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ABA Model Rule 8.4(g): National Adoption is Long Overdue

Sara Rakowiecki*

The American Bar Association (hereinafter “ABA”) originally adopted the current version of the Model Rules of Professional Conduct in 1983, but it took until 2016 before the Model Rules were amended to include a prohibition against discrimination and harassment with conduct related to the practice of law, otherwise known as Model Rule 8.4(g).¹ Model Rule 8.4(g) passed the 598-member ABA House of Delegates by a unanimous vote, yet the states responded with an unprecedented pushback.² Also in 2016, the ABA amended Model Rule 5.5 to better explain multijurisdictional practice.³ Directly after this amendment, every jurisdiction, except nine states adopted the exact rule or some variation of that rule.⁴ Similarly, in 2020, the ABA amended Model Rule 1.8(e) to allow financial assistance to pro bono clients.⁵ Again, in a very short time, all but eleven jurisdictions adopted a rule that is identical or similar to Model Rule 1.8(e).⁶ The ABA amended Rule 8.4(g) to cultivate a legal community free from harassment and discrimination in attempt to create a community where lawyers are consistently ethical and professional in the

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¹ Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS’N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/.

² Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, AM. BAR ASS’N (Oct. 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/>.

³ *Multijurisdictional Practice*, BAR RECIPROCITY, <https://barreciprocity.com/mjp/>.

⁴ *Id.*

⁵ Alberto Bernabe, *ABA Adopts Amendment to Model Rule 1.8(e) to Allow Financial Assistance to Pro Bono Clients*, PRO. RESP. BLOG (Aug. 9, 2020), <http://bernabepr.blogspot.com/2020/08/aba-adopts-amendment-to-model-rule-18e.html>.

⁶ Amanda Robert, *Model Rule Revision Allows Attorneys to Help Pro Bono Clients in Need*, ABA J. (Dec. 1, 2020), <https://www.abajournal.com/magazine/article/model-rule-revision-allows-attorneys-to-help-pro-bono-clients-in-need>.

practice of law.⁷ Why is the legal profession so hesitant to pass a rule prohibiting discrimination and harassment when it is in dire need of one? What message does this send to the public as to the legal profession's proclamation that we can self-regulate the profession? Why do lawyers think the laws they enforce should not apply to them?

Unfortunately, discrimination is still prevalent in the legal profession.⁸ A 2018 ABA report found that 63% of women of color reported having to go "above and beyond" to get the same recognition as their colleagues.⁹ Jean Lee, CEO of Minority Corporate Counsel Association stated, "[t]his study confirms what many of us have known about the legal profession for some time, that women, especially women of color, face a lot of barriers to success and aren't measured as equals by their employers and peers."¹⁰ The ABA's "Profile of the Legal Profession's 2020 Report" revealed that the legal profession in America has remained overwhelmingly white and male over the last decade and that racial diversity among lawyers has actually regressed in some respects.¹¹ The "you-don't-look-like-a-lawyer" mentality continues to affect people of color as the need to work longer or harder to get noticed with the pressure to be flawless because the stereotypical assumption of incompetence leaves little to no margin for error.¹² These obviously discriminatory behaviors call into question the competence of lawyers who engage in them. Attorney Jana DiCosmo opines, "Lawyers who manifest racist attitudes not only prejudice the

⁷ See Kubes et al., *supra* note 1.

⁸ Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear "You Don't Look Like a Lawyer"*, HARVARD BUSINESS REVIEW (Aug. 7, 2019), <https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer>.

⁹ *New Study Finds Gender and Racial Bias Endemic in Legal Profession*, AM. BAR ASS'N (Sept. 6, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/new-study-finds-gender-and-racial-bias-endemic-in-legal-professi/>.

¹⁰ *Id.*

¹¹ Hassan Kanu, 'Exclusionary and Classist': Why the Legal Profession is Getting Whiter, REUTERS (Aug. 10, 2021), <https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/>.

¹² See Melaku, *supra* note 8.

administration of justice and tarnish a very noble profession, but such lawyers also call into question their very competence to practice law.”¹³

Additionally, sexual harassment is alarmingly commonplace in the legal profession.¹⁴ Sexual harassment occurs most commonly in the physical workplace, but is also frequent at work-related social events, conferences, and during work travel.¹⁵ An ABA Report found that sexual harassment occurs during all practices of law, especially at activities such as firm dinners and other nominally social events for which lawyers are present solely because of their association with their law firm.¹⁶ These incidents indicate that sexual harassment can occur during all encounters related to law.

Diversity, inclusion, and equity, both in the legal profession and in the pursuit of justice, are core values of the American Bar Association.¹⁷ The ABA was also continuously informed of illegal and inappropriate harassment taking place at firm outings, dinners, and bar association events that required an amendment to include Rule 8.4(g).¹⁸ The fact that Model Rule 8.4(g) passed by a unanimous vote clearly emphasized the necessity for an anti-discrimination and anti-harassment ethical rule. Former ABA President, Paulette Brown, stated that lawyers are “responsible for making our society better” and that because of lawyers’ “power,” lawyers should be “the standard by which all should aspire.”¹⁹

Despite the evidence of the need for Rule 8.4(g) and the overwhelming

¹³ Jana DiCosmo, *Racism in the Legal Profession: A Racist Lawyer is an Incompetent Lawyer*, 75 NAT’L LAW. GUILD REV. 82 (2018).

¹⁴ Kieran Pender, *Us Too?: Bullying and Sexual Harassment in the Legal Profession*, INT’L BAR ASS’N 5, 49 (2019).

¹⁵ *Id.*

¹⁶ Jack Park, *ABA Model Rule 8.4(g): An Exercise in Coercing Virtue*, 22 CHAP. L. REV. 267, 270 (2019).

¹⁷ Michael Ariens, *Model Rule 8.4(g) and the Profession’s Core Values Problem*, 11 ST. MARY’S J. ON LEGAL MALPRACTICE AND ETHICS 180, 219 (2021).

¹⁸ See Park, *supra* note 16, at 269.

¹⁹ *Id.*

support, the Rule has also been subject to various disapproving opinions. Professor Eugene Volokh at UCLA School of Law claims the rule is nothing more than a “speech code” for lawyers.²⁰ Professor Volokh argues that if a group of lawyers were to debate about, for example, immigration from Muslim countries, that it would potentially violate 8.4(g).²¹ However, in July 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493 to provide guidance on the purpose, scope, and application of Model Rule 8.4(g) to help eliminate any criticism and confusion.²² The Opinion explains that conduct that violates section (g) of Rule 8.4 will often be intentional and typically targeted at a particular individual or group of individuals, such as directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature.²³ In Professor Volokh’s criticism of Model Rule 8.4(g), he fails to realize that Formal Opinion 493 states, “A general point of view, even a controversial one, cannot be reasonably understood as harassment or discrimination contemplated by Rule 8.4(g).”²⁴ Additionally, Rule 8.4(g) “does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit in any way a lawyer’s speech or conduct in settings unrelated to the practice of law.”²⁵

With respect to the appropriateness of these Model Rules which limit with whom and what a lawyer can say, David Grenardo, an ethics expert who teaches professional responsibility at St. Mary’s University School of Law expounds, “Some lawyers may argue that they should be able to say whatever they want in the name of zealous advocacy...Lawyers should know that their conduct and speech are regulated by the state bar and

²⁰ The Federalist Society, *Eugene Volokh: A Nationwide Speech Code for Lawyers?*, YOUTUBE (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

²¹ *Id.*

²² ABA COMM. ON ETHICS & PRO. RESP., Formal Op. 493 (2020).

²³ *Id.*

²⁴ Clare Roubion, *ABA Issues Formal Opinion on Application of Anti-Discrimination Model Rule 8.4(g)*, LA. LEGAL ETHICS (Dec. 1, 2020), <https://lalegaethics.org/aba-issues-formal-opinion-on-application-of-anti-discrimination-model-rule-8-4g/>.

²⁵ *Id.*

court rules because the practice of law is a privilege, not a right.”²⁶ The need for this type of Model Rule is crucial according to Mr. Grenardo, “Because incivility runs rampant in society and occurs too often in the legal profession...Some lawyers are stubborn and will only refrain from attacking others personally or will only treat others with dignity and respect if there is a rule that requires them to refrain from those personal attacks or a rule that requires them to act civilly.”²⁷ If Mr. Grenardo is correct as to the necessity of this rule to fight the incivility epidemic of the legal profession, it is essential that States adopt an ethical rule prohibiting discrimination and harassment to monitor the legal profession.

Within the United States, Vermont and New Mexico are the only two states to date to fully adopt Model Rule 8.4(g) as written.²⁸ Since 2016, at least six states have completely condemned Model Rule 8.4(g), eleven states have no existing rule prohibiting discrimination and harassment, while the remaining states have either considered a rule change and have not acted on it or have adopted a similar version to Rule 8.4(g).²⁹ Some states fail to realize that Model Rule 8.4(g) is not a speech code for lawyers, but rather a provision to ensure equality within the legal profession that most other professions have implemented already. Just as Chief Justice Cady observed, “justice can only replace injustice when a challenge to the law is examined through the lens of those who have been forced by our law to endure the injustices of our past.”³⁰ While Model Rule 8.4(g) might have imperfections, it creates a pathway to begin to address the injustices of misconduct within the legal profession. The legal profession cannot and should not wait any longer to adopt Model Rule 8.4(g) or amend their state’s current rules. It is not enough for the people

²⁶ David L. Hudson Jr., *Lawyer Speech Triggers Both Civility and Constitutional Concerns*, ABA J. (Sept. 1, 2019), <https://www.abajournal.com/magazine/article/lawyer-speech-triggers-both-civility-and-constitutional-concerns>.

²⁷ *Id.*

²⁸ ABA CTR. FOR PRO. RESP. POL’Y IMPLEMENTATION COMM., *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (2019).

²⁹ See generally CHRISTIAN LEGAL SOC’Y CTR. FOR L. AND RELIGIOUS FREEDOM (2022), <https://www.clsreligiousfreedom.org>.

³⁰ *State v. Watkins*, 914 N.W.2d 827, 849 (Iowa 2018).

within the legal profession to idly stand by as injustice occurs. It is time to uniformly adopt an anti-discrimination and anti-harassment rule. Change is imminent, and the time is now.

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