

[Parties TBD]

[Date]

[Highest Court / Applicable State Bar Committee]

[Address]

Regarding Adoption of American Bar Association Model Rule 8.4(g)

Enclosures:

- Exhibit A - ABA Model Rules of Professional Conduct Section 8.4
- Exhibit B - Paragraphs 3 - 5 of the Comment to ABA Model Rules of Professional Conduct Section 8.4
- [Additional exhibits as needed, e.g. data on bias/discrimination/diversity in your state]

Dear [Highest Court / Applicable State Bar Committee]:

At the 2016 Annual Meeting of the American Bar Association (ABA) in San Francisco, a new rule 8.4(g) of the Model Rules of Professional Conduct was adopted by the ABA House of Delegates and added to the Model Rules of Professional Conduct, stating that 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 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.

As discussed in further detail below, the undersigned members of the [State] legal community hereby propose a change to the [State Rules of Professional Conduct] to include the ABA Model Rule 8.4(g) language under Section [____] of the [State Rules of Professional Conduct].

I. Existing [State Rules of Professional Conduct] [Cite to Section of State Rule] Compared to Prior ABA Model Rule 8.4.

Sample language if existing state rules looks similar to ABA Model Rule 8.4 and associated Comment prior to the adoption of ABA Model Rule 8.4(g):

Similar to the state of ABA Model Rule 8.4 and associated Comment prior to the adoption of ABA Model Rule 8.4(g), [Cite to Section of State Rule] states that “[current state rule language].”

Sample language if existing state rules have stronger antidiscrimination language, in 8.4(d) or elsewhere, than the [previous version of Model Rule 8.4\(d\)](#):

[Cite to Section of State Rule] provides that it is professional misconduct for a lawyer to “[current state rule language].”

However, ABA Model Rule 8.4(d) states only that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” Prior to the adoption of ABA Model Rule 8.4(g), [Cite to Section of State Rule] [not only] provided strong anti-discrimination language as compared to the ABA Model Rules [but provided strong language in the body of the rules, rather than just in the commentary]. (Comments, according to the [Cite to Section of State Rule, e.g., preamble], “[do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.]”) In addition, [Cite to Section of State Rule], states [add any additional antidiscrimination language in place under state rules.] In other words, prior to the adoption of ABA Model Rule 8.4(g) the [State] Rules went above and beyond the ABA Model Rules by prioritizing the prevention of discrimination.

II. Existing [Cite to Section of State Rule] Compared to New ABA Model Rule 8.4.

Draft based on your analysis in Step 3 of the above checklist, for example:

Scope. [Cite to Section of State Rule] addresses conduct that occurs “in the course of representing a client” and that is “prejudicial to the administration of justice.” In contrast, ABA Model Rule 8.4(g) now more broadly addresses “conduct related to the practice of law.”

Paragraph 4 of the updated ABA Model Rule 8.4 Comment clarifies that:

“Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”

Bases of Discrimination. In addition, ABA Model Rule 8.4(g) disallows discrimination based on “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.” However, [Cite to Section of State Rule], addresses only “race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status” and does not include ethnicity, gender identity, or marital status.

Knowledge Standard. The current [Cite to Section of State Rule] focuses on conduct that is prejudicial to the administration of justice and carried out knowingly. ABA Model Rule 8.4(g) instead addresses conduct that a lawyer “knows or reasonably should know” is discriminatory. The 8.4(g) standard is consistent with the [Cite to Section of State Rule] generally, which regularly use the “knows or reasonably should know,” such as in Rule 1.13(f), Rule 2.3(b), Rule 2.4(b), Rule 3.6(a), Rule 4.3, Rule 4.4(b), and Rule 7.3(b).

III. Need for Adoption of ABA Model Rule 8.4(g) Under the [State] Rules

Sample language if existing state rules have stronger antidiscrimination language, in 8.4(d) or elsewhere, than the [previous version of Model Rule 8.4\(d\)](#):

Prior to the adoption of ABA Model Rule 8.4(g), the [State] Rules took a more proactive approach to preventing discrimination as compared to the ABA Model Rules. The [State] Rules should now include the ABA Model Rule 8.4(g) language to reaffirm and preserve that approach. *If applicable*. In addition, the ABA Model Rule includes additional bases for discrimination that should be included in the [State] Rules.

Additional sample language:

[Scope Issue:] The [State] Rules currently address discrimination primarily through [Cite to Section of State Rule], which is limited to discrimination that occurs during the course of client representation and that is prejudicial to the administration of justice. [Cite to Section of State Rule] may go a long way in preventing discrimination during client representation, in litigation settings, and against those individuals that are both external to the legal profession and part of a litigation proceeding. However, discrimination in the legal industry is a much broader, significant issue that stalls, limits access to, and prevents advancement in the legal profession. Discrimination must be prevented in all aspects of the practice of law, including those addressed by ABA Model Rule 8.4(g). Until we are able to more broadly prevent discrimination in the legal industry, our otherwise powerful profession will be limited in its ability to fully represent, protect, and benefit our community.

[Standard Issue:] Broadening the rules preventing discrimination is an important step, but there is more work to be done. It is incumbent upon every lawyer to cultivate an awareness of current issues surrounding discrimination in the practice of law and to avoid furthering a culture that allows discrimination, creates unequal opportunities, and erodes trust and confidence in our profession. Setting a “knows or reasonably should know” standard for discriminatory behavior encourages such an awareness that is easily achieved with minimal self-education. A “knowingly” standard instead leaves room for willful and inexcusable ignorance. The lower, “knowingly” standard, combined with the limited “in the course of representing a client” and “prejudicial to the administration of justice” scope discussed above, is too narrow to further the already slow-moving progress* on discrimination and unequal advancement in the legal industry, an issue that exists apart from discrimination prejudicial to the administration of justice and should be dealt with separately. [* Here, can proactively add in a footnote examples of discrimination and unequal advancement in the profession, State-specific where possible.]

IV. Proposal

To strengthen [reaffirm and preserve] [State]’s [proactive] approach in preventing discrimination and to ensure equal access to and advancement in our important profession, the undersigned members of the [State] legal community hereby propose:

That the following language be added to [Cite to Rules]:

[(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

[Bases of Discrimination Issue:] That the words “ethnicity, gender identity, marital status,” be added to [Cite to Rules and Location of Addition].
That the ABA Model Rule 8.4 Comments attached hereto at Exhibit B be added to the [Cite to Rules] Commentary.

Respectfully and with appreciation for your consideration of this important matter,

[Name]
[Title]

[Name]
[Title]

[Name]
[Title]

[Name]
[Title]

EXHIBIT A

ABA Model Rules of Professional Conduct Section 8.4

Rule 8.4: Misconduct

Maintaining the Integrity of The Profession

It is professional misconduct for a lawyer to:

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

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html

EXHIBIT B

Paragraphs 3-5 of the Comment to ABA Model Rules of Professional Conduct Section 8.4:

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

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

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

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4.html