Pennsylvania's New Disciplinary Rule Prohibiting Harassment and Discrimination in the Practice of Law

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ABSTRACT

On August 29, 2023, the Supreme Court of Pennsylvania's robust disciplinary rule, 8.4(g) that prohibits lawyers, in the practice of law, from knowingly engaging in harassment or discrimination directed to women, minorities or other persons in protected categories finally went into effect. This article traces the development of the Rule on the national level and the circuitous route to its implementation in Pennsylvania. In August 2016, the American Bar Association House of Delegates approved adoption of Model Rule of Professional Conduct 8.4(g), which provides a disciplinary remedy for harassment and discrimination related to the practice of law. Spurred by developments on the national level, Pennsylvania developed its unique version of Rule 8.4(g) which underwent several distinct iterations proposed by the Disciplinary Board. After receiving critical comments on its first two restrictive draft rule recommendations, the Board ultimately proposed more expansive rule language in 2019 that garnered the support of the Pennsylvania Bar Association and the major metropolitan bars and, finally, the Pennsylvania Supreme Court. Nevertheless, that rule was challenged and thereafter enjoined by a federal court on First Amendment grounds on the same date it was to become effective. The Supreme Court then amended its rule to address the First Amendment concerns expressed by the district court. The new rule was met with another challenge and another district court decision enjoining the Rule on free speech grounds. This time, however, the Supreme Court appealed the decision, and the Third Circuit dismissed the case for lack of standing. Pennsylvania attorneys now face the potential for discipline if they knowingly harass or discriminate in the practice of law, including in connection with bar sponsored conferences and continuing legal education programs.

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Knowing harassment or discrimination in the practice of law now may trigger discipline for Pennsylvania lawyers under new Rule of Professional Conduct 8.4(g).

I. INTRODUCTION

On June 8, 2020, the Pennsylvania Supreme Court issued an order, effective December 8, 2020, adopting Pennsylvania's version of ABA Model Rule of Professional Conduct 8.4(g) as follows:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

* * * * *

(g) In the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based on race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status or socioeconomic status. 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 advice or advocacy consistent with these Rules.

The rule was accompanied by new Comments [3] and [4], as follows:

> [3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.
>
> [4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.[2]

This adoption was the culmination of a process that began long before August 8, 2016, when, at its annual meeting, the American Bar Association (ABA) House of Delegates approved a new Model Rule of Professional Conduct forbidding lawyers from engaging in harassment or discrimination in law practice. The rule passed the ABA's policymaking body by an overwhelming voice vote, with the support of the Pennsylvania delegation, notwithstanding the fact that early drafts of the rule drew significant objections from various lawyer constituencies and the public. The ABA debate drew substantial attention, and the outcome was uncertain, in part because earlier, more modest efforts to add an anti-bias provision to the text of the Model Rules had failed to gain traction.

In recent years, however, the composition of the profession, the House of Delegates, and ABA leadership has trended in favor of greater participation by women and minorities. During the same time frame, the ABA adopted several objectives, including its Goal III entitled "Eliminate Bias and Enhance Diversity," intended to "promote full and equal participation in the association, our profession, and the justice system by all persons," and to "eliminate bias in the legal profession and the justice system." State and local bars similarly adopted diversity and inclusion policies, bolstered their efforts to advance women in the profession, and broadly invited law students (a majority of whom are now women) to bar membership to enhance the pipeline of new members.[3]

The legal profession at the national level responded to this shift by adopting a new subpart to the rule governing professional misconduct, Model Rule 8.4(g), which specifically prohibits lawyer harassment and discrimination directed to individuals in certain protected categories. Many states, however, have been reluctant to adopt the rule, and some elected officials have publicly opined that the rule is an affront to protected free speech rights. This article summarizes the development of this important and controversial addition to Model Rule 8.4 ("Misconduct"), which "elevates" a for-

2 2020 Pa. Lexis 3147; 50 Pa.B. 3011 (June 20, 2020).

3 Health professional organizations, as a reflection of or response to this shift, have adopted codes of ethics that reflect an anti-discrimination sentiment. In 2016, the American Medical Association added several new opinions to its Code of Medical Ethics that prohibit sexual harassment and discrimination based on gender identity, sexual orientation, race, color, religion, national origin or "any other basis that would constitute invidious discrimination." Code of Medical Ethics 9.1.2, 9.1.3 (Am. Medical Ass'n 2016). The American Dental Association also updated its Code of Professional Conduct in a similar fashion between 2011 and 2018. *See* Principles of Ethics and Code of Prof'l Conduct 4.A (Am. Dental Ass'n 2018).

mer comment addressing harassment[4] and discrimination[5] into the black letter of the Model Rules and expands its scope. Next, the article traces the four-year evolution of efforts to adopt a version of Rule 8.4(g) in Pennsylvania. The article compares and contrasts the final Pennsylvania rule with the ABA Model Rule and reviews the recent federal court challenge to the rule's implementation. The adoption process in the Commonwealth serves as a case study that highlights the obstacles to adoption the Rule has faced in certain states.

Enthusiastically backed by the PBA's Legal Ethics and Professional Responsibility Committee and its Commission on Women in the Profession, Rule 8.4(g) gained modest support from the Pennsylvania Disciplinary Board at the outset of the rulemaking process. The Board offered up two versions of the Rule for public comment, each with materially limiting provisions. In the end, a third, more robust version of the new rule promulgated by the Board and deemed palatable by the organized bar, was approved by the Pennsylvania Supreme Court in June 2020, effective six months thereafter, in December 2020. As a result, Pennsylvania became the fourth state to adopt a Rule 8.4(g) since the ABA adopted its Model Rule in 2016.[6] Pennsylvania's version of the rule is unique, and more limited in scope than the Model Rule in several respects as discussed in this article, although it is too early to predict to what extent those language differences will be outcome determinative in the context of disciplinary proceedings.

II. THE NATIONAL LANDSCAPE

Though criticized for limiting lawyers' autonomy and free speech, Model Rule 8.4(g) seeks to redress lawyer misconduct in the form of harassment or discrimination directed to persons in protected categories. The rule, built on multiple previous efforts to prohibit such misconduct, and its adoption, represented a watershed moment for those who had campaigned for the legal profession to set a positive example against harassment and discrimination in the practice of law.

A. #LawyersToo

While vast media attention has been given to high profile cases of sexual harassment in Hollywood and Washington, pervasive harassment and discrimination in the legal profession should not be overlooked. As one judge said, discrimination is the "'dirty little secret,' which, while undoubtedly occurring on a daily basis, no one

4 "Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct [including] 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)." Model Rules of Prof'l Conduct r. 8.4(g), cmt. [3] (Am. Bar Ass'n) [hereinafter referred to as Model Rules].

5 "[D]iscrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." *See* Model Rules r. 8.4(g), cmt. [3].

6 Matt Fair, *Backers of Anti-Bias Rule for Attys Reject 'PC Police' Tag,* Law360 (June 17, 2020). Vermont adopted the Model Rule in 2017, and New Mexico's rule became effective in December 2019. Several states revised their existing rules to further address discrimination or harassment since the ABA Model Rule's adoption. Maine's more limited version of the rule became effective in June 2019; Colorado's rule revision was effective in September 2019; Missouri's revision was effective in July 2019; New Hampshire's revision became effective on August 1, 2019; and Connecticut's rule became effective on January 1, 2022. The U.S. Virgin Islands, American Samoa and the Northern Mariana Islands also adopted the Model Rule in its entirety. Recommendations from the New York City and District of Columbia Bar Associations to adopt versions of Rule 8.4(g) are pending.

speaks about in public."[7] Surveys and case law from myriad jurisdictions document the problem's pervasiveness, demonstrating the need for a profession-wide prohibition.[8]

Notably, a recent gender survey in New York examined the experience of women in the court system against an earlier study. More than 5,000 attorneys participated. Nearly half of the female attorneys reported that they experienced unwelcome contact on occasion from their fellow attorneys. While women also reported the view that system-wide, there had been marked improvement in areas of bias, nearly one quarter of the women reported that they experienced unwelcome physical contact from other attorneys, and another 44% said they sometimes experienced verbal or nonverbal harassment.[9]

The Massachusetts Women's Bar Association (WBA) surveyed 1,243 individuals who have worked in a law office in that commonwealth.[10] Eighty percent of respondents were women, 17% men, with even distribution across three generations.[11] Nearly 38% of respondents said they had been the recipient or copied on unwelcome communications of a personal or sexual nature at work.[12] More than 21% responded "Yes" to the question, "Have you ever been the recipient of or witnessed unwelcome physical contact at work?"[13] A sizeable 40.23% reported having been present when comments or jokes were made that were sexual in nature or disparaging of other people or groups. Summarizing the anecdotal questions, the survey concluded, "Unchecked power imbalance serves as the foundation for and perpetuation of negative and inappropriate behaviors in the workplace."[14] These problems are of course not limited to Massachusetts. In Florida, the state bar's Young Lawyers Division reported that in a survey of its female members, 45% of respondents said they experienced some level of gender discrimination in their career.[15] On the national level, the Association of National Legal Administrators conducted a survey in 2018. Of the 461 respondents, 77% said sexual harassment has occurred at their firms.[16] Among this subset of respondents, 36% knew of incidents involving partners and associates, 54% knew of incidents involving partners and staff, and 30% knew of incidents among staff members.[17]

Myriad examples of lawyer harassment and discrimination may be found in reported cases across the nation. The Supreme Court, Appellate Division, of New York censured an attorney for directing "vulgar, obscene and sexist epithets toward [opposing counsel's] anatomy and gender."[18] The attorney also lost his job, and was forced to

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7 Principe v. Assay Partners, 586 N.Y.S.2d 182, 185 (N.Y. Sup. Ct. 1992).

8 Wendi S. Lazar, ZERO TOLERANCE: BEST PRACTICES FOR COMBATING SEX-BASED HARASSMENT IN THE LEGAL PROFESSION 6 (1st ed. 2018)("It is time for the legal profession to take a hard look at itself, and to adopt a zero tolerance approach to sex-based harassment.").

9 New York State Judicial Comm. on Women in the Courts Gender Survey 2020, at 7-8, 22-24.

10 Lauren S. Rikleen, *Survey of Workplace Conduct and Behavior in Law Firms,* Mass. Women's Bar Ass'n 5 (2018).

11 *Id.* at 6.

12 *Id.* at 9.

13 *Id.* at 11.

14 *Id.* at 8.

15 Standing Comm. on Ethics & Prof'l Responsibility et al., Report to the House of Delegates, Revised Res. 109, at 6 (Aug. 8, 2016) [hereinafter Report to the House].

16 Gayle Cinquegrani, *Heal Thyself: Law Firms Grapple With Harassment Claims,* Bloomberg Law (July 10, 2016).

17 *Id.*

18 In re Schiff, 190 A.D.2d 293, 294 (N.Y. App. Div. 1993).

apologize and to pay monetary sanctions.[19] A Colorado attorney told a black client's son that he must "obey his mother," that he goes "to a [ ] Christian high school," and that he was "behaving like some kid out of the ghetto."[20] The Presiding Disciplinary Judge noted that there was no indication that the son was delinquent, before publicly censuring the attorney, and directing him to attend ethics school. Similarly, a Tri-County Hearing Panel reprimanded a Michigan attorney for misconduct after he admitted to having told a probation officer at a probation review meeting that she had "angry black women's syndrome."[21]

There have been numerous lawyer harassment cases resulting in discipline for Pennsylvania lawyers in the absence of an express prohibition against harassment or discrimination, but the actual basis for discipline has typically been predicated upon a criminal conviction.[22] For example, a Harrisburg attorney received a public reprimand for making unwanted advances toward multiple women during a Dauphin County bench-bar conference.[23] The Supreme Court recently approved the one year suspension of a Philadelphia attorney based on a criminal conviction for "harassment by offensive touching or threat," after locking a young female lawyer in a boat cabin, and threatening and assaulting her by grabbing her by the buttocks and kissing her.[24] These cases are just a sampling of the numerous reported instances of lawyer misconduct involving harassment or discrimination.[25]

B. Cracks In the System

Despite the presence of such misconduct in the legal profession, challenges stand in the way of victims seeking justice. Systemic reporting issues, costs, and judicial malaise often discourage or impede victims from achieving an appropriate remedy.

Data suggest that there are far more incidents of misconduct occurring than are reported. In the Massachusetts WBA survey cited above, for example, 66.67% of those who responded "yes" to the question about unwelcome communications said they

19 *Id.* at 293. More recently, a New York First Department Appellate Division panel agreed to publicly censure a lawyer for a tirade directed to a Spanish-speaking deli worker after he conversed with a customer in Spanish. The lawyer's rant went viral, and he was evicted from his office space. The lawyer admitted that his conduct "adversely reflects on his fitness as a lawyer" in violation of New York Rule 8.4(h). *In re* Schlossberg, 137 N.Y.S.3d 44 (N.Y. App. Div. 2020).

20 People v. Wareham, 2017 WL 4173661, at *1 (Colo. O.P.D.J. Sept. 13, 2017).

21 M. Frisch, *Discourtesy Leads to Reprimand,* Legal Prof'l Blog (Oct. 20, 2017).

22 *E.g.,* ODC v. Bonavita, No. 189 DB 2004 (PA Dec. 16, 2006) (three year suspension following conviction for having indecent contact); ODC v. Picciotti, 49 Pa. D.&C.4th 119 (2000) (lawyer engaged in offensive touching of client, and was convicted of indecent assault); ODC v. Gordon, No. 127 D. Bd. Rpt. April 6, 1998) (five year suspension for three counts of indecent assault involving lawyer's offensive touching of one client, the wife of another client, and the fiancée of a third client).

23 ODC v. TM, No. 159 DB 2019 (D. Bd. Order Oct. 2, 2019). The reprimand was deemed sufficient because his conduct "did not involve ongoing inappropriate sexual behavior or multiple instances."

24 ODC v. M.B., No. 74 DB 2019 (PA Aug. 19, 2020). The hearing committee had recommended a public reprimand be imposed. The ODC filed exceptions to that disposition and sought a six-month suspension. The Board determined that M.B. should be suspended for one year for professional misconduct under Rule 8.4(b) in committing a criminal act that reflects adversely on the lawyer's fitness to practice and Pa. R.D.E. 203 for conviction of a crime and failure to report it to the ODC. The victim had testified that the sexual assault was traumatizing, led her to seek professional counseling and seriously consider leaving the legal profession. The disposition raises the question whether the discipline imposed might have been more severe if Rule 8.4(g) were already in force.

25 *See, e.g.,* In re Ward, 726 N.W.2d 497 (Minn. 2007) (describing an attorney who made physical contact with a job applicant); In re Peters, 428 N.W.2d 375 (Minn. 1988) (describing a law school dean who engaged in unwelcome physical contact and verbal comments with four women employees).

did not report it.[26] A similar number said they did not report when they were touched against their will, and of those that heard an inappropriate joke at work, almost 87% said they did not report the joke.[27] What stands in the way of reporting these incidents? Many employees either do not know how to report misconduct or do not trust their firms or offices to handle the situation, especially if the perpetrator is a "rainmaker" or in leadership.[28] This mistrust is borne from "a lack of proper reporting protocols, confidentiality, and enforcement" and can lead to "delays in investigations and retaliation against the complainant," which also further discourage complaints.[29]

The cost of reporting or pursuing a remedy is also an obstacle to meting out justice in the event of misconduct. For starters, many employees subject to a hostile work environment do not have an alternative career path. If they fear that they will be fired for causing a stir or would have to leave their job to avoid the misconduct, they may maintain the status quo as the only way to advance their career.[30] Lawsuits are also prohibitively expensive. There is a reason the #MeToo movement has garnered so much attention in the entertainment, business, and political spheres and not on main street: the plaintiffs can afford to sue.[31] Even if plaintiffs win or settle for large sums of money, they may need to front thousands in attorney fees. Many potential plaintiffs just cannot afford this gamble.[32]

Even if aggrieved employees are able to file their claims, the courts may not provide the relief sought. Judges may be reluctant to police their own profession. In an early high-profile case, *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, Nancy Ezold accused the Wolf Block firm of intentionally discriminating against her on the basis of her sex when it refused her partnership.[33] Even though the district court, as fact finder, found her accusations to be true, the Third Circuit overruled the district court's holding. It explained that courts should avoid the "unwarranted invasion or intrusion into matters involving professional judgments about an employee's qualifications for promotion within a profession."[34] More recently, in *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser LLP*, the district court judge overturned a jury verdict for the plaintiff.[35] In addition to creating a hostile work environment where male attorneys often joked about their sexual exploits, associates called the plaintiff a "dyke" and a "butch."[36] The district court judge dismissed the sexual comments as "humorous" and excused the associates for their name calling, explaining that they were well-educated,

26 *See* Rikleen, *supra* note 10, at 9.

27 *Id.* at 11, 19.

28 *See* Cinquegrani, *supra* note 16.

29 Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make It Stop,* N.Y.L.J. (March 4, 2016).

30 Kari Paul, *The Damaging, Incalculable Price of Sexual Harassment,* MarketWatch (Jan. 9, 2018).

31 S*ee* Megan Garber, *Is This the Next Step for the #MeToo Movement?,* The Atlantic (Jan. 2, 2018) ("For the most part, powerful women. For the most part, wealthy women. For the most part, white women. #MeToo, for all the progress it has made in exposing sexual harassment and abuse—and in exposing the contours of systemic sexism more broadly—has been, from the outset, largely limited in its scope: a movement started, in this iteration, by the famous and the familiar.").

32 Paul, *supra* note 30.

33 983 F.2d 509 (3d Cir. 1992).

34 *Id.* at *527.*

35 153 F.Supp.2d 219 (S.D.N.Y. 2011), *overruled by* Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser LLP, 29 Fed.Appx. 740 (2d Cir. 2002). *See also* David Levine et al., *Courthouse Confidential: How the Courts Help Companies Keep Sexual Misconduct Under Cover,* Reuters (Jan. 10, 2018).

36 *Fitzgerald,* 153 F.Supp.2d at 223.

generally well-mannered, and had remarkably likeable and attractive personalities.[37] The Second Circuit reversed this judgment and held for Fitzgerald.[38] It is unclear precisely where the line is to be drawn in such cases. Some outcomes may result from a judge's personal bias,[39] whereas others may be a function of the practical reality that local judges regularly interact with the very same lawyers, or their firms, and naturally want to maintain positive relationships with the local trial bar.

C. Early Attemps at Regulating Harassment and Discrimination Flounder

The idea of regulating harassment and discrimination in the legal profession arose decades before the current #MeToo movement. The ABA first adopted the Model Rules, including Rule 8.4, on August 2, 1983. The rules included no reference to bias, prejudice, harassment or discrimination. Since at least 1992, ABA constituencies have been attempting to beef up Model Rule 8.4 to combat harassment and discrimination in the legal profession.[40] In 1994, the ABA's Standing Committee on Ethics and Professional Responsibility (Standing Committee) and its Young Lawyers Division each proposed adding an anti-bias paragraph to Rule 8.4.[41] The proposals were merged and downgraded to an aspirational resolution, though it passed eighty to seventy in 1994.[42]

The Standing Committee made a second attempt in 1998, when it sought to attach similar language as a comment to Rule 8.4(d), which forbids a lawyer to "engage in conduct that is prejudicial to the administration of justice." The approved comment ("Comment [3]")[43] read:

> A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on 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.[44]

The utility of Comment [3], however, was severely hampered from the

37 *Id.* at 222.

38 *Fitzgerald,* 29 Fed.Appx at 740.

39 Lazar, *supra* note 29 (citing Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 Law & Hum. Behav. 69 (2003)).

40 *Id.* ("In 1992, the American Bar Association implemented a policy . . . to take action on sexual harassment in the legal profession.").

41 Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g),* 30 Geo. J. Legal Ethics 195, 203 (2017).

42 *Id.* at 206.

43 *Id.* at 208. The Criminal Justice Section had developed its own proposal to add a new nondiscrimination provision that was combined with the Standing Committee's proposal and adopted by the ABA House in August 1998.

44 *Id.* at 206-07.

start. Comments themselves are not rules, but rather guides to interpretation, and therefore do not carry the same weight as the black letter. The ABA's Model Rules Preamble states, "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[45] Some states do not even adopt the comments, rendering them irrelevant in those jurisdictions.[46] Comment [3] also only applied when misconduct triggered Rule 8.4(d).[47] Since this rule only applies to the "administration of justice," it arguably only governs conduct before tribunals—not transactional matters such as client meetings or mediation. Rule 8.4(d) also only applies in the course of representing a client, so Comment [3] did not govern conduct at bar association events, firm functions or day-to-day meetings inside a law office (which is where much misconduct is reported to occur).[48] Finally, the comment was effectively redundant, since the language of Rule 8.4(d) already prohibits language or conduct prejudicial to the administration of justice. The comment only added an example of how this behavior may be manifest.

D. ABA Rule 8.4(g) Breaks Through Despite Critics

In 2014, the ABA Standing Committee established a Working Group to evaluate the need for a new antidiscrimination rule. In July 2015, armed with the Working Group's conclusion that there was a need for a comprehensive antidiscrimination provision in Model Rule 8.4, the Standing Committee issued a working discussion draft of a proposal to rectify the limitations of Comment [3] by elevating the prohibition on bias or prejudice into the black letter of the Model Rules. Over the course of the next year and a half, drafters debated two main points of contention: (1) the mens rea requirement, and (2) the "nexus" requirement (or applicability and scope).[49] Many organizations, individuals, and ABA entities weighed in, including the Standing Committee on Professional Discipline, the Section of Litigation, the Commission on Sexual Orientation and Gender Identity, the Commission on Disability Rights, the Section of Labor and Employment Law, the Commission on Women in the Profession, and the Business Law Section.[50] The Christian Legal Society also offered critical comment on the resolution, claiming the proposal was an affront to religious freedom.[51]

After reviewing the comments and holding a public hearing in February 2016, the Standing Committee amended its draft resolution and, finally, at the ABA annual meeting in August 2016, proposed the following:

> It is professional misconduct for a lawyer to: (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

45 Model Rules, Preamble & Scope [20].

46 As of June 2017, thirteen states had not adopted the ABA comments to the Model Rules. Am. Bar Ass'n, State Adoption of the ABA Model Rules of Professional Conduct and Comments (2017).

47 Gillers, *supra* note 41, at 208.

48 Lauren Rikleen, *The Cost to Law Firms of Ignoring Harmful Workplace Behavior,* The Am. Lawyer (July 9, 2018).

49 *See also* Gillers, *supra* note 41, at 216-31 ("Ten Issues Likely to Arise in Deliberations Over an Anti-Bias Rule").

50 *Id.* at 215-16.

51 *Id.* at 216.

> status or socioeconomic status in conduct related to the practice of the 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.

This new resolution solved the points of contention. First, it included a compromise "knows or reasonably should know" mens rea requirement rather than either a strict liability approach or a more elevated "knowing" standard.[52] Second, it determined that the Rule would apply to "conduct related to the practice of law," not just "in the practice of law," which the original draft suggested. The ABA reasoned that the Model Rule should prohibit harassment and discrimination beyond the scope of representing a client, such as at "bar association functions" or "law firm social events." The ABA House of Delegates approved the adoption of Rule 8.4(g) by an overwhelming voice vote on August 8, 2016.

E. Rationales Behind Model Rule 8.4(g)

Critics of the new Model Rule claim that it is redundant, extreme and overbroad, and a violation of lawyers' First Amendment rights.[53] One state legislature and four Republican Attorneys General weighed in against the Rule, raising constitutional and other objections.[54] In the redundancy vein, critics claim that Rule 8.4(g) overregulates attorneys because the EEOC and regular civil liability already provide an avenue for recourse against misconduct.[55] Some Rule opponents contend that plaintiffs should

52 *Compare* Model Rules r. 8.4 Amendment (Am. Bar Ass'n, Discussion Draft, July 2015) *with* Standing Comm. on Ethics & Prof'l Responsibility et al., Revised Resolution, at 1-3 (Aug. 8, 2016).

53 *See, e.g., Margaret Tarkington, Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward,* 95 *St. John's L. Rev. 121 (2021); Ron Rotunda, The ABA Overrules the First Amendment,* Wall Street J. (Aug. 16, 2016); Alice M. Sherren, et al., *Revised ABA Model Rule 8.4(g): Anti-Discrimination Rule or Unconstitutional Speech Code?, 9* Prof'l Liability Def. Q. 8 (2017); Francis G.X. Pileggi, *ABA Seeks to Enforce Political Correctness,* The Bencher 9 (Nov./Dec. 2016); Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' include in law-related social activities, The Washington Post (Aug. 10, 2016)*([T]he ABA wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that it disapproves of.").

54 The Montana state legislature issued a joint resolution declaring that the Montana Supreme Court lacked the authority to enact such a rule regulating lawyers. The resolution asserted that the Model Rule violates the First Amendment and "seeks to destroy the bedrock foundations and traditions of American independent thought, speech, and action." S.J. 15, 2017 Leg., 65th Sess. (Mont. 2017). Texas Attorney General Ken Paxton issued an advisory opinion that the rule "would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues," including illegal immigration, same-sex marriage, or restrictions on bathroom usage. Tex. Atty Gen. KP-0123 (Dec. 20, 2016). Louisiana's Attorney General pronounced that the Model Rule's expansive reach to "conduct related to the practice of law is "unconstitutionally broad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct." La. Atty Gen. Op. 17-0114 (Sept. 8, 2017). The Louisiana State Bar Association thereafter determined not to proceed with Rule 8.4(g). K. Kubes, et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law (ABA J. March 12, 2019). See also Op. S.C. Att'y Gen. (May 1, 2017); Op. Tenn. Att'y Gen. No. 18.11 (March 16, 2018).*

55 Samuel Stretton, *Ethics Forum: Questions and Answers on Professional Responsibility,* The Legal Intelligencer (May 31, 2018).

have to exhaust these resources before resorting to a disciplinary hearing.[56] The Rule is also overbroad, in their view, because it does not fit into the current rules. By applying to any "conduct related to the practice of law," including office interactions and social gatherings, it expands the reach of the disciplinary process and goes further than the vast majority of other rules in regulating attorneys' private lives.[57] Few other rules also have a "knows or should reasonably know" standard, which, in the opponents' view, is too low a threshold and may result in disciplinary action for accidental or inadvertent behavior not intended to offend or harass.[58] Finally, opponents argue it violates their First Amendment rights because they will be forced to take on undesirable clients and prohibited from expressing controversial views on current legal or political topics.[59] For example, they contend that a devoted Evangelical attorney might face disciplinary action if she refused to assist a gay couple in drafting a prenuptial agreement.[60] Or that a lawyer may face disciplinary action for speaking out in favor of a presidential ban on immigrants from certain countries.[61]

Though the language of Model Rule 8.4(g) and supporting comments does not satisfy its vocal critics, the Standing Committee set forth its reasoning in support of the new Model Rule and to rebut its opponents' concerns. First, the Rule is not actually new, but rather, it builds on the long trajectory of prior ABA policy positions. The ABA has long recognized its responsibility to promote "equal justice for all."[62] In 2008, the ABA determined one of its core strategic goals would be to "Eliminate Bias and Enhance Diversity."[63] The new Rule falls squarely in line with that goal. Additionally, though it may expand the mens rea and nexus requirements, the language of Rule 8.4(g) is not drastically different from former Comment [3] to Model Rule 8.4(d).[64] In fact, it seeks to address some of the limitations of the Comment, as explained above. Further, the Model Code of Judicial Conduct already contains anti-harassment and anti-discrimination provisions,[65] as do the *ABA Standards for Criminal Justice: Prose-*

56 Report to the House, *supra* note 15, at 11. A rule requiring that a victim first process her claim of harassment or discrimination before an available tribunal and secure a finding of an unlawful discriminatory practice before proceeding with a disciplinary complaint is commonly referred to as a "tribunal filing requirement."

57 Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30* Geo J. Legal Ethics 241, 250 (2017). *See also Bradley Abramson, Gagging Attorneys: A Critical Look at the ABA "Anti-Discrimination" Rule,* Jurist (July 31, 2017).

58 Andrew Halaby, et al., *New Model Rule of Profession Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship, 41 J. Legal Prof. 201, 223-25 (2017).*

59 *See, e.g., Letter from Alan Wilson, Attorney General, South Carolina, to John McCravy, South Carolina State Representative (May 1, 2017); Letter from Ken Paxton, Attorney General, Texas, to State Bar of Texas (Sept. 9, 2020)*(urging that bar cease consideration of the rule because it is unnecessary and "effectively suppresses honest and thoughtful exchanges on complex issues."). *See also Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment, The Federalist Society (Nov. 24, 2016).*

60 Gillers, *supra* note 41, at 235 (citing 123 U.S. Conf. of Catholic Bishops Ofc. of General Counsel, *Comments on Proposed Amendment to Model Rule 8.4,* at 6 (Mar. 10, 2016)).

61 Sherren, et al., *supra* note 53, at 8.f.

62 Report to the House, *supra* note 15, at 1.

63 *Id.* At least one author has urged the ABA to consider adopting a more aspirational version of Rule 8.4(g) designed to more effectively accomplish the goals of eliminating bias and enhancing diversity, and to address "covert discrimination throughout the profession." Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA L. Rev. 805, 861 (June 2019).

64 *Id.* at 2.

65 *Id.*at 1.

cution Function and Defense Function.[66] It is only logical to hold the entire profession accountable to a similar standard.

Second, as discussed above, former Comment [3] had its limitations. Because the Comment was not obligatory, "the ABA did not . . . forthrightly address prejudice, bias, discrimination and harassment as would be the case if this conduct were addressed in the text of a Model Rule."[67] In fact, many courts had been misapplying Comment [3] and Rule 8.4(d) by using them to remedy situations beyond their scope.[68] By adding new language and elevating the Comment to a rule, the ABA has established a more clear and workable rule for practitioners to follow.

Third, rules prohibiting harassment or discriminatory behavior already had been implemented by twenty-five jurisdictions by the time the Standing Committee presented its resolution before the ABA House of Delegates.[69] This is important for several reasons. Primarily, it shows that many states already determined that the Comment [3] structure was not adequately addressing bias in the legal profession.[70] These states also provided examples of what happens when a state adopts such a rule, or, more aptly, what does not happen. The supreme courts in these jurisdictions did not see a surge in complaints (as opponents of the Rule feared), but rather, they disciplined lawyers for misconduct in appropriate circumstances.[71] Rather than undermining free speech, Rule 8.4(g) respects a lawyer's First Amendment right to freely express opinions and ideas on matters of public concern while also prohibiting discriminatory and harassing conduct in the practice of law that generates skepticism and distrust of those charged with ensuring justice and fairness.

Fourth, the Model Rule's mens rea requirement, "knows or reasonably should know," balances objective and subjective standards. "Knowing" is a subjective standard that requires a finding of what a lawyer actually knew. This is advantageous to respondents as it protects against overzealous prosecution for conduct the respondent attorney could not have known was discrimination. On the other hand, "reasonably should know" provides an objective standard that "safeguards against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination."[72] The Standing Committee also noted in its Report to the House supporting the new Rule that the "knows or reasonably should know" standard is not rare: it appears in Rule 1.13(f), Rule 2.3(b), Rule 3.6(a), Rule 4.3, and Rule 4.4(b).[73]

Fifth, the scope of the rule is not as broad or extreme as some critics claim. In fact, it is actually narrower and more limited in scope than some other provisions. Rule 8.4(c), which prohibits dishonesty, fraud, deceit, and misrepresentation, applies at all times throughout a lawyer's life. Such conduct may adversely reflect on the lawyer's fitness to practice, serving as grounds for discipline.[74] However, the scope of Rule

66 *Id.* at 5 (citing Standards 3-1.6 and 4.16, respectively).
67 *Id.* at 4.
68 *Id.* at 9. For example, an Illinois disciplinary panel relied on Rule 8.4(d) in recommending a six month suspension of a lawyer who repeatedly engaged in harassing verbal conduct directed to courthouse staff and opposing counsel. In re Lewin, No. 2023PR00042 (Hearing Bd. Nov. 14, 2023).
69 Report to the House, *supra* note 15, at 5.
70 *Id.* & n.11.
71 *Id.* at 6, n.15.
72 *Id.* at 8.
73 *Id.*
74 *Id.* at 9.

8.4(g) may be expanded from that in Comment [3], but this expansion is necessary. Lawyers are more than "officers of the court and managers of their own law practices." They are public citizens that "have a responsibility for the administration of justice" and should be held to that standard.[75] Lawyers regularly participate in activities that they would not were they not lawyers: mentoring events, client entertainment, bar association functions, and, yes, actual legal practice. In each of these settings, the lawyer is advocating for a client, promoting access to the legal system or making improvements to the law and the profession. Some of these events, though "social" in nature, are highly encouraged by the law office, or even mandatory.[76] The standards of the profession should follow a lawyer to these professional events.

Sixth, the Standing Committee denied that Rule 8.4(g) infringes on any constitutional rights of attorneys. The Rule explicitly states that it does not "limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16" nor does it "preclude legitimate advice or advocacy."[77] Lawyers remain free to represent whom they wish to represent and may advocate for positions they are inclined to support. If anything, this rule regulates speech in much the same way other rules regulate lawyer speech. Rules 1.6(a) and 1.9(c), for example, prohibit attorneys from sharing confidential information about a former client with a new client.[78] Rule 4.2 forbids certain communications with another lawyer's client.[79] Rules 3.4(e), 3.4(f), 3.5, 4.2, and 8.2(a) all limit or regulate the speech afforded attorneys, as well.[80] Lawyers remain free to challenge the application of the Rule in specific circumstances on constitutional grounds in a disciplinary hearing.[81]

Seventh, there is no other Model Rule that requires a complainant to exhaust all common law claims before seeking disciplinary action. To have a rule to the contrary would be unprecedented. Put simply, "[t]he two systems run on separate tracks."[82] The Preamble to the Model Rules states, "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[83] Consequently, the profession's internal standards do not necessarily give way to civil liability, nor would a civil suit, usually resulting in damages, preclude the attorney from facing professional discipline.

Eighth, Rule 8.4(g) aids in the public perception of the profession. As Deborah Rhode, Stanford University's Director of the Center on the Legal Profession, explains, "The rule provides a useful symbolic statement and educational function."[84] To con-

75 *Id.* at 10. *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, 130 (2018).*

76 Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech, 31* Geo. Legal Ethics 31, 68 (2018).

77 *See* Model Rules, *supra* note 5, at r. 8.4(G).

78 *Id.* at R. 1.6(a), 1.9(c).

79 *Id.* at R. 4.4(a).

80 *Id.* at R. 3.4(e), 3.4(f), 3.5, 4.2, 8.2(a).

81 Gillers, *supra* note 41, at 239. *See also* Alex Hamilton, winner of 2019-2020 Temple American Inn of Court Stephen T. Saltz Memorial Scholarship for his paper entitled *In Support of Pennsylvania Adopting Model Rule 8.4(g)* (Dec. 2019)(contending that the rule satisfies free speech standards articulated by the U.S. Supreme Court).

82 *See* Report to the House, *supra* note 15, at 11.

83 *See* Model Rules, Preamble & Scope [20].

84 David L. Hudson, Jr., *States Split on New ABA Model Rule Limiting Harassing or Discriminatory Conduct,* ABA J. (Oct. 2017).

nect back to the goals of the ABA, having anti-discrimination and anti-harassment policies sends a message to the public that the law is accessible and all are welcome to pursue justice through the legal system.

Finally, Rule 8.4(g) has other advantages not directly promoted by the ABA. Biased conduct in the workplace not only perpetuates stereotypes and the submissive status of its targets, but it is also costly.[85] Uncomfortable work environments decrease productivity. Lawsuits and discovery are expensive. It is therefore in the best interest of employers to reduce, correct, and prevent problems of harassment and discrimination before they become "severe and pervasive."[86] Moreover, given the high profile momentum of the #MeToo movement, law offices with clear anti-harassment and discrimination standards, robust reporting systems, and strict enforcement may win over clients and top talent.

F. Examples Where Prior State Versions of Rule 8.4(g) Have Been Applied Successfully

Some states adopted their own versions of Rule 8.4(g) prior to the ABA's Model Rule, and they have come into play to redress misconduct on several occasions. For example, attorney Daniel McCarthy of Indiana was an officer of a title company involved in a legal dispute. The agent representing the seller directed his assistant to send an email to McCarthy demanding that he arrange a meeting for all involved in the dispute. McCarthy wrote back to the assistant, stating:

> I know you must do your bosses [sic] bidding at his direction, but I am here to tell you that I am neither you [sic] or his ni**er. You do not tell me what to do. You ask. If you ever act like that again, it will be the last time I give any thought to your existence and your boss will have to talk to me. Do we understand each other?[87]

The court found that McCarthy violated Rule 8.4(g) because the "N" word was derogatory and racist and that its use "serves only to fester wounds caused by past discrimination and encourage future intolerance."[88] Accordingly, McCarthy was suspended from practice for thirty days. Since McCarthy's comments were not made in the course of representing a client, former Comment [3] to Rule 8.4(d) would not have directly addressed his egregious conduct. Also given that the assistant was not his employee and the incident only occurred once, it is unclear whether she would have had any viable EEOC or civil claims against him. Rule 8.4(g) was perhaps the only avenue to pursue discipline.

In New Jersey, there have been several instances of discipline for violations of its version of Rule 8.4(g). The New Jersey Supreme Court recently reprimanded a lawyer who made demeaning, discriminatory statements directed to the opposing party who was Asian, including asserting in a letter to counsel that lying "to achieve some business or social aim, and getting away with it, is considered to be a sign of intelli-

85 *See Lazar, supra* note *29.*
86 *Id.*
87 In re McCarthy, 938 N.E.2d 698 (Ind. 2010).
88 *Id.*

gence and social skill among many Chinese."[89]

In Minnesota, Rebekah Nett was disciplined under Rule 8.4(g) for various offensive statements she made in bankruptcy court filings accusing the judges and others of bias based on race and religion.[90] She was found to have made harassing personal attacks and discriminatory statements in 11 pleadings in five distinct matters. The Supreme Court of Minnesota accepted Nett's admissions of misconduct under that state's version of Rule 8.4(g) adopted in 1990 and suspended her from practice indefinitely.[91]

In Iowa, a county attorney was charged with violation of that state's version of Rule 8.4(g) for sexually harassing a young, inexperienced legal assistant. The Iowa Supreme Court rejected a grievance commission's recommended thirty-day suspension and instead imposed a suspension for an indefinite period, concluding that "[s]exual harassment in all forms is unacceptable and unethical."[92]

In Vermont, a family lawyer was disbarred for misconduct, including having sex with a divorce client and demanding that she sign a contract that the relationship was consensual, and made unwanted advances toward a female employee with mental health issues.[93] The Supreme Court of Washington suspended a lawyer from practice for, among other things, "manifesting prejudice" in violation of that state's version of the rule for writing ex parte letters to the court disparaging the opposing party based on her national origin.[94]

III. PENNSYLVANIA AND RULE 8.4(g): A TORTUOUS CASE STUDY

Historically, Pennsylvania has supported adoption of the ABA Model Rules of Professional Conduct to "promote consistency in application and interpretation of the rules from jurisdiction to jurisdiction."[95] Pennsylvania's version of Model Rule 8.4(g) wended its way slowly through the approval process. It is not unheard of in Pennsylvania for a proposed disciplinary rule to move toward adoption at a glacial pace, in part because this state, unlike various other jurisdictions, lacks an established timetable for publication, review and Supreme Court action on either procedural or disciplinary rule recommendations. The process by which Rule 8.4(g) came to be adopted was highly unusual, if not unique, in that it took nearly six years and several different proposed iterations of the Rule proffered by the Disciplinary Board, as well as vigorous input from the organized bar (and from individual attorneys and advocacy groups) at each

89 In re Farmer, D-76 Sept. Term 2018, No. 082332 (NJ Sept. 6, 2019). *See also* In Pinto, 168 N.J. 111 (2001)(reprimand for sexual harassment of "vulnerable, unsophisticated female client"); In re Geller, 177 N.J. 505 (2003)(reprimand for, among other misconduct, exhibiting "ethnic bias" toward Irish judge).

90 In re Nett, 839 N.W.2d 716, 720 (Minn. 2013). *See also In re* Woroby, 779 N.W.2d 825 (Minn. 2010) (harassment of former client on the basis of religion and national origin).

91 *Id.* at 723.

92 Iowa Supreme Court Disc. Bd. v. Watkins, 944 N.W.2d 881 (June 19, 2020). The Court observed: "Sexual harassment is a problem in our profession, and our sanction in this case needs to reflect the seriousness of this problem to deter similar misconduct by other attorneys and 'uphold the integrity of the profession in the eyes of the public.'" *Id.* at 888. The Illinois Supreme Court recently approved the addition of "sexual harassment prevention" to the enumerated topics qualifying for professional responsibility CLE credit hours under Rule 794(d)(1). The rule change, made effective February 1, 2024, was supported by various entities, including the Commission on Professionalism and the Chicago Bar Association's Sexual Harassment Prevention Task Force, whose chair presented testimony in support of the rule change because "sexual harassment is unfortunately still a prevalent issue in the legal profession[.]"

93 In re Robinson, 209 A.3d 570 (Vt. 2019).

94 In re McGrath, 280 P.3d 1091 (Wa. 2012).

95 46 Pa. B. 7519 (Dec. 3, 2016).

stage of the process. The series of three Board recommendations and their material differences are summarized below.

A. Competing Proposals From the PBA and the Disciplinary Board

Though the Rule had strong support within the leadership of the PBA and the Philadelphia and Allegheny County Bar Associations, the Disciplinary Board approached the rulemaking process with caution. The Board was unwilling to recommend wholesale adoption of the Model Rule, citing First Amendment concerns and limited prosecutorial resources to fully investigate and potentially pursue a significant number of harassment claims. After publishing two different versions for public comment — each of which severely limited the scope of the Rule compared to the Model Rule, the Board recommended to the Pennsylvania Supreme Court a rule in 2019 that garnered the support of the organized bar and was finally approved by the Court in June 2020 in the midst of the nationwide protests and public reckoning surrounding racial inequities in the justice system following the tragic death of George Floyd two weeks earlier.

B. The PBA's Decades Long Effort to Combat Harassment and Discrimination

Efforts to address harassment and discrimination in the Pennsylvania legal profession began before 1996 when the PBA first formally recommended to the Supreme Court of Pennsylvania an amendment to Rule 8.4 that would have included sexual harassment as a form of professional misconduct.[96] In 1999, the PBA reiterated and expanded upon its recommendation to include race, this time with the support of what was then called the Gender Education Committee.[97] Each of these attempts was unsuccessful.

Nonetheless, the PBA made some inroads as well. In 1997, the PBA Legal Ethics and Professional Responsibility Committee issued an extensive formal opinion urging that a "bright line" rule be adopted prohibiting lawyers from initiating sexual relationships with current clients.[98] That forward-thinking guidance paved the way for the PBA's recommendation in 2002 that the Supreme Court approve Model Rule 1.8(j) codifying this prohibition.[99] The Committee explained that such a relationship could lead to exploitation, ineffective representation, and general conflicts of interest.[100] The prohibition on sex with clients was not only an important precursor to Rule 8.4(g), but it is also likely that there will be instances of harassing lawyer conduct that trigger

96 Letter from Sara A. Austin, PBA President, to Hon. Thomas G. Saylor, Chief Justice, Supreme Court of Pennsylvania, at 1 (Dec. 2, 2016) [hereinafter Austin Letter].

97 Letter from Leslie A. Miller, PBA President, to Hon. John P. Flaherty, Jr., Chief Justice, Supreme Court of Pennsylvania (April 19, 1999).

98 PBA Legal Ethics & Prof'l Resp. Comm., Formal Op. 97-100: Attorney-Client Sexual Relations. The Committee opined that a lawyer's initiation of sexual contact with a client not a spouse of the lawyer presents "grave ethical concerns," and further recommended adoption of a new "bright line" rule prohibiting initiation of intimate relations with clients, except where the consensual relationship predated the lawyer-client relationship.

99 34 Pa. B. 4837 (Sept. 4, 2004**).** Supporting Comment [17] explains that the lawyer occupies a fiduciary relationship with a client, and that an intimate relationship between lawyer and client "can involve unfair exploitation" in violation of the lawyer's fundamental "ethical obligation not to use the trust of the client to the client's disadvantage."

100 Pennsylvania Ethics Handbook 157, M. Temin & T. Wilkinson eds. (PBI Press 5th ed. 2017).

discipline under both rules.

The addition of Rule 2.3 ("Bias, Prejudice, and Harassment") to the Pennsylvania Code of Judicial Conduct is also noteworthy.[101] Similar to the ABA's Model Judicial Code, the Pennsylvania Supreme Court approved this new rule in 2014.[102] It reads in part:

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.[103]

Rule 2.3 of the Code of Judicial Conduct signaled an increasing awareness of, and desire to curb, discrimination and harassment in and among the Pennsylvania judiciary.[104]

C. Collaborative Efforts In Support of the New Rule

As the conversation around Rule 8.4(g) ignited in Pennsylvania, many organizations weighed in, most in full support of the ABA Rule formulation, some in support of a Rule with modifications.

In line with the trajectory of recommendations reviewed above, the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Interbranch Commission") recommended to the Supreme Court a version of Rule 8.4(g) in February 2016. This version of the rule was different from the ABA Model Rule in two key ways. Instead of "knowing or reasonably should know," the Commission supported a Rule that focused on "knowing" conduct. Likewise, its proposed rule had a limited nexus requirement: the Rule only would apply to a lawyer's misconduct in the "course of representing a client," not more broadly to conduct "related to the practice of law," as the ABA would approve six months later.[105] The Commission explained the proposed new rule was necessary to "promote equal justice for all Pennsylvanians."[106]

Shortly following the ABA's adoption of Model Rule 8.4(g), the PBA's Women in

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101 This is consistent with the recommendations of the PBA Task Force on the Code of Judicial Conduct appointed by then PBA President Wilkinson. *See* Task Force Report at 5, 12-13 (April 2013)(approved by the PBA House of Delegates in May 2013).

102 Letter from Interbranch Comm'n for Gender, Racial and Ethnic Fairness, to Hon. Thomas G. Saylor, Chief Justice, Supreme Court of Pennsylvania, at 1 (Feb. 7, 2016) [hereinafter Interbranch Letter].

103 PA Code of Jud. Conduct r. 2.3(B).

104 In August 2020, the Judicial Conduct Board charged Allegheny County Common Pleas Judge Mark V. Tranquilli with violation of Canon 2, Rule 2.3 after he allegedly referred to a Black juror in a headscarf who served on a drug trial as "Aunt Jemima," and suggested she had a "baby daddy" who was "probably slinging heroin too." The Judicial Conduct Board petitioned the Court of Judicial Discipline for Tranquilli to be suspended without pay by reason of a litany of disparaging racist comments attributed to the judge, demonstrating improper bias or prejudice. Matt Fair, *Alleged Racist Remark About Juror Lands Judge in Hot Water,* Law360 (Aug. 12, 2020). In November 2020, Tranquilli resigned his judicial office, and the Supreme Court entered an order confirming that such resignation was "binding and irrevocable."

105 *See* Interbranch Commission Letter*, supra* note 102, at 2.

106 *Id.*

the Profession (WIP) Executive Council approved a recommendation to amend Pennsylvania Rule 8.4 to fully incorporate ABA Model Rule 8.4(g).[107] In support of this recommendation, the WIP explained that the PBA has maintained a policy of not discriminating in employment and its activities since June 2006, and that the proposed Rule naturally flows from the PBA's Diversity and Inclusion Plan. The proposed Rule also aligned with the mission statements[108] of the various committees and sections that signed on to the recommendation.[109] In its resolution supporting full adoption of Model Rule 8.4(g), the Philadelphia Bar Association explained that changing the misconduct provisions was a state-wide effort dating back to 1997 and was a necessary step for a profession dedicated to diversity and inclusion.[110]

Other metropolitan bars also offered recommendations. In its resolution, the Allegheny County Bar Association (ACBA) proposed removing the "reasonably should know" mental state requirement and adding a provision defining harassment and discrimination by pre-existing federal, state and local law. However, the ACBA fully supported the remainder of the proposed rule, including the nexus requirement.[111] The PBA Legal Ethics and Professional Responsibility Committee produced its report and recommendation with modified proposed rule language and successfully urged the WIP to join in the recommendation. This joint recommendation was approved unanimously by the PBA Board of Governors on November 16 and by the House of Delegates on November 18, 2016.[112]

The PBA submitted the formal recommendation to the Pennsylvania Supreme Court, explaining that proposed Rule 8.4(g) was "[i]n furtherance of PBA's long-standing mission to promote justice, respect for the rule of law, excellence, and betterment of the legal profession[.]"[113] The PBA's proposed rule language follows:

> It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows is harassment or discrimination as those terms are defined in applicable federal, state or local statute or ordinance, 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.[114]

107 Pa. Bar Ass'n Women in the Prof. Comm'n, et al., Report to the Board of Governors & House of Delegates, at 2 (Oct. 31, 2016).

108 *Id.* at 3-4.

109 The Minority Bar Committee, GLBT Rights Committee, Worker's Compensation Law Section, and other committees and sections supported the recommendation. *Id.* at 10-12.

110 Philadelphia Bar Ass'n Board of Governors, Resolution Supporting Adoption by the Pennsylvania Supreme Court of the Amendment to ABA Model Rule 8.4 (Oct. 26, 2016).

111 Allegheny Cty. Bar Ass'n Board of Governors, Resolution (Dec. 6, 2016).

112 *See* Austin Letter, *supra note* 96, at attachment C. PBA Legal Ethics and Professional Responsibility Committee Chair Daniel Q. Harrington took the lead in presenting these recommendations to the Board of Governors and House of Delegates, along with WIP Council representative and Zone One Governor Kathleen D. Wilkinson.

113 *See* Austin Letter, *supra* note 96, at 1.

114 *Id.* at attach. A.

In a curious coincidence of timing, the Disciplinary Board published for comment a competing proposed new Rule 8.4(g) on November 16, 2016, the same day the PBA Board of Governors voted to support the formulation of the new rule developed by the Legal Ethics and Professional Responsibility Committee in conjunction with the WIP. This presented the proponents of the PBA's recommendation with the strategic decision whether to withdraw or postpone the proposal pending consideration of the Disciplinary Board's rule formulation or forge ahead with the bar's recommendation.

D. The Disciplinary Board Cycles Through Several Formulations of the Proposed Rule: Round I (August 2016) — A Restrictive Rule Recommendation

The Disciplinary Board's first effort to articulate a new Rule 8.4(g) conspicuously omitted key provisions and safeguards of the ABA Model Rule. There was no mens rea or nexus requirement. Instead, the Board proposed that, as a condition to proceeding with a complaint under Rule 8.4(g), the claimant would be required to pursue to conclusion an administrative or civil proceeding against the lawyer that results in a finding of a violation of federal, state, or local harassment or discrimination law. Even then, the misconduct had to be so serious as to "reflect adversely on the lawyer's fitness as a lawyer." The Board would consider this adverse finding or judgment among many other factors related to the incident(s) at issue, including the setting in which it occurred.[115] The Board asserted that the tribunal filing requirement and other limitations were necessary because it did not want enforcement of the proposed rule to burden the "resource-strapped" Office of Disciplinary Counsel or to make the Board "the tribunal of first resort for workplace harassment or discrimination claims against lawyers."[116]

Because the Disciplinary Board's initial draft proposed rule prohibiting harassment and discrimination was so unduly restrictive as to preclude discipline even for serious misconduct in certain cases, the PBA's comment letter to the Supreme Court not only stood behind the bar's recommendation, but also critiqued the Board's recommended rule formulation. The PBA expressed strong reservations with the Board's first Rule 8.4(g) proposal, and presented eight reasons in its comment letter why the Board's approach was deficient: (1) The Board's proposed rule mirrored a 1993 Illinois anti-discrimination provision that was outdated and not reflective of the ABA Model Rule in scope or application;[117] (2) The proposed rule omitted certain categories that the ABA Model Rule protected, such as marital status, ethnicity, and gender identity; (3) The "transient issue of availability of funding or staffing" should not determine the appropriate standards for professional conduct; (4) Forcing plaintiffs to pursue all other administrative remedies first would increase strain on the judicial system when claimants could come directly to the Disciplinary Board for a remedy;[118] (5) Perpetrators could potentially avoid discipline because of a complainant's technical error in not pursuing an appropriate administrative or civil remedy through to conclusion in another legal regime; (6) Accused attorneys could buy their way out of discipline by settling and avoiding adjudication before a tribunal; (7) Because disciplinary hearings

115 46 Pa.B. 7519 (Dec. 3, 2016).
116 *Id.*
117 *See* Austin Letter, *supra* note 96, at 3.
118 *Id.* at 4.

have a heightened evidentiary standard, there still would have been significant costs if and when a complaint came from civil court to the disciplinary authority because the disciplinary authority would have to reexamine the evidence; and (8) Even if a lawyer committed harassing or discriminatory conduct, it would not necessarily reflect adversely on the lawyer's fitness to practice law.

E. Round II (April 2018) – A Swing and a Miss

After processing the public commentary, the Disciplinary Board issued for public comment a second proposed version of Rule 8.4(g) in May 2018, stating that a lawyer shall not:

> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation (except employment discrimination unless resulting in a final agency or judicial determination). 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] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.
>
> [4] Harassment, as referred to in paragraph (g), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.
>
> [5] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.[119]

The May 2018 Board proposal expressly did not recommend adopting Model Rule 8.4(g) "wholesale." The Board declined to recommend incorporation of the "broad scope of the language 'conduct related to the practice of law'" found in the Model Rule. Specifically, the Board expressed "grave concerns that adoption of such language would unconstitutionally chill lawyers' speech in forums disconnected from the provision of legal services." Therefore, the Board proposed an alternative: "'in the practice of law' as a more narrowly-tailored scope of prohibited conduct." The Board "conclude[d] that private activities are not intended to be covered by this proposed rule

119 48 Pa.B. 2936 (May 19, 2018).

amendment, since to do so would increase the likelihood of infringing on constitutional rights of lawyers."

The Board's May 2018 rule recommendation also applied a more stringent mens rea standard: that a lawyer "knowingly manifest bias or prejudice, or engage in harassment." This was viewed by the rule's critics as a positive development, as it would tend to exclude situations where the subjective feelings of a listener may result in an ethics violation. Rather, the misconduct must be knowing and deliberate.[120]

This second proposed version of the rule was less narrow than the first, but still precluded discipline arising from "employment discrimination" absent a finding resulting from a final agency or judicial determination.[121] Oddly, the Board also included a new protected category, "political affiliation," without explanation, apparently borrowing from the UJS anti-discrimination policy applicable to judges and other court personnel. Finally, the Board added a "knowing" mens rea requirement, taking up the PBA's recommendation, so as to avoid unintentional violation of the rule.[122] In its second rule proposal, the Board clearly attempted to strike a balance between ABA Model Rule 8.4(g) and the First Amendment objections raised by the some of the rule's vocal opponents.

The Board's second proposed formulation of Rule 8.4(g) drew critical commentary from both supporters and opponents of adoption of a rule prohibiting harassment and discrimination in the practice of law. The Christian Legal Society submitted a spirited letter calling the Board's proposed rule facially unconstitutional because it expressly prohibited protected speech.[123] Proponents of a more robust version of Rule 8.4(g) were also dissatisfied.[124] On May 31, 2018, shortly after the Board issued its second Notice of Proposed Rulemaking, the PBA president wrote to the Board, explaining that, while the second recommendation was much improved from the 2016 proposal, it was still too narrow in scope. Instead, the PBA urged adoption of the PBA's original recommendation from December 2016, including the broad scope of the nexus requirement that would permit discipline for misconduct at firm-sponsored and other professional events.[125] The PBA again expressed concern about inclusion of a tribunal filing requirement, which creates an onerous obstacle for complainants and tends to deter reporting of misconduct. In June 2018, the ACBA and Philadelphia Bar Associations wrote to the Board expressing a similar sentiment.[126] In addition, a group of bar ethics

120 Josh Blackman, *Pennsylvania Adopts Variant of ABA Model Rule 8.4(g),* The Volokh Conspiracy (June 11, 2020).

121 Violation of a disciplinary rule is a basis for possible discipline that is not dependent upon or limited by either statutory or common law claims. The disciplinary system and the civil legal system "run on separate tracks." Report to the House, at 11.

122 48 Pa.B. 2936 (May 19, 2018).

123 Letter from David Nammo, CEO & Exec. Dir., Christian Legal Soc., to Disciplinary Board (July 19, 2018). The Society had urged support for the Disciplinary Board's first rule proposal, concluding in a letter dated February 3, 2017 that it was "written in a thoughtful and temperate manner that fairly balances the interests of both attorneys and the public."

124 Letter from Josh Blackman to Disciplinary Board (July 13, 2018)(praising the heightened mens rea standard by use of the term "knowingly," but expressing concerns about the vagueness of the term "in the practice of law," given that Pennsylvania rules do not define what constitutes the practice of law).

125 Letter from Charles Eppolito, III, PBA President, to Disciplinary Board (May 31, 2018). The Interbranch Commission also objected to the Board's second proposal's inclusion of an amended exhaustion of administrative remedies requirement and its exclusion of employment based claims as unduly restrictive.

126 Letter from Hal D. Coffey, President, ACBA, to Disciplinary Board, at 1-2 (June 6, 2018); Letter from Mary F. Platt, Chancellor, Philadelphia Bar Ass'n, to Disciplinary Board (June 8, 2018).

committee members jointly wrote to the Board to urge deletion of "political affiliation" as a protected characteristic under the proposed rule on the ground that, while there may be good reason to regulate political speech of judges to ensure public confidence in the independence and impartiality of the judiciary, lawyers are free to participate or advocate, either on their own or on behalf of a client, in the political arena. The group explained that inclusion of political affiliation as a protected characteristic might operate to infringe on core political speech of lawyers.[127]

F. Round III (August 2019) — Garners Wide Support

The Disciplinary Board went back to the drafting board and, in August 2019, published for comment a substantially revised proposed Rule 8.4(g).[128] This third recommendation made no specific mention of the prior two iterations or the factors that convinced the Board to alter its approach. In its published notice, the Board explained that "Pennsylvania historically has supported adoption of the ABA Model Rule amendments to promote consistency in application and interpretation of the rules among jurisdictions, except when policy considerations justify a deviation from the Model Rule language."[129] The Board then set out the proposed new rule and explained that it differs from Model Rule 8.4(g) in several respects:

> (1) it limits the scope of the prohibited activity to "in the practice of law"; (2) it limits the "reasonably should know" standard in favor of "knowingly"; (3) it adds the language "manifest bias or prejudice"; (4) it clarifies the scope of the prohibited activity as "defined in applicable federal, state and local statutes or ordinances"; and (5) it eliminates the qualifier "legitimate" to describe a lawyer's advocacy.[130]

The Board's third Rule 8.4(g) formulation deleted the earlier proposed comments providing more specific guidance on what conduct constitutes "harassment," and the black letter text was somewhat more awkwardly phrased than either the Model Rule or the PBA's proposed rule language.[131] Notwithstanding these drawbacks, the leadership of the Legal Ethics and Professional Responsibility Committee and the WIP recommended that the PBA support the Board's recommendation because it conformed substantially to the PBA's initial rule recommendation in November 2016, and urged prompt approval, embracing the aphorism that "perfect is the enemy of the good." The PBA Board of Governors unanimously approved submission of a letter advising the Board that its proposed Rule 8.4(g) satisfied key concerns raised in response to the Board's first two rule proposals. In particular, the proposal dovetailed with the PBA's effort to tie the offending conduct to harassment or discrimination as those terms

127 Joint letter from PBA Legal Ethics Comm. members to Disciplinary Board (June 12, 2018).

128 49 Pa.B. 4941 (Aug. 31, 2019).

129 *Id.*

130 *Id.* There is a significant body of precedent in the disciplinary context concerning the application of rules imposing a knowing" standard, such as misrepresentation in violation of Rule 8.4(c). *Must Disciplinary Violations Be Intentional?,* Attorney News, Disciplinary Board (Sept. 2020).

131 The Board also deleted the reference to "political affiliation" as a protected characteristic consistent with the recommendation of members of the PBA Legal Ethics Committee and others.

are defined in applicable federal, state or local law.[132] The Board's recommended rule language also added a "knowingly" mens rea requirement to avoid discipline for inadvertent conduct. While not acknowledging the organized bar's input, the Board also incorporated the bar's recommendation that the rule apply where lawyers are engaged in bar association meetings and conferences where continuing legal education seminars are offered.

The Interbranch Commission commended the Board's "laudable efforts" that served to alleviate many of the previously expressed concerns "regarding the restrictive prior formulations of this Rule." The Commission then urged that the reference to applicable law should also include "federal and state administrative agency decisions and guidance, and **case law**," because the term "harassment" has been defined by case law interpreting federal, state and local statutes, as well as by administrative agency decisions, guidance and case law.[133] The Commission also recommended that discrimination on the basis of sexual orientation and gender identity be expressly prohibited because there was no statewide prohibition, and the rule should not apply inconsistently depending on where the lawyer practices.[134]

G. The PA Supreme Court Makes the Final Call

Demonstrating the old adage that "the third time is the charm," in June 2020, the Pennsylvania Supreme Court approved the Disciplinary Board's proposed rule change that had been published for comment in August 2019.[135]

Pennsylvania Rule 8.4(g) prohibits a lawyer from knowingly manifesting bias or prejudice, or engaging in harassment or discrimination within the meaning of federal, state or local statutes or ordinances.[136] Such misconduct includes, but is not limited to bias, prejudice, harassment or discrimination based on race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital

132 Letter from PBA President Anne N. John to Disciplinary Board (Sept. 9, 2019). *See also* Letter from Phila. Bar Chancellor Rochelle M. Fedullo to Disciplinary Board (Sept. 26, 2019). *See also* Nancy Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, Geo. J. of Legal Ethics, Vol. 23:1, 55 (2010) (reviewing those rules with specific mental state requirements and those rules that fail to specify any such requirement, and suggesting that the default standard should be negligence in rules designed to protect clients and knowledge in rules designed to protect courts and third parties).

133 Letter from Interbranch Commission to Disciplinary Board (Sept. 17, 2019) at 3 (emphasis in original).

134 *Id.* at 4.

135 50 Pa.B. 3011, 2020 Pa. Lexis 3147. Justice Sally Mundy dissented without opinion. By happenstance, the Pennsylvania rule resembles Missouri's version of Rule 8.4(g), adopted before the Model Rule. The Missouri rule directs that a lawyer shall not "(g) manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status." The Missouri rule applies only to conduct in the course of representing a client and includes fewer protected characteristics.

136 In its comment letter, the Interbranch Commission urged that the proposed rule expressly include discrimination on the bases of sexual orientation and gender identity or expression, noting the lack of current federal protection and the fact that only three Pennsylvania counties and various cities and townships proscribe such discrimination.

status, or socioeconomic status.[137] Conduct in the "practice of law" includes participation in activities required to practice law, such as legal education seminars, bench bar conferences and bar association activities where CLE credits are offered.[138]

The rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation consistent with Rule 1.16 (Declining or Terminating Representation). By way of example, a lawyer may seek court permission to withdraw on the basis of client nonpayment of legal fees, notwithstanding the fact that the client may be in one or more of the protected categories.

The rule's adoption capped an over four year effort on the part of the PBA and its Legal Ethics and Professional Responsibility Committee to bring the Pennsylvania rules into closer conformity with the ABA Model Rules by prohibiting knowing harassment and discrimination in the practice of law, including activities with a "sufficient and obvious nexus to the practice of law," such as bar association events and bar conferences offering CLE programming.[139] As noted above, the rule change adopted in Pennsylvania is somewhat narrower than the Model Rule in several respects, but should provide disciplinary authorities, as well as victims of harassment and discrimination, a long awaited avenue for recourse against serious lawyer misconduct.

In a statement issued on June 9, 2020, the PBA stated: "We thank the Supreme Court for approving this much-needed rule that is consistent with the PBA's longstanding policies."

IV. THE ABA ISSUES GUIDANCE CONCERNING THE SCOPE AND APPLICATION OF MODEL RULE 8.4(g)

In July 2020 the ABA Standing Committee issued Formal Opinion 493 entitled Model Rule 8.4(g): Purpose, Scope, and Application.[140] The 14-page opinion, buttressed by 67 footnotes, is an extraordinary effort to provide guidance concerning the anti-harassment rule's practical application, while at the same time encouraging states to give serious consideration to adopting the rule or updating their existing anti-harassment rules to incorporate the Model Rule's more expansive approach.

The Standing Committee explained that whether conduct violates the Model Rule must be assessed using a standard of "objective reasonableness," and only conduct that is found harmful will be grounds for discipline. The Model Rule is not restricted to conduct that is "severe or pervasive," a standard commonly used in the employment context. Having said that, the committee opined that conduct that violates Rule 8.4(g) will often be intentional and typically targeted at a particular individual or group, "such as directing racial or sexist epithets towards others or engaging in unwelcome, noncon-

137 A week after the Court approved Rule 8.4(g), the Supreme Court of the United States concluded in a closely watched opinion that Title VII of the Civil Rights Act prohibits firing an individual for being homosexual or transgender. Bostock v. Clayton Cty., 590 U.S. 644 (2020) (Gorsuch, J.). Discrimination or harassment based on sexual orientation is also protected under Pennsylvania's version of the new disciplinary rule, but the rule should not be equated with a new employment law, and its violation does not produce the remedies typically arising in that context, including back pay, front pay or attorney's fees.

138 Prof. Blackman expressed concern that the Pennsylvania rule's express application to legal seminars, "could prohibit certain types of speech at a CLE debate, for example." *Pennsylvania Adopts Variant of ABA Model Rule 8.4(g), supra,* n. 117. He also asserted that the "including but not limited to" language in the rule created a lack of certainty as to its scope.

139 *Id.* at 3.

140 ABA Standing Comm. on Ethics and Prof. Resp. Formal Op. 493 (July 15, 2020).

sensual physical conduct of a sexual nature."[141]

The Standing Committee devoted several pages to address the First Amendment concerns raised by critics of the rule as an infringement of lawyers' free speech. The committee explained that several Rules of Professional Conduct already limit the scope of lawyer speech and have been upheld against constitutional challenge.[142] While regulation of "professional speech" must comply with traditional First Amendment standards,[143] numerous judicial opinions confirm the legitimacy of a state's regulatory interest in prohibiting conduct that reflects adversely on the profession and undermines the public's confidence in the legal system and its trust in lawyers.[144]

The Standing Committee concluded that "Rule 8.4(g) promotes a well-established state interest by prohibiting conduct that reflects adversely on the profession and diminishes the public's confidence in the legal system and its trust in lawyers."[145] The rule also "protects specific categories of victims from identified harm, and a violation can only take place when the offending conduct engaged in is 'related to the practice of law,' and the lawyer knows or reasonably should know that it constitutes harassment or discrimination."[146] Therefore, "a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender based epithet toward another individual, in circumstances related to the practice of law."[147] By contrast, a single instance of a lawyer making a derogatory sexual comment toward another person in the practice of law may not violate Title VII, but would violate Rule 8.4(g). However, the isolated nature of the misconduct presumably would be a mitigating factor in the disciplinary process.[148]

The Standing Committee presented a series of illustrations intended to drive home the point that accepting representation of clients espousing controversial, conservative religious positions or advocating against race-conscious college admissions in a CLE program would not violate Rule 8.4(g).[149] The Standing Committee expressly referenced the recent Supreme Court ruling in *Bostock* interpreting Title VII of the Civil Rights Act of 1964 to extend to protect against sexual orientation and gender identity discrimination, explaining that a lawyer who advocates for the ability of private employers to refuse to employ individuals based on those characteristics or a legal orga-

141 *Id.* at 11.

142 *Id.* at 9-10. Lawyers are forbidden from making a false or reckless statement concerning the qualifications or integrity of members of the judiciary under Rule 8.2(a), and under Rule 3.6 are admonished not to comment publicly about litigation if the lawyer knows or should know that the comments "have a substantial likelihood of materially prejudicing an adjudicative proceeding[.]"). Rule 4.1 prohibits making knowingly false statements, even outside the practice of law, and Rule 7.1 limits communications about a lawyer or a lawyer's services to those that are truthful and not misleading.

143 Nat'l Inst. of Family and Life Advocates v. Becerra, 585 U.S. 755 (2018).

144 ABA Formal Op. 493, at 11. *See also* Matter of Vincenti, A.2d 470, 474 (N.J. 1989)("In the context of either the practice of law or the administration of justice, prejudice both to the standing of the profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.").

145 *Id.*

146 *Id.*

147 *Id.* For example*, in* In re Dempsey, 986 N.E.2d 816, 817 (Ind. 2013) the court rejected a free speech challenge to a lawyer's three year suspension for distributing fliers concerning personal litigation depicting his adversaries as "slumlords," calling their counsel "bloodsucking shylocks," and making disparaging remarks about Jews generally.

148 *Id.* at 4 (citing Annotated ABA Standards for Imposing Lawyer Sanctions (2d ed. 2019)). *See also* David L. Hudson, Jr., "Conduct Unbecoming," ABA J. 32 (Oct.-Nov. 2020).

149 *Id.* at 12. The Standing Committee explained that, while some might take offense at the lawyer's expression of hot-button political or social views, it is not the type of "harm" required for a violation.

nization supporting that position would not violate the rule.[150]

Two instances where a rule violation should be found, the Standing Committee opined, are (1) where a lawyer teaching as an adjunct professor supervising a law student in a law school clinic "made repeated comments about the student's appearance and also made unwelcome, nonconsensual physical contact of a sexual nature with the student;" and (2) in the case of a law firm partner's remarks during an associate orientation program that Muslim lawyers should never be trusted, and that they should never represent a Muslim client.[151]

Due to the language differences between Model Rule 8.4(g) and the Pennsylvania Rule, ABA Formal Opinion 493 will represent persuasive but not conclusive guidance for the Rule's application as a disciplinary enforcement tool in Pennsylvania. The district court opinion confirmed at least the following material differences between the two rules:

- The Model Rule applies when the conduct is "related to the practice of law,"[152] whereas the Pennsylvania rule's application is limited to conduct "in the practice of law."

- The Model Rule also is more expansive because it applies to conduct the "lawyer reasonably should know" constitutes discrimination or harassment, whereas the Pennsylvania rule prohibited words or conduct that "knowingly" manifest bias or prejudice, thus serving to "exclude inadvertent or negligent conduct."[153]

- The Pennsylvania rule injects the words "manifest bias or prejudice" drawn from the Code of Judicial Conduct.[154]

- The Model Rule provides in Comment [3] that "the substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of 8.4(g)," whereas the Pennsylvania rule elevated this point to the black letter and directs that substantive law

150 There is legislation pending that would extend the Pennsylvania Human Relations Act (PHRA) to include protections for sexual orientation and gender identity. For helpful discussions of the legal import and limitations of *Bostock* on LGBTQ rights, *see* L. Carpenter, *Sweet Georgia Bostock*, and N. Conrad and H. Goldner, *The Ramifications of Bostock for Plaintiffs, Defendants and Their Counsel*, Open Court, PBA LGBTQ+ Rights Comm. Newsletter (Fall 2020).

151 ABA Formal Op. 493, at 13.

152 Model Rule 8.4(g), cmt. [4] lists the following activities as "conduct related to the practice of law": 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 practice; and participating in bar association, business or social activities in connection with the practice of law. What types of "social activities" will be deemed sufficient to fall within the ambit of the Model Rule and outside the Pennsylvania rule will require case law development, but one could surmise that harassment or discriminatory misconduct occurring, for example, during or following a lawyers' softball league game would more likely expose the lawyer to discipline under the Model Rule formulation.

153 49 Pa.B. 4941, at 3, *citing* Pa.RPC 1.0(f). *See* Pa.R.J.C. 2.3.

154 The somewhat awkward addition of the words "manifest bias or prejudice" following "knowingly" raised an interpretation question, which is whether the adverb "knowingly" also modifies the following phrase, "or engage in harassment or discrimination." In any event, the Disciplinary Board has publicly stated that the Pennsylvania rule imposes a higher mens rea standard than the Model Rule.

guide application of the rule.[155]

- The Model Rule includes in Comment [3] descriptions of conduct constituting "discrimination and harassment" that were not incorporated into the Pennsylvania comment.[156]

V. THE PENNSYLVANIA RULE IS CHALLENGED IN THE EASTERN DISTRICT: *GREENBERG v. HAGGERTY*

In August 2020, Pennsylvania lawyer Zachary Greenberg, with the backing of a nonprofit "devoted to the protection of Free Expression under the First Amendment," filed a challenge to Rule 8.4(g) in the Eastern District of Pennsylvania, contending that the new Rule "seeks to dictate what views members of its bar may hold and express, and what views are too offensive to share."[157] The complaint for declaratory and injunctive relief named all members of the Disciplinary Board and the Board's chief counsel as defendants. Consisting of two counts, unconstitutional infringement of free speech and unconstitutional vagueness, the complaint alleged that plaintiff Zachary Greenberg, a First Amendment advocate working for the Foundation for Individual Rights in Education ("FIRE"), would be forced to self-censor his remarks during CLE presentation or in writings so that his speech would not be "at risk of being incorrectly

155 One proponent of the Model Rule has warned that undue reliance on substantive employment law to determine a violation could serve to inject a "severe or pervasive" requirement. Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women From Harassment,* Univ. of Detroit Mercy L. Rev. 579, 597 (Summer 2019). Professor Hess maintains that "[i]mporting the unduly high bar from Title VII for plaintiffs to establish sexual harassment would only weaken Rule 8.4(g)'s application and risks, making the rule yet another ineffective tool for addressing harassing conduct." The higher clear and convincing standard of proof applicable in disciplinary proceedings, rather than the lower standard of preponderance of the evidence in Title VII cases, does not bode well for complainants in attorney sexual harassment proceedings. Id. at 598.Ohio adopted a version of the rule that expressly prohibits lawyers from "engaging in a professional capacity, in conduct involving discrimination prohibited by law." *Id*. at 599. The Ohio Supreme Court has approved discipline in a harassment case notwithstanding the adoption of Title VII jurisprudence, but virtually all of the disciplinary cases involving instances of workplace harassment did not charge a violation of the state's antidiscrimination rule. Id. at 601-02. In contrast, Iowa expressly rejected using a definition of sexual harassment from anti-discrimination employment laws, explaining that Rule 8.4(g) is meant to "strengthen, and not limit, the application of ethical rules in the sexual harassment context." Iowa Supreme Court Atty Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 604 (Iowa 2015) (imposing discipline for multiple acts of harassment and sexual misconduct against female clients). Such harassment should be interpreted broadly because it "has no legitimate place in a legal setting." *Id*. It does not require that "harassment be ongoing or pervasive as has been required in some employment contexts." Further, in the context of client relationships, consent is not a defense to sexual harassment because a vulnerable nonlawyer cannot "consent" given the power imbalance. *Id.*

156 *PA Supreme Court Adopts Variant of Model Rule 8.4(b), supra note 119 (criticizing deletion of the definition of harassment, which he characterized as a "nebulous term," also creating "serious First Amendment problems.").*

157 Zachary Greenberg v. James C. Haggerty, et al., Case 2:20-cv-03822-CFK (E.D. Pa.), at para. 1. In an August 6, 2020, email circulated on the First Amendment Lawyers Association ("FALA") listserv hours before the lawsuit was filed, Greenberg acknowledged that the suit's objective was not solely to enjoin what he characterized as a "speech code for lawyers. We're hoping that a successful suit will be a shot across the bow to other states as they consider adopting the rule."

perceived as manifesting bias or prejudice."[158]

The *Greenberg* complaint briefly traced the evolution of Model Rule 8.4(g) and the Pennsylvania version of the rule, but conspicuously omitted any mention of the heightened mens rea requirement in the Pennsylvania rule, as well as the recently issued ABA Formal Opinion confirming that the expression of controversial views on "hot button" legal topics, such as opposition to the promotion of racial diversity in college admissions, would not violate the rule.[159] The complaint sought a ruling that Rule 8.4(g) facially violates the First and Fourteenth Amendment and a permanent injunction prohibiting its enforcement.[160]

In this context, "hypothesizing that a violation of the rule could result from a CLE that debates same-sex marriage or immigration from Muslim countries or use of bathrooms determined by gender identity versus biological sex," may engender a lively discussion, but does not constitute harassment or discrimination against any particular individual. Rather, asserting that such a discussion would inevitably violate the Model Rule reveals a political agenda that transcends the relevant "question of what is appropriate for disciplinary standards in the practice of law."[161]

The *Greenberg* defendants moved to the dismiss the complaint, contending that Greenberg lacked standing to pursue the challenge because his subjective belief that "unknown third parties may be offended" by his remarks at CLE programs and file a disciplinary complaint that would be pursued by disciplinary counsel as a violation of

158 *Id.* at para. 75. Greenberg asserted that the "vast majority" of topics he covered in speaking engagements to illustrate his points "are considered biased, prejudiced[,] offensive, and hateful by some members of his audience, and some members of society at large." *Id*. at para. 61. He then expressed the fear that, after Rule 8.4(g) is in place, he would be the subject of a possible disciplinary investigation that would harm [his] professional reputation, available job opportunities, and speaking opportunities." *Id*. at para. 69. No example of such discipline in any state was identified in the complaint. Instead, the complaint related a series of examples where speakers, such as college professors and Supreme Court Justices, were criticized by commentators for speech asserted to be biased or prejudiced. D. Weiss, *Suit claims anti-bias ethics rule infringes lawyer's free speech rights,* ABA J. Online (Aug. 11, 2020).

159 ABA Formal Op. 493, at 12. The ABA opinion further explained that "[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor does it limit in any way a lawyer's speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation." *Id. a*t 14. M. Stanzione, *Lawyer Sues Penn. Ethics Authorities Over Anti-Bias Rule,* Bloomberg Legal Ethics (Aug.7, 2020), quoting this author that the rule "does not prohibit discussion and debate on legal issues, nor does it mandate 'politically correct' viewpoints."

160 While Rule 8.4(g) does prohibit certain forms of speech, it also "indisputably includes conduct that is not protected by the First Amendment." Aviel, *supra* note 76, at 41. By way of example, there is no free speech defense available to an attorney who directs unwanted sexual advances to a junior associate. *Id.* Nor is all speech protected; where an attorney harasses the same associate, warning that she will not be promoted unless she complies with his demands, the quid pro quo harassment deserves no protection. Id. As then Philadelphia Bar Chancellor Rochelle M. Fedullo emphasized in her comment letter, "the [Court] should reject any argument that the right to engage in discriminatory and harassing speech while engaged in the practice of law is conduct worthy of protection on free speech grounds."

161 Dennis Rendleman, *The Crusade Against Model Rule 8.4(g),* ABA Ethics in Review (Oct. 2018). Notwithstanding the guidance in Formal Opinion 493 that the Model Rule "does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern," conservative First Amendment advocates assert that the Model Rule's comments are written so broadly as to arguably prohibit political speech supporting "traditional marriage, gender identity issues including bathroom and locker-room usage, homosexual and single parent adoptions and surrogacies, birth control and abortion, terrorism, and immigration and refugee assistance[.]" Tarkington, *supra* note 53, at 146. In any event, Pennsylvania's rule did not incorporate those ABA comments.

Rule 8.4(g) was unduly speculative.[162] The defendants also maintained that Greenberg "cannot establish a credible threat of prosecution," noting that no attorneys in other states that have adopted a version of Rule 8.4(g) have been charged with a violation for speech similar to what Greenberg claims might place him at risk of discipline. Moreover, the rule itself provides a safe harbor by stating that it "does not preclude advice or advocacy consistent with these Rules."[163] The motion also stressed that the rule amendments "are narrowly tailored to serve Pennsylvania's compelling interest in regulating attorney conduct to protect the integrity and fairness of the judicial system and its participants, and they are not viewpoint-based."

Plaintiff Greenberg moved for a preliminary injunction to prohibit the Disciplinary Board and Disciplinary Counsel from enforcement of Rule 8.4(g) by "reviewing, investigating, prosecuting or adjudicating Rule 8.4(g) violations." The motion characterized the rule as an "effort to eradicate social injustices, prevent offense, avoid controversy, and swathe fragile sensibilities[.]" The motion contended that Rule 8.4(g) "directly regulates the expressed opinions, views and beliefs of members of the Pennsylvania Bar." The motion also argued that the rule is impermissibly "viewpoint-based, and also facially overbroad.[164] In addition, Greenberg maintained that the "Commonwealth has other existing tools at its disposal to combat harassment and discrimination by members of the Bar," including the laws against discrimination in employment, as well as the Code of Civility, which urges attorneys to "refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process."[165]

The parties to the *Greenberg* suit jointly submitted stipulated facts to the court. Judge Chad F. Kenney of the Eastern District heard oral argument on the Defendants' motion to dismiss and on Greenberg's motion for preliminary injunction in November 2020, and issued a ruling on December 8, 2020, the same day the rule became effective, enjoining enforcement of Rule 8.4(g) on First Amendment grounds. The district court concluded in its memorandum opinion that Greenberg satisfied the prerequisites for standing to raise a pre-enforcement challenge to the new rule, notwithstanding the lack of any actual threat of discipline, on the ground that his allegation that his speech

162 In the context of a pre-enforcement challenge to a statute or rule, a plaintiff must establish a "realistic danger of sustaining injury" if the challenged provision is enforced. Pipito v. Lower Bucks Co. Joint Mun. Auth., No. 19-2939, 2020 WL 4717933, at *2 (3d Cir. 2020) (non-precedential).

163 The motion to dismiss also argued that Rule 8.4(g) is a permissible regulation of professional conduct that only incidentally burdens speech, consistent with various other rules of professional conduct that curtail attorney speech in certain respects. The overbreadth doctrine is "strong medicine," which should be used "sparingly and only as a last resort." Defts' Brief in Support of Mot. to Dismiss Complaint, p.17, *quoting* Free Speech Coalition, Inc. v. U.S., 974 F.3d 408 (3d Cir. 2020).

164 The motion for preliminary injunction relied in substantial measure on the Third Circuit's reasoning in Saxe v. State College Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) and its progeny invalidating expansive public school speech codes prohibiting, for example, "hostile," "offensive," and gender-motivated" comments that might offend others. *See also Emily Laver, Lawyer Asks Court to Block Pa. Bar's Anti-Bias Rule, Law360 (Oct. 19, 2020).*

165 Mem. in Support of Mot. for Preliminary Injunction, p. 24, *citing 204 Pa. Code* § 99.3(7). The referenced "tools" do not involve attorney discipline. The Pennsylvania Code of Civility, for example, is entirely aspirational. The brief also attached a declaration of Greenberg explaining why he felt "threatened and chilled by Rule 8.4(g)." He asserted that some audience members at his speaking engagements may view the examples he uses to illustrate points to be "biased, prejudiced, offensive, and hateful," and stated that he would self-censor his remarks to avoid speech that could be perceived as manifesting bias or prejudice. His declaration also related various instances where college professors came under fire for speech that students or other faculty members deemed offensive.

will be chilled by the Rule shows a "threat of specific future harm."[166] The alleged chilling effect, the court found, constitutes injury in fact that is "concrete, particularized, and imminent," and that "the threatened injury is 'certainly impending,' and that there is a 'substantial risk' that the harm will occur.'"[167]

The ruling also concluded that Greenberg had shown a likelihood that his proposed speech at CLE programs is "arguably proscribed" by Rule 8.4(g) because he alleged that he intends to mention epithets, slurs, and demeaning nicknames as part of this presentation on First Amendment and due process rights. The court focused on the wording of Rule 8.4(g) stating that it is attorney misconduct to, "by **words** or conduct, knowingly manifest bias or prejudice," noting that the language was drawn from the Code of Judicial Conduct.[168] The court further emphasized that, in Comment 2 to that rule, "manifestations of bias include … epithets; slurs; demeaning nicknames; negative stereotyping …." The court found "his intended conduct is arguably proscribed by [Rule 8.4(g)]" and that there is a substantial risk that he will be subjected to a disciplinary complaint of investigation.[169]

The court cautioned that the "Rule 8.4(g)'s language, 'by words … manifest bias or prejudice,' are a palpable presence in the Amendments and will hang over Pennsylvania attorneys like the sword of Damocles."[170] The court therefore concluded that the "clear threat to Greenberg's First Amendment rights and the chilling effect that results is the harm that gives [him] standing.[171]

As for Greenberg's claim that Rule 8.4(g) violates his First Amendment rights and constitutes unconstitutional viewpoint-based discrimination, the court initially concluded that the regulation of "professional speech" is not entitled to any particular deference following the recent Supreme Court ruling in *NIFLA v. Becerra.*[172] The court acknowledged a legitimate state interest in regulating attorney speech in connection with judicial proceedings, but emphasized that Rule 8.4(g)'s scope extended to words or conduct "during activities that are required for a lawyer to practice law," including seminars and activities where CLE credits are offered.[173]

After concluding that the speech Rule 8.4(g) regulates is "entitled to the full protection of the First Amendment," Judge Kenney found that Rule 8.4(g) and supporting Comments 3 and 4 are "viewpoint-based discrimination in violation of the First

166 Greenberg v. Haggerty, 491 F. Supp. 3d 12, 23 (E.D. Pa. 2020). The court concluded that Greenberg's "alleged fear of a disciplinary complaint and investigation is objectively reasonable based on Plaintiff's allegation that the 'vast majority of topics' discussed at Plaintiff's speaking events 'are considered biased, prejudiced, offensive, and hateful by some members of the audience, and some members of society at large." *Id.*

167 *Id., quoting* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) and Clapper v. Amnesty Intern. USA, 568 U.S. 398, 437 (2014).

168 *Id.* (emphasis in orig.). The court made no reference to the recently issued guidance in ABA Ethics Opinion 493 explaining that a speaker's discussion of controversial First Amendment case law in the context of a CLE program would not violate Model Rule 8.4(g).

169 *Id.* at 24. The court apparently inferred that the inclusion of wording borrowed from Rule 2.3 of the Judicial Code prohibiting judges from exhibiting "bias or prejudice" meant that the supporting comment to Rule 2.3 also had been impliedly incorporated into Model Rule 8.4(g).

170 *Id.* The court further warned: "This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation."

171 *Id.* at 25.

172 *Id.* at 26, *citing Becerra*, 585 U.S. 755, 773 (2018).

173 *Id.* at 28.

Amendment."[174] The court again focused on the rule's application in the context of bench-bar conferences and mandatory CLE programs, stating that "[t]his rule represents the government restricting speech outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of 'administration of justice.'" In doing so, the court maintained that "the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance."[175]

VI. THE SUPREME COURT AMENDS RULE 8.4(g), AND A SECOND CHALLENGE PROCEEDS

The leaders of the PBA and the Philadelphia Bar Association issued public statements expressing disappointment in the *Greenberg* decision.[176] The Disciplinary Board defendants first sought interlocutory review of the district court's grant of Greenberg's motion for preliminary injunction to the Third Circuit, but later voluntarily dismissed their appeal. Instead on July 26, 2021, the Supreme Court promulgated an amended Rule 8.4(g) intended to address the district court's stated concerns. The resulting revised rule and commentary contain several significant changes, including excising the "manifest bias or prejudice" language drawn from the Pennsylvania Code of Judicial Conduct that the district court repeatedly referenced and found problematic as "simply regulat[ing] speech."[177] Comment [3] to the revised rule also clarifies the meaning of "in the practice of law" to include interacting with witnesses, and others in connection with the representation of a client; operating or managing a law firm or law practice; and participating in judicial boards, conferences and continuing legal education programs. The Comment also clarifies that the rule does not apply to "speeches, communications, debates, presentations, or publications[.]" On August 19, 2021, Greenberg filed an amended complaint challenging the revised version of the rule. Again, Greenberg asserted that the rule facially violated the First Amendment and was facially vague under the Fourteenth Amendment. He asserted standing based on his intent to present CLEs about current caselaw or due-process and free-speech rights, because "some members of his audience" might consider his presentations "offensive, denigrating, hostile and

174 *Id.* at 30. The court substantially relied on the recent ruling in Matal v. Tam, 137 S. Ct. 1744, 1751 (2020), where the Supreme Court found a provision of a federal law prohibiting the registration of trademarks that may "disparage" or bring persons into "contempt" or "disrepute" to violate the Free Speech Clause of the First Amendment because "[s]peech may not be banned on the ground that it expresses ideas that offend."

175 *Id.* at 30-32. The district court in Greenberg had been apprised of the ABA's interpretation of Model Rule r. 8.4(g) not to mandate "socially or politically acceptable" speech, but did not address that guidance. The court also was presented with the submissions of the PBA, Philadelphia Bar Association, Allegheny County Bar Association, and Interbranch Commission in support of the adoption of Rule 8.4(g), but omitted any mention of the position of the organized bar in its opinion.

176 Chancellor Michael A. Snyder's Statement on PA Rules of Professional Conduct 8.4(g), issued Dec. 8, 2020, concluded, "The Philadelphia Bar Association unequivocally supports a rule prohibiting a lawyer engaged in the practice of law from knowingly manifesting bias or prejudice, or discriminating against or harassing any person on the basis of race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status."

177 *Greenberg,* 491 F. Supp. 3d at 29.

hateful." The parties cross-moved for summary judgment and the defendants submitted a declaration from Pennsylvania's Chief Disciplinary Counsel, Thomas Farrell, stating that Greenberg's desired presentations "do not violate Rule 8.4(g)," noting that Pennsylvania "would not pursue discipline for Greenberg's presentations."

In January of 2022, the district court heard the parties' cross-motions for summary judgment and in March granted summary judgment to Greenberg and permanently enjoined Rule 8.4(g).[178] In a 78-page opinion, Judge Kenney found that the rule was vague, overbroad and constituted viewpoint-based discrimination. Judge Kenney wrote that the Disciplinary Board "wants the court to blindly accept anti-harassment and anti-discrimination policy as an overwhelming good that is justified in and of itself, and the court cannot do so without more focus on the state's interests for enacting this particular rule. This nebulous good is insufficient to serve as a compelling interest to restrict freedom of speech and expression."[179] Judge Kenney also faulted the rule for vagueness and concluded that the rule did not provide sufficient notice to the ordinary attorney of what could subject an attorney to discipline and expressed concern about arbitrary enforcement.[180] Finally, Judge Kenney agreed with Greenberg that the application of the Rule beyond the courtroom was too broad and could make controversial speakers subject to disciplinary complaints.[181] Judge Kenney was not persuaded by the Declaration of the Chief Disciplinary Counsel that the Disciplinary Board would not target speakers under the circumstances outlined in Greenberg's complaint. He found that it was not adequately binding against the misuse of the Rule and that the Disciplinary Board had the authority to ignore the declaration.[182]

VII. THE THIRD CIRCUIT REJECTS THE CHALLENGE AND THE RULE FINALLY IS IN FORCE

The Pennsylvania Supreme Court determined to appeal the district court's adverse ruling and this time retained highly regarded national appellate counsel to defend revised Rule 8.4(g).

The Supreme Court, through its General Counsel, retained Lisa S. Blatt of Williams & Connolly, a premier appellate advocate who had argued before the U.S. Supreme Court over 40 times, more than any other female lawyer.

Some 37 entities filed nearly 20 amicus briefs, including from the Christian Legal Society and other faith-based nonprofits, the Pacific Legal Foundation, National Legal Foundation, and other conservative advocacy groups opposing the rule.

Amicus briefs were filed on behalf of eighteen supporters of the Rule including the PBA, Philadelphia Bar Association, Allegheny County Bar Association, and the Inter-Branch Commission for Racial, Gender and Ethnic Fairness. Additional supporting briefs were filed by the American Bar Association, prominent professional responsibility law professors Stephen and Barbara Gillers, Rebecca Aviel, Myles V. Lynk and

178 Greenberg v. Goodrich, 593 F. Supp. 3d 174 (E. D. Pa. 2022).
179 *Id.* at 175.
180 *Id.* at 216, 220-225.
181 *Id.* at 219-220.
182 *Id.* at 220. In response to this ruling, the PBA expressed disappointment that the rule had been blocked. In a March 22, 2022, statement, then President Kathleen Wilkinson noted that the PBA "again offers its strong encouragement of the Supreme Court, as well as its offer to assist the Court, in its pursuit of measures to make it clear that knowing harassment and discrimination by lawyers will not be tolerated."

Ann Ching, as well as various affinity bar associations, including the Asian Pacific American Bar Association of Pennsylvania.

Notably, the ABA brief highlighted the importance of Rule 8.4(g) to "address[] misconduct that is antithetical to the administration of justice: attorney words and actions that constitute improper discrimination or harassment."[183] The ABA further argued that the Rule does not contravene the First Amendment as "[t]here is no constitutional right to engage in discrimination or harassment in the practice of law."[184] The ABA also cited the Supreme Court's holding in *NIFLA* that "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech."[185]

Oral argument was held before a Third Circuit panel consisting of Chief Judge Chagares, Judge Scirica and Judge Ambro on April 13, 2023. The panel pressed Greenberg's counsel on the threshold issue of standing to sue and questioned why the Farrell Declaration did not provide adequate comfort that Greenberg would not be disciplined for his intended speech. Judge Ambro said, "It looks like you have an Office of Disciplinary Counsel doing its job in a way that doesn't portend any type of harm coming to Mr. Greenberg." It was apparent from the questions posed by the panel, that the judges were skeptical that Greenberg had a legitimate fear of being subject to discipline for his proposed speech.

In its opinion issued on August 29, 2023, the Third Circuit determined that Greenberg lacked standing to bring his challenge. "Rule 8.4(g) does not generally prohibit him from quoting offensive words or expressing controversial ideas, nor will Defendants impose discipline for his planned speech. Thus, any chill to his speech is not objectively reasonable or cannot be fairly traced to the Rule. We will reverse."[186] Judge Scirica authored the opinion.

The Third Circuit provided a summary overview of the process of adoption of ABA Model Rule 8.4(g), and of the Pennsylvania version of the rule. The court then summarized Greenberg's complaint for declaratory judgment and the district court proceedings leading to its order permanently enjoining enforcement of Rule 8.4(g) in its entirety.[187]

The court explained that for Greenberg to have standing to sue, he "must establish he suffers an actual or imminent injury that is fairly traceable to Rule 8.4(g). He cannot. His planned speech does not arguably violate the Rule, and he faces no credible threat of enforcement. Thus, it is not objectively reasonable for Greenberg to alter his speech in response to the Rule."[188] The court examined Greenberg's contentions concerning his planned speeches and concluded that nothing he proposed to say "comes close" to transgressing the Rule.

The court reviewed the common definitions of harassment and discrimination, and highlighted the rule's prohibition only of such conduct that is knowing or intentional, noting that "knowingly" is defined in Rule 1.0(f). Moreover, the comment's definition

183 Brief for the American Bar Association as Amicus Curiae, at p. 9.

184 *Id* at 10.

185 *Id.* at 20, citing *Becerra,* 585 U.S. at 768.

186 Greenberg v. Lehocky, 81 F.4th 376, 379 (3d Cir. 2023).

187 At the outset of the court's analysis, it quickly disposed of Greenberg's contention, which the district court had accepted, that the amendment to Rule 8.4(g) raised an issue of mootness and not standing, concluding that it raised a standing issue, *citing Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 473-74 (2007) and other cases. *Greenberg,* 81 F.4th at 384, n. 4.

188 *Id.*

of "discrimination" includes only "conduct that a lawyer knows manifests an "intention" to treat a person as inferior based on a protected characteristic."[189]Again, the court found that Greenberg's planned speech involving "controversial legal positions" wherein he would "verbalize epithets" could not be interpreted as falling within the definitions of discrimination or harassment.[190]

Additionally, the court found that there was compelling evidence that Greenberg faced no threat of prosecution as the Defendants had disavowed enforcement against Greenberg's proposed conduct.[191] Moreover, Greenberg's assertion that Rule 8.4(g) would chill his speech and force him to self-censor was not reasonable under the circumstances.[192] Referring to Greenberg's lengthy discussion of public attitudes about offensive speech in his amended complaint, the court found that the situations he outlined did not trigger a reasonable fear of prosecution in the discipline system.[193]

In conclusion, the Third Circuit observed that the Disciplinary Board had yet to enforce the rule, "so there has been no opportunity to observe its effects. If facts develop that validate Greenberg's fears of enforcement, then he may bring a new suit to vindicate his constitutional rights. Our decision, as always, is limited to the record before us, and we express no opinion on the merits of his suit."[194]

In a two-paragraph concurring opinion, Judge Ambro explained that he wrote separately:

> only to note that someday an attorney with standing will challenge [Rule] 8.4(g). When that day comes, the existing Rule and its commentary may be marching uphill needlessly. We cannot advise on whether it will pass constitutional muster. But if the Bar's actions during the pendency of this litigation are any indication, it has a card to play. It can amend the Rule preemptively to eliminate many of the constitutional infirmities alleged by Greenberg in this case. In doing so, it might look to Maine, New Hampshire, New York, and Connecticut for guidance.
>
> Those states' analogous enactments implement a comparatively robust safeguarding of attorneys' First Amendment rights. They direct regulatory reach away from constitutionally protected speech Greenberg and his *amici* wish to espouse and narrowly steer it toward the overt and insidious evils the Pennsylvania Bar and its *amici* wish to eradicate. Doubtless Pennsylvania is striving to do the same. But if it thinks it can do better, it need not start from scratch.[195]

189 *Id.* at 385.
190 *Id.*
191 *Id.* at 386.
192 *Id.* at 388.
193 *Id.* Greenberg's counsel was reported to have said that by adopting the standard definitions of harassment and discrimination, and by crediting testimony from the Disciplinary Board's Chief Counsel who said that the rule required targeting persons, the Third Circuit's opinion essentially adopted the narrow interpretation that Greenberg had been seeking. Max Mitchell, *Third Circuit Nixes Suit Challenging Pa. Disciplinary Board's Anti-Bias Rules,* The Legal Intelligencer (Aug. 29, 2023).
194 *Greenberg,* 81 F.4th at 389.
195 *Id.* at 390 (citing state rules).

Judge Ambro's thoughtful concurrence and guidance generated some conjecture that the Pennsylvania Supreme Court might consider further amending, and possibly narrowing further, the scope of Rule 8.4(g) to insulate it from a later as applied First Amendment challenge. While that exercise may someday gain traction, there are several other considerations that came into play. First, the Pennsylvania rule, unlike the other state versions referenced in Judge Ambro's concurrence, include a stricter mens rea standard, requiring that the violator "knowingly" engage in prohibited discrimination or harassment. While Connecticut's and New York's rules include an express caveat for protected First Amendment speech, New York's version of the rule contains the lower mean rea requirement of "knows or reasonably should know."[196]

The Third Circuit later denied Greenberg's petition for rehearing[197] without comment, and the Pennsylvania rule prohibiting knowing harassment and discrimination in the practice of law finally became effective and enforceable. In order to ensure the rule's application in only appropriate circumstances, the Disciplinary Board's chief counsel directed that he must first approve any charge of a violation under Rule 8.4(g).

As a postscript to the Third Circuit rejection of Greenberg's challenge, the Hamilton Lincoln Law Institute filed a petition for a writ of certiorari to the Supreme Court on Greenberg's behalf on February 2, 2024. The thrust of the argument was that the Third Circuit should have applied a "mootness" standard to Greenberg's amended complaint rather than re-assessing standing.[198] The petition characterized the Supreme Court's amendments to the Pennsylvania rule that led to the Amended Complaint as "insignificant," without actually reviewing them. The petition asserted that the issue presented a conflict among the circuits. In the meantime, the petition forewarned that, "Pennsylvania has hung a vague and viewpoint-based 'Sword of Damocles' over all Pennsylvania attorneys. … But all the attorneys can do is wait for case-by-case adjudication."[199]

In opposition Greenberg's petition to the Supreme Court, the Disciplinary Board argued that the Third Circuit correctly applied basic standing principles to Greenberg's challenge to the amended Rule 8.4(g), consistent with precedent in this and other circuits. After distinguishing the standing authorities upon which Greenberg's counsel had relied, the Board's brief maintained that "Greenberg's problem is that he wants to litigate a constitutional challenge to a Rule that does not cover his planned conduct. Nothing in his petition calls into question the Third Circuit's holding that he lacks

196 On June 10, 2022, New York's four Appellate Division departments adopted a more robust version of that state's Rule 8.4(g), nearly a year after receiving a detailed recommendation approved by the New York State Bar Association and supported by the in-depth study of its Committee on Standards of Attorney Conduct. Like Pennsylvania, the New York rule applies to conduct "in the practice of law," including interactions with other lawyers at CLE programs, law firm or bar association events, recognizing that much of the misbehavior occurs in non-litigation contexts. Model Rule 8.4(g), N.Y. Ct. Rules, Pt. 1200.

197 Greenberg's petition for rehearing primarily argued that the court had erred in applying the standard applicable to standing rather than to mootness in assessing the amended version of Model Rule 8.4(g).

198 U. S. Supreme Court Docket No. 23-833. Greenberg argued that his counsel mistakenly labeled his complaint challenging the amended Rule 8.4(g) as an "amended complaint" rather than a "supplemental complaint," and that the latter label would have bolstered his contention that the mootness standard should govern.

199 Greenberg Pet. for Cert. at p. 33 (citing Judge Ambro's concurrence). Several faith based groups filed amicus briefs in support of Greenberg's petition. The Foundation for Moral Law argued, for example, that Rule 8.4(g) would somehow chill a lawyer's assertion in a filing "that might be critical of the LGBT agenda or lifestyle[.]"

standing to do so."

In the interim, Connecticut's version of Rule 8.4(g) was the subject of a First Amendment challenge that reached the Second Circuit.[200] After the challenge was dismissed for lack of standing in the district court,[201] the Second Circuit on appeal appeared poised to reverse and remand on the basis that there was an insufficient factual record to assess whether the rule might potentially infringe upon lawyer speech notwithstanding an express caveat in the rule that it does not prohibit conduct protected under the First Amendment or the Connecticut state constitution.

The Second Circuit panel at oral argument drew comparisons between the Pennsylvania rule and the status of the respective cases when they were decided, placing emphasis on the fact that, at the motion to dismiss stage, the allegations in the Connecticut challengers' complaint had to be taken as true, whereas the *Greenberg* case was decided at the summary judgment stage based on a record. The judges also drew distinctions in the language of the two rules, noting that Pennsylvania's rule includes a mens rea requirement ("knowingly") and defines "discrimination" more narrowly as an intention to treat a person as "inferior" based on one of more of the characteristics listed.[202]

The Second Circuit's assessment of the relative strength of the Pennsylvania rule does not comport with the suggestion in Judge Ambro's concurring opinion in *Greenberg* that the other states' versions of Rule 8.4(g) provide more robust First Amendment protection.

Not long after the Third Circuit rejected Greenberg's challenge to Pennsylvania's version of Rule 8.4(g), the Disciplinary Board issued for comment a proposed additional comment to the rule prohibiting sexual relations with clients that would substantially expand its application.[203]

The Board would amend Comment [17] by extending the definition of "sexual

200 Connecticut Rule 8.4(7) provides that it is professional misconduct to "Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital 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, or to provide advice, assistance or advocacy consistent with these Rules." The lengthy Comment includes the following caveat: "A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the first amendment to the United States constitution or article first, § 4 of the Connecticut constitution." This provision was described as a First Amendment "safe harbor" by Marcy Stovall, of the state bar's Standing Committee on Professional Ethics. M. Heelan, *Connecticut's New Anti-Bias Rule Addresses Free Speech Concerns, Bloomberg Law (July 22, 2021).*

201 Cerame v. Bowler, No. 3:21-cv-1502 (AWT)(D. Conn. Aug. 29, 2022). The district court concluded that the two attorney challengers lacked standing to bring their case. In their complaint, the plaintiffs alleged that they will, for example, be reluctant to … "[t]ell [] jokes to other attorneys that the speaker does not intend to be taken seriously but that some members of a protected group deem offensive[.]" The court explained that a pre-enforcement challenge requires a showing that "each plaintiff has alleged facts sufficient to show that he is 'chilled from exercising [his]right to free expression or forgoes expression in order to avoid enforcement consequences.' This requires showing a real and imminent fear of such chilling, as opposed to an abstract, subjective fear that his rights are chilled." (citations omitted)

202 One judge pressed at oral argument whether a lawyer who deliberately refused to use a person's preferred pronouns would violate the Connecticut rule, an issue not raised in the briefing, suggesting that any bar discipline for such speech would encroach on the First Amendment.

203 53 Pa.B. 5275 (Aug. 26, 2023). The Board stated its "justification for the Rule's ban on client sexual relations applies with equal force to prohibit sexual communications between lawyer and client, as the same danger of harm to client's interests exists." *See* Aleeza Furman, *Pa. Disciplinary Board Floats Rule Barring Lawyer-Client Sexting*, The Legal Intelligencer (Aug. 28, 2023).

relations" under Rule 1.8(j) to include "sexual communications with a client." While the Comment itself does not use the term "sexting," the Board's Explanatory Report refers to increased complaints it has received of incidents of "sexting." The proposed rule change has been met with some concern. The Philadelphia Bar Association recommended that the Board consider defining the term "sexual communications" to both eliminate challenges for vagueness and limit the scope so that inappropriate or unprofessional communications do not automatically trigger discipline under the revised rule.[204] The Bar's report pointed out that the term "sexual communications" could not be equated with the typical definition of "sexual relations," and therefore would operate as a significant and counterintuitive expansion of the rule's prohibition. Others simply oppose additional regulation of how consenting adults conduct their relationships.[205]

Given that the Pennsylvania Board's action was prompted by a concerning increase in complaints from clients about unwanted text messages containing sexual content from their lawyers, the Board's desire to directly address and prohibit such conduct in the disciplinary rules appears warranted. Providing guardrails to text communications, which are often viewed as more personal and informal than emails, may have the dual benefit of protecting clients from unwanted sexual communications and saving lawyers from undermining their relationships with clients.

The Board's final recommendation to the Pennsylvania Supreme Court concerning an amendment to Rule 1.8(j) had not been disclosed as of the time of publication, but as a matter of practice lawyers in any jurisdiction should avoid any form of messaging to clients that contains sexual content. When communicating with clients, even in informal settings, attorneys must be mindful of their role as fiduciary and not blur the lines between the professional and personal which could ultimately damage the client's trust in the attorney and thereby harm the representation.

Time will tell whether the material differences in the scope of the Model Rule and the Pennsylvania rule will prove to be outcome determinative in attorney disciplinary cases involving attorney harassment or discrimination as defined in the new rule.

VI. CONCLUSION

The several decades long effort leading to adoption of a disciplinary rule prohibiting Pennsylvania lawyers from knowingly engaging in bias or prejudice, harassment or discrimination toward women, minorities and others in protected categories concluded in the midst of the national reckoning surrounding systemic racism in the justice system at the time of Court approval in June 2020. Public sentiment in favor of prohibiting and providing remedies for overt harassment and discrimination certainly strengthened during this time frame, and was aided and abetted in recent years by the #MeToo movement against sexual abuse and harassment, as well as the increasing public support for recognizing the rights of those in the LGBTQ+ community.

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204 *See* D. Winokur, *Pennsylvania Proposes Ban on a Lawyer's "Sexual Communications" with Client*s, American Bar Association Ethics & Professionalism Committee (Nov. 30, 2023).

205 Pennsylvania solo practitioner and disciplinary defense counsel Samuel Stretton expressed "shock" at the Board's Rule 1.8(j) recommendation, stating "I just don't think boorish, crude, or undignified conduct should necessarily [be] the basis for discipline, or at least discipline for sexual intercourse. … At some point, you lose the independence of the profession if you overregulate the lawyers." Furman, *supra* note 203.

Notwithstanding material differences in the verbiage proffered in the several rule recommendations, the proposals all recognized that the continued failure to impose an ethical prohibition on knowing harassment and discrimination by lawyers in their practice was no longer an acceptable option. The Pennsylvania version of Rule 8.4(g) arguably enhances the Model Rule in certain respects, including by providing greater protection against the perceived threat of discipline for inadvertent or purely negligent conduct and by expressly confirming that its reach includes law firm management, bar sponsored conferences and continuing legal education seminars. Perseverance on the part of the rule's early proponents, led by the Pennsylvania Bar Association and the major state metropolitan bars, helped to produce a rule presenting meaningful, not merely incremental, reform. The inclusion of the rule should discourage attorneys from knowingly engaging in harassing or discriminatory conduct and encourage other lawyers and victims to report it. Pennsylvania Rule 8.4(g) should not only serve as a disciplinary backstop for serious misconduct that the legal profession will no longer tolerate, but also a concrete demonstration of the legal profession's commitment to support and protect the rights and dignity of all those who interact with lawyers and the justice system.