

**EXPLORING RECENT CHANGES  
TO ABA MODEL RULES OF  
PROFESSIONAL CONDUCT:**

**The Affects Discrimination and Anti-harassment  
Language Will Have on the Legal Profession**

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## **Recent Changes to ABA Model Rules of Professional Conduct 8.4 Misconduct**

In August 2016, ABA passed resolution 109 amended ABA's Rules of Professional Conduct 8.4 to add section 8.4(g).

ABA Rules of Professional Conduct 8.4 Misconduct:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comments:

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

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

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

ABA Rules of Professional Conduct 8.4

### **Rationale for adopting 8.4(g) and amending the comments section [5]:**

- Prohibit discriminatory harassment in the practice of law and other professional functions such as bar association meetings and social gatherings.<sup>1</sup>
- Believe that moving the anti-discrimination provisions from the comments section, which is guidance, to the rules would help enforcement in disciplinary hearings.<sup>2</sup>
- Previous anti-discrimination language in Comment [3] “was too limited as it only addressed bias or prejudice when representing a client and only when prejudicial to the administration of justice.”<sup>3</sup>
- Co-sponsors of the amendment state:

The new rule is broader in scope as it prohibits “harassment or discrimination . . . in conduct that is related to the practice of law.” As the new Comment [4] explains:

...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.<sup>4</sup>

- At the time the resolution was passed, 25 states had already amended their Professional Rules of Conduct to include discrimination and anti-harassment language in their rules.<sup>5</sup>
- Improving the climate for women in the legal profession and for female clients.

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<sup>1</sup> Peter Geraghty, ABA Adopts New Anti-discrimination Rule 8.4(g), ABA Center for Professional Responsibility (September 2016) <https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

- Preventing employment discrimination on basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.<sup>6</sup>

### **Discrimination and Anti-harassment Language in States' Rule of Professional Conduct**

- **California Prof. Conduct, Rule 2-400 adopted in 1994**

(A) For purposes of this rule:

- (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;
- (2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and
- (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

(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 been dismissed.

(Prof. Conduct, Rule 2-400, CA ST RPC Rule 2-400 1994)

- **Iowa amended Rule 32:8:24 to include discrimination and anti-harassment language in 2005:**

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<sup>6</sup> Lorelei Laird, Discrimination and harassment will be legal ethics violations under ABA model rule, ABA Journal (August 8, 2016, 6:36 pm),

[http://www.abajournal.com/news/article/house\\_of\\_delegates\\_strongly\\_agrees\\_to\\_rule\\_making\\_discrimination\\_and\\_harass](http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass).

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Iowa Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Iowa Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so.  
(I. C. A. Rule 32:8.4, IA R 32:8.4)

- **New York Rules of Professional Conduct included discrimination and anti-harassment language in 2009.**

A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability:
  - (1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or
  - (2) to achieve results using means that violate these Rules or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. 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, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer. (Rules of Prof. Con., Rule 8.4 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 8.4)

- **Ohio amended to include discrimination and anti-harassment language in 2007**

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

(Rules of Prof. Cond., Rule 8.4, OH ST RPC Rule 8.4)

*Supreme Court of Ohio v. Young:*

- A complaint was filed charging Young, an attorney in Ohio, with violating DR 1-102(B), the predecessor to 8.4(g). Young hired a young female law student as his clerk. Throughout the course of her employment he continuously made

inappropriate statements of a sexual nature despite her repeatedly requesting that he stop and stating that the comments made her feel uncomfortable.

- Court found that Young had violated DR 1-102(B) by continually harassing the law clerk creating and had created a hostile work environment.
- Young received a 1 year suspension, 1 year probation with six hours professionalism classes

89 Ohio St.3d 306 (Ohio 2000)

*Supreme Court of Ohio v. Mismas:*

- A complaint was filed charging Mismas, an attorney in Ohio, with violating OH ST RPC Rule 8.4(h) "...engage in any other conduct that adversely reflects on a the lawyer's fitness to practice law."
- Mismas interviewed a female law student for a law clerk position. After the interview, he sent the law clerk sexually explicit and inappropriate text messages. However, the law clerk accepted the job.
- After accepting the job, the law clerk would ask Mismas to stop or tell him he was making her feel uncomfortable when he would text inappropriate messages to her.
- In addition to the numerous text messages, on several occasions Mismas asked the law clerk to travel on overnight business trips with him, but she declined.
- After the law clerk refused to travel with Mismas, he told her she had strikes against her which would affect her employment.
- Ultimately, Mismas requested a sexual act from the law clerk and said her job depended on it. The law clerk decided to quit her employment.
- Mismas admitted he was an alcoholic and was seeking treatment; therefore, the court suspended his law license for one year and gave him six months of probation.

139 Ohio St.3d 346 (Ohio 2014)

- **Minnesota Rules of Professional Conduct amended in 2015 to include discrimination and anti-harassment language:**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities;

(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. 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;
- or

(i) refuse to honor a final and binding fee arbitration award after agreeing to arbitrate a fee dispute.

(52 M. S. A., Rules of Prof. Conduct, Rule 8.4, MN ST RPC Rule 8.4 2015)

### **States that Oppose Adopting Discrimination and Anti-harassment Language in Rules of Professional Conduct:**

#### **Nevada:**

- In 2017, The State Bar of Nevada attempted to adopt the amended ABA Rules of Professional Conduct, but it failed.<sup>7</sup>
- Attorneys worried that actions in social and state bar events could be subject to complaints being filed for misconduct.<sup>8</sup>
- Examples:
  - Say a group of male attorneys at a Nevada State Bar Association meeting are drinking, and a female lawyer walks by and one guy makes a vulgar comment about her. She hears him and is offended, or someone else is offended.

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<sup>7</sup> Jane Ann Morrison, State Bar rule against discrimination and harassment shot down, Las Vegas Review – Journal (November 1, 2017, 4:31 pm), <https://www.reviewjournal.com/news/news-columns/jane-ann-morrison/state-bar-rule-against-discrimination-and-harassment-shot-down/>.

<sup>8</sup> *Id.*

- Or during a Continuing Legal Education seminar debate on same-sex marriage, an attorney criticizes gays and transgender people.
  - Or perhaps a lawyer who's also an instructor of a law school class makes a tasteless joke in class about Muslims, offending someone.<sup>9</sup>
- Opponents believe the language “in conduct related to the practice of law” could make the above scenarios a basis for filing a complaint with the bar association.<sup>10</sup>
  - Other opponents believe the rule change would limit their free speech:

The Christian Legal Society predicted the rule change “would create ethical concerns for attorneys who serve on nonprofit boards, speak on panels, teach at law schools or otherwise engage in public discussions regarding current political, social and religious questions.”<sup>11</sup>

**Texas:** “... Model Rule 8.4(g) would severely restrict attorneys’ ability to engage in meaningful debate on a range of important social and political issues.”<sup>12</sup>

- Although courts has concluded that an attorney’s free speech should be limited in the courtroom, Model Rule 8.4(g) extends far beyond the courtroom.<sup>13</sup>
- The language “related to the practice of law” can include participation in bar association or other attorney related social activities.<sup>14</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Eugene Volokh, Texas AG: Lawyer Speech Code proposed by American Bar Association would violate the First Amendment, The Washington Post (December 20, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/texas-ag-lawyer-speech-code-proposed-by-american-bar-association-would-violate-the-first-amendment/?utm\\_term=.673dda73213d](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/texas-ag-lawyer-speech-code-proposed-by-american-bar-association-would-violate-the-first-amendment/?utm_term=.673dda73213d).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*