”

